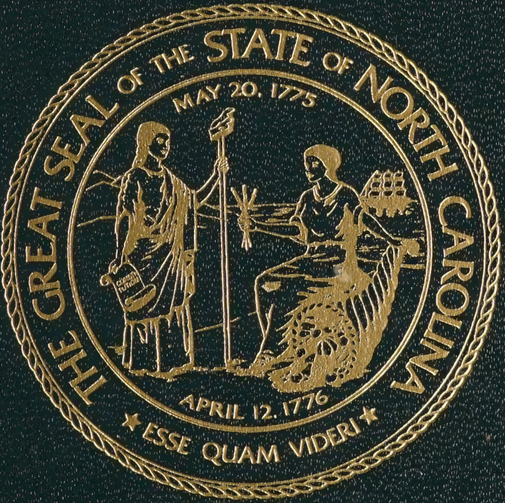
# GENERAL STATUTES OF NORTH CAROLINA

---

ANNOTATED


MAY 20. 1775
APRIL 12. 1776

2009 EDITION

Digitized by the Internet Archive
in 2026 with funding from
State Library of North Carolina

https://archive.org/details/generalstatuteso00nort_92

State Library of North Carolina
Raleigh

# GENERAL STATUTES OF NORTH CAROLINA

# ANNOTATED

## Volume 16

## Chapters 136 Through 143

*Prepared Under the Supervision of*
The Department of Justice
of the State of North Carolina
*by*
*The Editorial Staff of the Publisher*

LexisNexis®

**QUESTIONS ABOUT THIS PUBLICATION?**

For EDITORIAL QUESTIONS concerning this publication, or REPRINT PERMISSION, please call:
800-833-9844

For CUSTOMER SERVICE ASSISTANCE concerning replacement pages, shipments, billing or other matters, please call:

| | |
|---|---|
| Customer Service Department at | 800-833-9844 |
| Outside the United States and Canada | 518-487-3000 |
| FAX | 518-487-3584 |

For INFORMATION ON OTHER MATTHEW BENDER PUBLICATIONS, please call:

| | |
|---|---|
| Your account manager or | 800-223-1940 |
| Outside the United States and Canada | 518-487-3000 |

COPYRIGHT © 2009
BY
MATTHEW BENDER & COMPANY, INC.,
A MEMBER OF THE LEXISNEXIS GROUP.

All rights reserved.

LexisNexis and the Knowledge Burst logo are registered trademarks and Michie is a trademark of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.

4539614 (hardbound volume)
4535014 (hardbound set)
4640516 (softbound set)

ISBN 978-1-4224-5158-8 (hardbound volume)
ISBN 978-1-4224-5142-7 (hardbound set)
ISBN 978-1-4224-5140-3 (softbound set)

LexisNexis®

Matthew Bender & Company, Inc.

701 East Water Street, Charlottesville, VA 22902-5389

*www.lexisnexis.com*

(Pub.45350) (HB)
(Pub.46405) (SB)

# Preface

This volume contains the general laws of a permanent nature enacted by the General Assembly through the 2009 Regular Session that are within Chapters 136 through 143, and brings to date the annotations included therein.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 60 days after the adjournment of the session" in which passed.

A ready reference index is included at the back of this volume. This index is intended to give the user a quick reference to larger bodies of statutes within this volume only. For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LexisNexis, Charlottesville, Virginia.

Roy Cooper
*Attorney General*

# Scope of Volume

**Statutes:**

Permanent portions of the General Laws enacted by the General Assembly through the 2009 Regular Session affecting Chapters 136 through 143 of the General Statutes.

**Annotations:**

This publication contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of the appropriate federal courts posted through September 18, 2009. These cases will be printed in the following reporters:

South Eastern Reporter 2nd Series.
Federal Reporter 3rd Series.
Federal Supplement 2nd Series.
Federal Rules Decisions.
Bankruptcy Reports.
Supreme Court Reporter.

Additionally, annotations have been taken from the following sources:

North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

# User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

# Abbreviations

(The abbreviations below are those found in the General Statutes that refer to prior codes.)

| | |
|---|---|
| P.R. | Potter's Revisal (1821, 1827) |
| R.S. | Revised Statutes (1837) |
| R.C. | Revised Code (1854) |
| C.C.P. | Code of Civil Procedure (1868) |
| Code | Code (1883) |
| Rev. | Revisal of 1905 |
| C.S. | Consolidated Statutes (1919, 1924) |

# STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

*December 2009*

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2009 Replacement Code to the General Statutes of North Carolina was prepared and published by LexisNexis under the supervision of the Department of Justice of the State of North Carolina.

Roy Cooper
*Attorney General of North Carolina*

# Table of Contents

---

For complete listing of chapters set out in the North Carolina General Statutes, see the Table of Contents included in Volume 1.

---

## VOLUME 16

Chapter 136. Transportation, G.S. 136-1 to 136-256
  Art. 1. Organization of Department of Transportation, G.S. 136-1 to 136-16.10
  Art. 2. Powers and Duties of Department and Board of Transportation, G.S. 136-17 to 136-44
  Art. 2A. State Transportation Generally., G.S. 136-44.1 to 136-44.19
  Art. 2B. Public Transportation, G.S. 136-44.20 to 136-44.29
  Art. 2C. House Movers Licensing Board [Repealed.]
  Art. 2D. Railroad Revitalization, G.S. 136-44.35 to 136-44.49
  Art. 2E. Transportation Corridor Official Map Act, G.S. 136-44.50 to 136-44.54
  Art. 3. State Highway System, G.S. 136-45 to 136-66
  Art. 3A. Transportation Systems in and around Municipalities, G.S. 136-66.1 to 136-66.9
  Art. 3B. Dedication of Right-of-Way with Density or Development Rights Transfer, G.S. 136-66.10 to 136-66.11
  Art. 4. Neighborhood Roads, Cartways, Church Roads, etc, G.S. 136-67 to 136-71.5
  Art. 4A. Bicycle and Bikeway Act of 1974, G.S. 136-71.6 to 136-71.13
  Art. 5. Bridges, G.S. 136-72 to 136-81
  Art. 6. Ferries, etc., and Toll Bridges, G.S. 136-82 to 136-89
  Art. 6A. Carolina-Virginia Turnpike Authority [Repealed.]
  Art. 6B. Turnpikes [Repealed.]
  Art. 6C. State Toll Bridges and Revenue Bonds [Repealed.]
  Art. 6D. Controlled-Access Facilities, G.S. 136-89.48 to 136-89.59A
  Art. 6E. North Carolina Turnpike Authority [Repealed.]
  Art. 6F. North Carolina Bridge Authority [Repealed.]
  Art. 6G. Private Pilot Toll Project [Repealed.]
  Art. 6H. Public Toll Roads and Bridges, G.S. 136-89.180 to 136-89.218
  Art. 7. Miscellaneous Provisions, G.S. 136-90 to 136-102.8
  Art. 8. Citation to Highway Bond Acts [Repealed.]
  Art. 9. Condemnation, G.S. 136-103 to 136-121.1
  Art. 10. Preservation, etc., of Scenic Beauty of Areas along Highways, G.S. 136-122 to 136-125
  Art. 10A. Litter Prevention Account, G.S. 136-125.1 to 136-125.2
  Art. 11. Outdoor Advertising Control Act, G.S. 136-126 to 136-140.5
  Art. 11A. Exemption and Deferment from Removal of Certain Directional Signs, Displays, and Devices, G.S. 136-140.6 to 136-140.14
  Art. 11B. Tourist-Oriented Directional Sign Program, G.S. 136-140.15 to 136-140.19
  Art. 12. Junkyard Control Act, G.S. 136-141 to 136-155
  Art. 13. Highway Relocation Assistance Act [Repealed.]
  Art. 14. North Carolina Highway Trust Fund, G.S. 136-175 to 136-189
  Art. 15. Railroads, G.S. 136-190 to 136-199
  Art. 16. Planning, G.S. 136-200 to 136-209
  Art. 17. Rural Transportation Planning Organizations, G.S. 136-210 to 136-219

Art. 18. Virginia-North Carolina Interstate High-Speed Rail Compact, G.S. 136-220 to 136-249
Art. 19. Congestion Relief and Intermodal 21st Century Transportation Fund, G.S. 136-250 to 136-256
Chapter 137. Rural Rehabilitation, G.S. 137-1 to 137-43
Art. 1. State Rural Rehabilitation Law [Repealed.]
Art. 2. North Carolina Rural Rehabilitation Corporation [Repealed.]
Chapter 138. Salaries, Fees and Allowances, G.S. 138-1 to 138-8
Chapter 138A. State Government Ethics Act, G.S. 138A-1 to 138A-45
Art. 1. General Provisions, G.S. 138A-1 to 138A-5
Art. 2. State Ethics Commission, G.S. 138A-6 to 138A-20
Art. 3. Public Disclosure of Economic Interests, G.S. 138A-21 to 138A-30
Art. 4. Ethical Standards for Covered Persons, G.S. 138A-31 to 138A-44
Art. 5. Violation Consequences, G.S. 138A-45
Chapter 139. Soil and Water Conservation Districts, G.S. 139-1 to 139-57
Art. 1. General Provisions, G.S. 139-1 to 139-15
Art. 2. Watershed Improvement Districts, G.S. 139-16 to 139-38
Art. 3. Watershed Improvement Programs; Expenditure by Counties, G.S. 139-39 to 139-52
Art. 4. Grants for Small Watershed Projects, G.S. 139-53 to 139-57
Chapter 140. State Art Museum; Symphony and Art Societies, G.S. 140-1 to 140-15
Art. 1. North Carolina Museum of Art [Recodified.]
Art. 1A. Art Museum Building Commission [Repealed.]
Art. 1B. North Carolina Museum of Art, G.S. 140-5.12 to 140-5.17
Art. 2. North Carolina Symphony Society, G.S. 140-6 to 140-10.1
Art. 3. North Carolina State Art Society, G.S. 140-11 to 140-15
Chapter 140A. State Awards System, G.S. 140A-1 to 140A-6
Chapter 141. State Boundaries, G.S. 141-1 to 141-8
Chapter 142. State Debt, G.S. 142-1 to 142-99
Art. 1. General Provisions, G.S. 142-1 to 142-15.3
Art. 2. Borrowing Money in Emergencies and in Anticipation of Collection of Taxes, G.S. 142-16 to 142-19
Art. 3. Refunding Bonds [Repealed.]
Art. 3A. Refunding Bonds, G.S. 142-29.1 to 142-29.7
Art. 4. Sinking Fund Commission [Repealed.]
Art. 5. Sinking Funds for Highway Bonds [Repealed.]
Art. 5A. Exchange and Cancellation of Bonds Held in Sinking Funds; Investment of Moneys [Repealed.]
Art. 6. Citations to Bond and Note Acts [Repealed.]
Art. 7. General Fund Bond Sinking Fund [Repealed.]
Art. 8. State Energy Conservation Finance Act, G.S. 142-60 to 142-70
Art. 9. State Capital Facilities Finance Act, G.S. 142-80 to 142-99
Art. 10. Managing Debt Capacity, G.S. 142-100 to 142-106
Chapter 143. State Departments, Institutions, and Commissions, G.S. 143-1 to 143-747
Art. 1. Executive Budget Act [Repealed.]
Art. 1A. Periodic Review of Certain State Agencies, G.S. 143-34.10 to 143-34.24
Art. 1.2. Legislative Committee on Agency Review [Expired.]
Art. 1B. Capital Improvement Planning Act [Repealed.]
Art. 2. State Personnel Department [Repealed.]
Art. 2A. Incentive Award Program for State Employees [Repealed.]
Art. 2B. Notice of Appointments to Public Offices, G.S. 143-47.6 to 143-47.14
Art. 2C. Limit on Number of State Employees [Repealed.]

Art. 2D. North Carolina Board for Need-Based Student Loans [Repealed.]
Art. 3. Purchases and Contracts, G.S. 143-48 to 143-64
Art. 3A. Surplus Property, G.S. 143-64.01 to 143-64.9
Art. 3B. Conservation of Energy, Water, and Other Utilities in Government Facilities, G.S. 143-64.10 to 143-64.19
Art. 3C. Contracts to Obtain Consultant Services, G.S. 143-64.20 to 143-64.30
Art. 3D. Procurement of Architectural, Engineering, and Surveying Services, G.S. 143-64.31 to 143-64.49
Art. 3E. State/Public School Child Care Contracts, G.S. 143-64.50 to 143-64.52
Art. 3F. State Privacy Act, G.S. 143-64.60 to 143-64.69
Art. 3G. Personal Service Contracts, G.S. 143-64.70 to 143-64.79
Art. 3H. Overpayments of State Funds, G.S. 143-64.80 to 143-64.85
Art. 4. World War Veterans Loan Administration [Deleted.]
Art. 5. Check on License Forms, Tags and Certificates Used or Issued [Repealed and Transferred.]
Art. 6. Officers of State Institutions, G.S. 143-108 to 143-116.5
Art. 6A. Rules of Conduct; Traffic Laws for Institutions, G.S. 143-116.6 to 143-116.8
Art. 7. Persons Admitted to Department of Health and Human Services Institutions to Pay Costs, G.S. 143-117 to 143-127.1
Art. 7A. Damage of Personal Property in State Institutions, G.S. 143-127.2 to 143-127.6
Art. 8. Public Contracts, G.S. 143-128 to 143-135.9
Art. 8A. Board of State Contract Appeals [Repealed.]
Art. 8B. State Building Commission, G.S. 143-135.25 to 143-135.34
Art. 8C. Performance Standards for Sustainable, Energy-Efficient Public Buildings, G.S. 143-135.35 to 143-135.40
Art. 9. Building Code Council and Building Code, G.S. 143-136 to 143-143.7
Art. 9A. North Carolina Manufactured Housing Board — Manufactured Home Warranties, G.S. 143-143.8 to 143-143.54
Art. 9B. Uniform Standards Code For Manufactured Homes, G.S. 143-144 to 143-151.7
Art. 9C. North Carolina Code Officials Qualification Board, G.S. 143-151.8 to 143-151.25
Art. 9D. Enforcement of Building Code Insulation and Energy Utilization Standards [Repealed.]
Art. 9E. Master Electrical and Natural Gas Meters Prohibited, G.S. 143-151.42
Art. 9F. North Carolina Home Inspector Licensure Board, G.S. 143-151.43 to 143-151.64
Art. 10. Various Powers and Regulations, G.S. 143-152 to 143-162.2
Art. 11. Revenue Bonds and Governmental Aid, G.S. 143-163 to 143-165
Art. 12. Law-Enforcement Officers' Retirement System [Repealed.]
Art. 12A. Law-Enforcement Officers', Firemen's, Rescue Squad Workers' and Civil Air Patrol Members' Death Benefits Act, G.S. 143-166.1 to 143-166.12
Art. 12B. Salary Continuation Plan for Certain State Law-Enforcement Officers, G.S. 143-166.13 to 143-166.29
Art. 12C. Retirement Benefits for State Law-Enforcement Officers, G.S. 143-166.30 to 143-166.39
Art. 12D. Separation Allowances for Law-Enforcement Officers, G.S. 143-166.40 to 143-166.49

Art. 12E. Retirement Benefits for Local Governmental Law-Enforcement Officers, G.S. 143-166.50 to 143-166.59
Art. 12F. Separate Insurance Benefits Plan for State and Local Governmental Law-Enforcement Officers, G.S. 143-166.60 to 143-166.69
Art. 12G. Transfers of Assets of Law-Enforcement Officers' Retirement System to Other Retirement Systems, G.S. 143-166.70 to 143-166.79
Art. 12H. Sheriffs' Supplemental Pension Fund Act of 1985, G.S. 143-166.80 to 143-166.85
Art. 13. Publications, G.S. 143-167 to 143-170.5
Art. 14. North Carolina Zoological Authority, G.S. 143-171 to 143-177.3
Art. 15. Council of State Governments, G.S. 143-178 to 143-188
Art. 16. Spanish-American War Relief Fund [Repealed.]
Art. 17. State Post-War Reserve Fund, G.S. 143-191 to 143-194
Art. 18. Rules and Regulations Filed with Secretary of State [Repealed.]
Art. 19. Roanoke Island Historical Association, G.S. 143-199 to 143-204
Art. 19A. Governor Richard Caswell Memorial Commission [Repealed.]
Art. 19B. Historic Swansboro Commission [Repealed.]
Art. 19C. Outdoor Historical Dramas, G.S. 143-204.8
Art. 20. Recreation Commission [Repealed.]
Art. 21. Water and Air Resources, G.S. 143-211 to 143-215.74M
Art. 21A. Oil Pollution and Hazardous Substances Control, G.S. 143-215.75 to 143-215.104U
Art. 21B. Air Pollution Control, G.S. 143-215.105 to 143-215.114C
Art. 22. State Ports Authority [Recodified.]
Art. 23. Armories [Repealed.]
Art. 23A. Stadium Authority [Repealed.]
Art. 24. Wildlife Resources Commission, G.S. 143-237 to 143-254.5
Art. 25. National Park, Parkway and Forests Development Commission [Repealed.]
Art. 25A. Historic Sites Commission; Historic and Archeological Sites [Repealed.]
Art. 25B. State Nature and Historic Preserve Dedication Act, G.S. 143-260.6 to 143-260.10G
Art. 26. State Education Commission, G.S. 143-261 to 143-266
Art. 27. Settlement of Affairs of Certain Inoperative Boards and Agencies, G.S. 143-267 to 143-272
Art. 28. Communication Study Commission [Expired.]
Art. 29. Commission to Study the Care of the Aged and Handicapped, G.S. 143-279 to 143-283
Art. 29A. Governor's Council on Employment of the Handicapped, G.S. 143-283.1 to 143-283.10
Art. 29B. Governor's Coordinating Council on Aging [Repealed.]
Art. 29C. Youth Councils Act [Repealed.]
Art. 29D. Manpower Council [Repealed.]
Art. 30. Nutbush Conservation Area, G.S. 143-284 to 143-290.1
Art. 31. Tort Claims against State Departments and Agencies, G.S. 143-291 to 143-300.1A
Art. 31A. Defense of State Employees, Medical Contractors and Local Sanitarians, G.S. 143-300.2 to 143-300.12
Art. 31B. Defense of Public School Employees, G.S. 143-300.13 to 143-300.29
Art. 31C. Service on Certification Entity, G.S. 143-300.30 to 143-300.34
Art. 31D. State Employee Federal Remedy Restoration Act, G.S. 143-300.35

Art. 32. Payroll Savings Plan for State Employees, G.S. 143-301 to 143-305
Art. 33. Judicial Review of Decisions of Certain Administrative Agencies [Repealed.]
Art. 33A. Rules of Evidence in Administrative Proceedings before State Agencies [Repealed.]
Art. 33B. Meetings of Governmental Bodies [Repealed.]
Art. 33C. Meetings of Public Bodies, G.S. 143-318.9 to 143-318.18
Art. 34. Local Affairs, G.S. 143-319 to 143-328
Art. 35. Youth Service Commission [Expired.]
Art. 36. Department of Administration, G.S. 143-334 to 143-345.19
Art. 36A. State Employee Incentive Bonus Program, G.S. 143-345.20 to 143-345.25
Art. 37. Salt Marsh Mosquito Control [Repealed.]
Art. 37A. Marine Science Council [Repealed.]
Art. 37B. Marine Resources Center Administrative Board [Repealed.]
Art. 38. Water Resources, G.S. 143-348 to 143-359
Art. 39. U.S.S. North Carolina Battleship Commission [Repealed and Recodified.]
Art. 39A. Frying Pan Lightship Marine Museum Commission [Repealed.]
Art. 40. Advisory Commission for State Museum of Natural History [Recodified.]
Art. 41. Science and Technology Research Center [Recodified.]
Art. 42. Board of Science and Technology [Repealed.]
Art. 43. North Carolina Seashore Commission [Repealed.]
Art. 44. North Carolina Traffic Safety Authority [Repealed.]
Art. 45. North Carolina American Revolution Bicentennial Commission [Repealed.]
Art. 46. Governor's Committee on Law and Order [Repealed.]
Art. 47. Promotion of Arts, G.S. 143-403 to 143-408
Art. 47A. Art Works in State Buildings [Repealed.]
Art. 48. Executive Mansion, G.S. 143-409 to 143-415
Art. 49. North Carolina Human Relations Commission [Repealed.]
Art. 49A. Equal Employment Practices, G.S. 143-422.1 to 143-422.3
Art. 50. Commission on the Status of Women [Repealed.]
Art. 51. Tobacco Museums, G.S. 143-429 to 143-432
Art. 51A. Tax Study Commission [Repealed.]
Art. 51B. North Carolina Federal Tax Reform Allocation Committee, G.S. 143-433.6 to 143-433.9
Art. 52. Pesticide Board, G.S. 143-434 to 143-470.1
Art. 53. Commission for Mental Health, Mental Retardation and Substance Abuse Services [Repealed.]
Art. 54. North Carolina Council on State Goals and Policy Act [Repealed.]
Art. 55. The Southern Growth Policies Agreement, G.S. 143-490 to 143-506.5
Art. 55A. Balanced Growth Policy Act, G.S. 143-506.6 to 143-506.14
Art. 55B. North Carolina Commission on Jobs and Economic Growth [Expired.]
Art. 56. Emergency Medical Services Act of 1973, G.S. 143-507 to 143-520
Art. 57. Crime Study Commission [Repealed.]
Art. 58. Committee on Inaugural Ceremonies, G.S. 143-532 to 143-544
Art. 59. Vocational Rehabilitation Services, G.S. 145-545 to 143-551
Art. 60. State and Certain Local Educational Entity Employees, Nonsalaried Public Officials, and Legislators Required to Repay Money Owed to State, G.S. 143-552 to 143-562

Art. 61. Commission on the Bicentennial of the United States Constitution [Expired.]
Art. 62. North Carolina Child Fatality Prevention System [Repealed.]
Art. 63. State Employees Workplace Requirements Program for Safety and Health, G.S. 143-580 to 143-594
Art. 64. Smoking in Public Places, G.S. 143-595 to 143-609
Art. 65. Medical Education and Primary Care, G.S. 143-610 to 143-620
Art. 66. Health Care Purchasing Alliance Act, G.S. 143-621 to 143-639
Art. 67. First Flight Centennial Commission, G.S. 143-640 to 143-649
Art. 68. Regulation of Boxing, G.S. 143-650 to 143-659
Art. 69. Criminal Justice Information Network Governing Board, G.S. 143-660 to 143-669
Art. 70. Adopt-A-Beach Program [Repealed.]
Art. 71. North Carolina Postal History Commission, G.S. 143-675 to 143-681
Art. 72. Commission On Children With Special Health Care Needs, G.S. 143-682 to 143-689
Art. 73. [Reserved.]
Art. 74. North Carolina Government Competition Act [Repealed.]
Art. 75. Tobacco Trust Fund, G.S. 143-715 to 143-724
Art. 76. North Carolina Geographic Information Coordinating Council, G.S. 143-725 to 143-729
Art. 77. Managed Care Patient Assistance Program, G.S. 143-730 to 143-734
Art. 78. Commission on State Property [Repealed.]
Art. 79. Internal Auditing, G.S. 143-745 to 143-747

Art. 62. Commission on the Bicentennial of the United States Constitution [Expired.]
Art. 62A. North Carolina Child Fatality Prevention System [Repealed.]
Art. 63. State Employees Workplace Requirements Program for Safety and Health, G.S. 143-580 to 143-584
Art. 64. Smoking in Public Places, G.S. 143-595 to 143-601
Art. 65. Medical Education and Primary Care, G.S. 143-610 to 143-620
Art. 66. Health Care Purchasing Alliance Act, G.S. 143-621 to 143-639
Art. 67. First Flight Centennial Commission, G.S. 143-640 to 143-649
Art. 68. Regulation of Boxing, G.S. 143-650 to 143-658
Art. 69. Criminal Justice Information Network Governing Board, G.S. 143-660 to 143-664
Art. 70. Adopt-A-Beach Program [Repealed.]
Art. 71. North Carolina Postal History Commission, G.S. 143-675 to 143-681
Art. 72. Commission On Children With Special Health Care Needs, G.S. 143-682 to 143-689
Art. 73. [Reserved.]
Art. 74. North Carolina Government Competition Act [Repealed.]
Art. 75. Tobacco Trust Fund, G.S. 143-715 to 143-724
Art. 76. North Carolina Geographic Information Coordinating Council, G.S. 143-725 to 143-729
Art. 77. Managed Care Patient Assistance Program, G.S. 143-730 to 143-734
Art. 78. Commission on State Property [Repealed.]
Art. 79. Internal Auditing, G.S. 143-745 to 143-747

# Chapter 136.
# Transportation.

## Article 1.
## Organization of Department of Transportation.

Sec.

136-1 through 136-3. [Repealed.]
136-4. State Highway Administrator.
136-4.1 through 136-9. [Repealed.]
136-5.1. Transportation system.
136-10. Audit and rules.
136-11. Annual reports to Governor.
136-11.1. Local consultation on transportation projects.
136-12. Reports to General Assembly; Transportation Improvement Program submitted to members and staff of General Assembly.
136-12.1. Biennial report on off-premise sign regulatory program.
136-13. Malfeasance of officers and employees of Department of Transportation, members of Board of Transportation, contractors, and others.
136-13.1. Use of position to influence elections or political action.
136-13.2. Falsifying highway inspection reports.
136-14. Members not eligible for other employment with Department; no sales to Department by employees; members not to sell or trade property with Department; profiting from official position; misuse of confidential information by Board members.
136-14.1. Transportation engineering divisions.
136-14.2. Division engineer to manage personnel.
136-15. Establishment of administrative districts.
136-16. Funds and property converted to State Highway Fund.
136-16.1 through 136-16.3. [Reserved.]
136-16.4. Continuing aviation appropriations.
136-16.5. Purposes for continuing aviation appropriations.
136-16.6. Continuing rail appropriations.
136-16.7. Purposes for continuing rail appropriations.
136-16.8. Continuing appropriations for public transportation.
136-16.9. Purposes for continuing public transportation appropriations.
136-16.10. Allocations by Department Controller to eliminate overdrafts.

## Article 2.
## Powers and Duties of Department and Board of Transportation.

Sec.

136-17, 136-17.1. [Repealed.]
136-17.2. Members of the Board of Transportation represent entire State.
136-17.2A. Distribution formula for funds expended on Intrastate System and Transportation Improvement Program.
136-18. Powers of Department of Transportation.
136-18.01. Consultation required for welcome and visitor centers.
136-18.1. [Repealed.]
136-18.2. Seed planted by Department of Transportation to be approved by Department of Agriculture and Consumer Services.
136-18.3. Location of garbage collection containers by counties and municipalities.
136-18.4. Provision and marking of "pull-off" areas.
136-18.5. Wesley D. Webster Highway.
136-18.5A. Purple Heart Memorial Highway.
136-18.5B. Dale Earnhardt Highway.
136-18.5C. The U.S. Marine Corps Highway: Home of Carolina-Based Marines since 1941.
136-18.6. Cutting down trees.
136-18.7. Fees.
136-19. Acquisition of land and deposits of materials; condemnation proceedings; federal parkways.
136-19.1, 136-19.2. [Repealed.]
136-19.3. Acquisition of buildings.
136-19.4. Registration of right-of-way plans.
136-19.5. Utility right-of-way agreements.
136-20. Elimination or safeguarding of grade crossings and inadequate underpasses or overpasses.
136-20.1. To require installation and maintenance of block system and safety devices; automatic signals at railroad intersections.
136-21. Drainage of highway; application to court; summons; commissioners.
136-22. View by commissioners; report; judgment.
136-23. Appeal.
136-24. Rights of parties.
136-25. Repair of road detour.
136-26. Closing of State transportation infrastructure during construction; in-

Sec.
jury to barriers, warning signs, etc.
136-27. Connection of highways with improved streets; pipelines and conduits; cost.
136-27.1. Relocation of water and sewer lines of municipalities and nonprofit water or sewer corporations or associations.
136-27.2. Relocation of county-owned natural gas lines located on Department of Transportation right-of-way.
136-28. [Repealed.]
136-28.1. Letting of contracts to bidders after advertisement; exceptions.
136-28.2. Relocated transportation infrastructure; contracts let by others.
136-28.3. [Repealed.]
136-28.4. (Expires August 31, 2010) State policy concerning participation by disadvantaged minority-owned and women-owned businesses in highway contracts.
136-28.5. Construction diaries; bid analysis and management system.
136-28.6. Participation by the Department of Transportation with private developers.
136-28.6A. (Expires December 31, 2011) Partnerships with private developers.
136-28.7. Contract requirements relating to construction materials.
136-28.8. Use of recycled materials in construction.
136-28.9. Retainage — construction contracts.
136-28.10. Highway Fund and Highway Trust Fund Small Project Bidding.
136-28.11. Design-build construction of transportation projects.
136-28.12. Litter removal coordinated with mowing of highway rights-of-way.
136-28.13. Participation in the energy credit banking and selling program.
136-28.14. Project contractor licensing requirements.
136-28.15. Diesel vehicles purchase warranty requirement.
136-29. Adjustment and resolution of Department of Transportation contract claim.
136-30. Uniform signs and other traffic control devices on highways, streets, and public vehicular areas.
136-30.1. Center line and pavement edge line markings.
136-31. [Repealed.]
136-32. Other than official signs prohibited.
136-32.1. Misleading signs prohibited.
136-32.2. Placing blinding, deceptive or distracting lights unlawful.
136-32.3. Litter enforcement signs.
136-33. Damaging or removing signs; rewards.

Sec.
136-33.1. Signs for protection of cattle.
136-33.2. [Repealed.]
136-33.2A. Signs marking beginning of reduced speed zones.
136-34. Department of Transportation authorized to furnish road equipment to municipalities.
136-34.1. Department of Transportation authorized to furnish road maintenance materials to municipalities.
136-35. Cooperation with other states and federal government.
136-36 through 136-41. [Repealed.]
136-41.1. Appropriation to municipalities; allocation of funds generally; allocation to Butner.
136-41.2. Eligibility for funds; municipalities incorporated since January 1, 1945.
136-41.2A. Eligibility for funds; municipalities incorporated before January 1, 1945.
136-41.3. Use of funds; records and annual statement; excess accumulation of funds; contracts for maintenance, etc., of streets.
136-41.4. Municipal use of allocated funds; election.
136-42. [Transferred.]
136-42.1. Archaeological objects on highway right-of-way.
136-42.2. Markers on highway; cooperation of Department of Transportation.
136-42.3. Historical marker program.
136-43. [Transferred.]
136-43.1. Procedure for correction and relocation of historical markers.
136-44. Maintenance of grounds.

### Article 2A.

### State Transportation Generally.

136-44.1. Statewide transportation system; policies.
136-44.2. Budget and appropriations.
136-44.2A. Secondary road improvement program.
136-44.2B. Reports to appropriations committees of General Assembly.
136-44.2C. Special appropriations for State construction.
136-44.3. Maintenance program.
136-44.4. Annual construction program; State primary and urban systems.
136-44.5. Secondary roads; mileage study; allocation of funds.
136-44.6. Uniformly applicable formula for the allocation of secondary roads maintenance funds.
136-44.7. Secondary roads; annual work program.
136-44.7A. Submission of secondary roads con-

Sec.

struction programs to State agencies.
136-44.7B. Permit issuance by Department of Environment and Natural Resources transportation construction projects.
136-44.7C. Analysis and approval of Department of Transportation environmental policies or guidelines affecting transportation projects.
136-44.7D. Bridge construction guidelines.
136-44.7E. Compliance with federal guidelines for transportation projects.
136-44.8. Submission of secondary roads construction programs to the Boards of County Commissioners.
136-44.9. Secondary roads; annual statements.
136-44.10. Additions to secondary road system.
136-44.11. Right-of-way acquisitions; preliminary engineering annual report.
136-44.12. Maintenance of roads and parking lots in areas administered by the Division of Parks and Recreation.
136-44.13. [Reserved.]
136-44.14. Curb ramps or curb cuts for handicapped persons.
136-44.15. [Expired.]
136-44.16. Authorized use of contract maintenance resurfacing program funds.
136-44.17 through 136-44.19. [Reserved.]

### Article 2B.

### Public Transportation.

136-44.20. Department of Transportation designated agency to administer and fund public transportation programs; authority of political subdivisions.
136-44.21. Ridesharing arrangement defined.
136-44.22. Workers' Compensation Act does not apply to ridesharing arrangements.
136-44.23. Ridesharing arrangement benefits are not income.
136-44.24. Ridesharing arrangements exempt from municipal licenses and taxes.
136-44.25. Wage and Hour Act inapplicable to ridesharing arrangements.
136-44.26. Use of public motor vehicles for ridesharing.
136-44.27. North Carolina Elderly and Disabled Transportation Assistance Program.
136-44.28, 136-44.29. [Reserved.]

### Article 2C.

### House Movers Licensing Board.

136-44.30 through 136-44.34. [Repealed.]

### Article 2D.

### Railroad Revitalization.

Sec.

136-44.35. Railroad revitalization and corridor preservation a public purpose.
136-44.36. Department of Transportation designated as agency to administer federal and State railroad revitalization programs.
136-44.36A. Railway corridor preservation.
136-44.36B. Power of Department to preserve and acquire railroad corridors.
136-44.36C. Installment contracts authorized.
136-44.36D. Recreational leasing requirements.
136-44.37. Department to provide nonfederal matching share.
136-44.38. Department to provide State and federal financial assistance to cities and counties for rail revitalization.
136-44.39 through 136-44.49. [Reserved.]

### Article 2E.

### Transportation Corridor Official Map Act.

136-44.50. Transportation corridor official map act.
136-44.51. Effect of transportation corridor official map.
136-44.52. Variance from transportation corridor official map.
136-44.53. Advance acquisition of right-of-way within the transportation corridor.
136-44.54. Standard for appraisal of right-of-way within corridor.

### Article 3.

### State Highway System.

Part 1. Highway System.

136-45. General purpose of law; control, repair and maintenance of highways.
136-46 through 136-50. [Repealed.]

Part 2. County Public Roads Incorporated into State Highway System.

136-51. Maintenance of county public roads vested in Department of Transportation.
136-52, 136-53. [Repealed.]

Part 3. Power to Make Changes in Highway System.

136-54. Power to make changes.
136-55. [Repealed.]
136-55.1. Notice of abandonment.
136-56 through 136-58. [Repealed.]

Sec.
136-59. No court action against Board of Transportation.
136-60, 136-61. [Repealed.]
136-62. Right of petition.
136-63. Change or abandonment of roads.
136-64. Filing of complaints with Department of Transportation; hearing and appeal.
136-64.1. Applications for intermittent closing of roads within watershed improvement project by Department of Transportation; notice; regulation by Department; delegation of authority; markers.
136-65, 136-66. [Repealed.]

### Article 3A.

### Transportation Systems in and around Municipalities.

136-66.1. Responsibility for streets inside municipalities.
136-66.2. Development of a coordinated transportation system and provisions for streets and highways in and around municipalities.
136-66.3. Local government participation in improvements to the State transportation system.
136-66.4. Rules and regulations; authority of municipalities.
136-66.5. Improvements in urban areas to reduce traffic congestion.
136-66.6. Arrangements in a consolidated city-county.
136-66.7. Authority to include a Municipal Street System street in right-of-way of State Highway System.
136-66.8. Agreements with units of local government to expedite projects.
136-66.9. [Reserved.]

### Article 3B.

### Dedication of Right-of-Way with Density or Development Rights Transfer.

136-66.10. Dedication of right-of-way under local ordinances.
136-66.11. Transfer of severable development rights.

### Article 4.

### Neighborhood Roads, Cartways, Church Roads, etc.

136-67. Neighborhood public roads.
136-68. Special proceeding for establishment, alteration or discontinuance of cartways, etc.; petition; appeal.
136-69. Cartways, tramways, etc., laid out; procedure.

Sec.
136-70. Alteration or abandonment of cartways, etc., in same manner.
136-71. Church roads and easements of public utility lines laid out on petition; procedure.
136-71.1 through 136-71.5. [Reserved.]

### Article 4A.

### Bicycle and Bikeway Act of 1974.

136-71.6. How Article cited.
136-71.7. Definitions.
136-71.8. Findings.
136-71.9. Program development.
136-71.10. Duties.
136-71.11. Designation of bikeways.
136-71.12. Funds.
136-71.13. North Carolina Bicycle Committee; composition, meetings, and duties.

### Article 5.

### Bridges.

136-72. Load limits for bridges; penalty for violations.
136-73 through 136-76. [Repealed.]
136-76.1. Bridge replacement program.
136-77. [Repealed.]
136-78. Railroad companies to provide draws.
136-79. [Repealed.]
136-80. Fastening vessels to bridges misdemeanor.
136-81. Department of Transportation may maintain footways.

### Article 6.

### Ferries, etc., and Toll Bridges.

136-82. Department of Transportation to establish and maintain ferries.
136-82.1. Authority to insure vessels operated by Department of Transportation.
136-82.2. State toll bridges.
136-83 through 136-87. [Repealed.]
136-88. Authority of county commissioners with regard to ferries and toll bridges; rights and liabilities of owners of ferries or toll bridges not under supervision of Department of Transportation.
136-89. Safety measures; guard chains or gates.

### Article 6A.

### Carolina-Virginia Turnpike Authority.

136-89.1 through 136-89.11H. [Repealed.]

### Article 6B.

### Turnpikes.

136-89.12 through 136-89.30. [Repealed.]

### Article 6C.

### State Toll Bridges and Revenue Bonds.

Sec.

136-89.31 through 136-89.47. [Repealed.]

### Article 6D.

### Controlled-Access Facilities.

136-89.48. Declaration of policy.
136-89.49. Definitions.
136-89.50. Authority to establish controlled-access facilities.
136-89.51. Design of controlled-access facility.
136-89.52. Acquisition of property and property rights.
136-89.53. New and existing facilities; grade crossing eliminations.
136-89.54. Authority of local units to consent.
136-89.55. Local service roads.
136-89.56. Commercial enterprises.
136-89.57. [Repealed.]
136-89.58. Unlawful use of National System of Interstate and Defense Highways and other controlled-access facilities.
136-89.59. Highway rest area refreshments.
136-89.59A. Promotion of North Carolina farm products at rest areas and welcome centers.

### Article 6E.

### North Carolina Turnpike Authority.

136-89.60 through 136-89.77. [Repealed.]
136-89.77. [Repealed.]
136-89.78 through 136-89.158. [Reserved.]

### Article 6F.

### North Carolina Bridge Authority.

136-89.159 through 136-89.170. [Repealed.]

### Article 6G.

### Private Pilot Toll Project.

136-89.171 through 136-89.179. [Repealed].

### Article 6H.

### Public Toll Roads and Bridges.

Part 1. Turnpike Authority and Toll Projects.

136-89.180. Legislative findings.
136-89.181. Definitions.
136-89.182. North Carolina Turnpike Authority.
136-89.183. Powers of the Authority.
136-89.183A. Accelerated Pilot Toll Bridge Project.
136-89.183B. Accelerated Herbert C. Bonner Bridge Replacement Project.
136-89.183C. Accelerated Yadkin River Bridge Replacement Project.

Sec.

136-89.184. Acquisition of real property.
136-89.185. Taxation of property of Authority.
136-89.186. Audit.
136-89.187. Conversion of free highways prohibited.
136-89.188. Use of revenues.
136-89.189. Turnpike Authority revenue bonds.
136-89.190. Sale of Turnpike Authority revenue bonds.
136-89.191. Cost participation by Department of Transportation.
136-89.192. Equity distribution formula.
136-89.193. Annual plan of work; annual and quarterly reports.
136-89.194. Laws applicable to the Authority; exceptions.
136-89.195. Internet report of funds expended.
136-89.196. Removal of tolls.
136-89.197. Maintenance of nontoll routes.
136-89.198. Authority to toll existing interstate highways.
136-89.199 through 136-89.209. [Reserved.]

Part 2. Collection of Tolls on Turnpike Projects.

136-89.210. Definitions.
136-89.211. Tolls for use of Turnpike project.
136-89.212. Payment of toll required for use of Turnpike project.
136-89.213. Administration of tolls and requirements for open road tolls.
136-89.214. Bill for unpaid open road toll.
136-89.215. Required action upon receiving bill for open road toll and processing fee for unpaid toll.
136-89.216. Civil penalty for failure to pay open road toll.
136-89.217. Vehicle registration renewal blocked for unpaid open road toll.
136-89.218. Procedures for contesting liability for unpaid open road toll.

### Article 7.

### Miscellaneous Provisions.

136-90. Obstructing highways and roads misdemeanor.
136-91. Placing glass, etc., or injurious obstructions in road.
136-92. Obstructing highway drains prohibited.
136-93. Openings, structures, pipes, trees, and issuance of permits.
136-93.1. Express permit review program.
136-94. Gates projecting over rights-of-way forbidden.
136-95. Water must be diverted from public road by ditch or drain.
136-96. Road or street not used within 15 years after dedication deemed aban-

Sec.
doned; declaration of withdrawal recorded; joint tenants or tenants in common; defunct corporations.
136-96.1. Special proceeding to declare a right-of-way dedicated to public use.
136-97. Responsibility of counties for upkeep, etc., terminated.
136-98. Counties authorized to participate in costs of road construction and maintenance, participation is voluntary.
136-99 through 136-101. [Repealed.]
136-102. Billboard obstructing view at entrance to school, church or public institution on public highway.
136-102.1. Blue Star Memorial and American Ex-Prisoners of War Highway.
136-102.2. Authorization required for test drilling or boring upon right-of-way; filing record of results with Department of Transportation.
136-102.3. Filing record of results of test drilling or boring with Secretary of Administration and Secretary of Environment and Natural Resources.
136-102.4. Penalty for violation of §§ 136-102.2 and 136-102.3.
136-102.5. Signs on fishing bridges.
136-102.6. Compliance of subdivision streets with minimum standards of the Board of Transportation required of developers.
136-102.7. Hurricane evacuation standard.
136-102.8. Subdivision streets; traffic calming devices.

### Article 8.

### Citation to Highway Bond Acts.

136-102.50. [Repealed.]

### Article 9.

### Condemnation.

136-103. Institution of action and deposit.
136-103.1. Outside counsel.
136-104. Vesting of title and right of possession; recording memorandum or supplemental memorandum of action.
136-105. Disbursement of deposit; serving copy of disbursing order on Department of Transportation.
136-106. Answer, reply and plat.
136-107. Time for filing answer.
136-108. Determination of issues other than damages.
136-109. Appointment of commissioners.
136-110. Parties; orders; continuances.
136-111. Remedy where no declaration of taking filed; recording memorandum of action.
136-112. Measure of damages.
136-113. Interest as a part of just compensation.
136-114. Additional rules.
136-115. Definitions.
136-116. Final judgments.
136-117. Payment of compensation.
136-118. Agreements for entry.
136-119. Costs and appeal.
136-120. Entry for surveys.
136-121. Refund of deposit.
136-121.1. Reimbursement of owner for taxes paid on condemned property.

### Article 10.

### Preservation, etc., of Scenic Beauty of Areas along Highways.

136-122. Legislative findings and declaration of policy.
136-123. Restoration, preservation and enhancement of natural or scenic beauty.
136-124. Availability of federal aid funds.
136-125. Regulation of scenic easements.

### Article 10A.

### Litter Prevention Account.

136-125.1. Litter Prevention Account.
136-125.2. Report.

### Article 11.

### Outdoor Advertising Control Act.

136-126. Title of Article.
136-127. Declaration of policy.
136-128. Definitions.
136-129. Limitations of outdoor advertising devices.
136-129.1. Limitations of outdoor advertising devices beyond 660 feet.
136-129.2. Limitation of outdoor advertising devices adjacent to scenic highways, State and National Parks, historic areas and other places.
136-130. Regulation of advertising.
136-131. Removal of existing nonconforming advertising.
136-131.1. (See Editor's note for expiration of section) Just compensation required for the removal of billboards on federal-aid primary highways by local authorities.
136-132. Condemnation procedure.
136-133. Permits required.
136-134. Illegal advertising.
136-134.1. Judicial review.
136-134.2. Notification requirements.

Sec.
136-135. Enforcement provisions.
136-136. Zoning changes.
136-137. Information directories.
136-138. Agreements with United States authorized.
136-139. Alternate control.
136-140. Availability of federal aid funds.
136-140.1. Adopt-A-Highway.
136-140.2 through 136-140.5. [Reserved.]

### Article 11A.

### Exemption and Deferment from Removal of Certain Directional Signs, Displays, and Devices.

136-140.6. Declaration of policy.
136-140.7. Definitions.
136-140.8. Exemption procedures.
136-140.9. Deferment.
136-140.10 through 136-140.14. [Reserved.]

### Article 11B.

### Tourist-Oriented Directional Sign Program.

136-140.15. Scope of operations.
136-140.16. Eligibility criteria.
136-140.17. Terminating participation in program.
136-140.18. Temporary modification of TODS panels.
136-140.19. Department to adopt rules to implement the TODS program.

### Article 12.

### Junkyard Control Act.

136-141. Title of Article.
136-142. Declaration of policy.
136-143. Definitions.
136-144. Restrictions as to location of junkyards.
136-145. Enforcement provisions.
136-146. Removal of junk from illegal junkyards.
136-147. Screening of junkyards lawfully in existence.
136-148. Acquisition of existing junkyards where screening impractical.
136-149. Permit required for junkyards.
136-149.1. Judicial review.
136-150. Condemnation procedure.
136-151. Rules and regulations by Department of Transportation; delegation of authority to Secretary of Transportation.
136-152. Agreements with United States.
136-153. Zoning changes.
136-154. Alternate control.
136-155. Availability of federal aid funds.

### Article 13.

### Highway Relocation Assistance Act.

Sec.
136-156 through 136-174. [Repealed.]

### Article 14.

### North Carolina Highway Trust Fund.

136-175. Definitions.
136-176. Creation, revenue sources, and purpose of North Carolina Highway Trust Fund.
136-177. Limitation on funds obligated from Trust Fund.
136-177.1. Requirement to use federal funds for Intrastate System projects and urban loops.
136-178. Purpose and description of Intrastate System.
136-179. Projects of Intrastate System funded from Trust Fund.
136-180. Urban loops.
136-180.1. [Repealed.]
136-181. Supplement for city streets.
136-182. Supplement for secondary road construction.
136-183. [Repealed.]
136-184. Reports by Department of Transportation.
136-185. Maintenance reserve created in certain circumstances.
136-186 through 136-189. [Reserved.]

### Article 15.

### Railroads.

136-190. Powers of railroad corporations.
136-191. Intersection with highways.
136-192. Obstructing highways; defective crossings; notice; failure to repair after notice misdemeanor.
136-193. Joint construction of railroads having same location.
136-194. Cattle guards and private crossings; failure to erect and maintain misdemeanor.
136-195. To regulate crossings and to abolish grade crossings.
136-196. Injury to passenger while in prohibited place.
136-197. Ticket may be refused intoxicated person; penalty for prohibited entry.
136-198. Passenger refusing to pay fare or violating rules may be ejected.
136-199. [Reserved.]

### Article 16.

### Planning.

136-200. Definitions.
136-200.1. Metropolitan planning organizations recognized.

Sec.
136-200.2. Decennial review of metropolitan planning organization boundaries, structure, and governance.
136-200.3. Additional provisions applicable to consolidated metropolitan planning organizations.
136-200.4. Additional requirements for metropolitan planning organizations located in nonattainment areas.
136-200.5. Matching funds for Metropolitan Planning Organizations located in nonattainment areas or maintenance areas.
136-200.6. Funds for local transportation planning efforts in areas designated nonattainment areas or maintenance areas.
136-201. Plan for intermodal interface.
136-202. Metropolitan planning organizations.
136-203. [Repealed.]
136-204 through 136-209. [Reserved.]

**Article 17.**

**Rural Transportation Planning Organizations.**

136-210. Definitions.
136-211. Department authorized to establish Rural Transportation Planning Organizations.
Sec.
136-212. Duties of Rural Transportation Planning Organizations.
136-213. Administration and staff.
136-214 through 136-219. [Reserved.]

**Article 18.**

**Virginia-North Carolina Interstate High-Speed Rail Compact.**

136-220. Compact established.
136-221. Agreement.
136-222. Commission established; appointment and terms of members; chairman; reports; commission funds; staff.
136-223 through 136-249. [Reserved.]

**Article 19.**

**Congestion Relief and Intermodal 21st Century Transportation Fund.**

136-250. Congestion Relief and Intermodal Transportation 21st Century Fund.
136-251. Findings of fact.
136-252. Grants to local governments and transportation authorities.
136-253. Grants to other units.
136-254. Grant approval.
136-255. Expenditure.
136-256. Funds remain available until expended.

## ARTICLE 1.

## *Organization of Department of Transportation.*

**§§ 136-1 through 136-3:** Repealed by Session Laws 1973, c. 507, s. 23.

### § 136-4. State Highway Administrator.

There shall be a State Highway Administrator, who shall be a career official and who shall be the administrative officer of the Department of Transportation for highway matters. The State Highway Administrator shall be appointed by the Secretary of Transportation and he may be removed at any time by the Secretary of Transportation. He shall be paid a salary to be set in accordance with Chapter 126 of the General Statutes, the State Personnel Act. The State Highway Administrator shall have such powers and perform such duties as the Secretary of Transportation shall prescribe. (1921, c. 2, ss. 5, 6; C.S., s. 3846(g); 1933, c. 172, s. 17; 1957, c. 65, s. 2; 1961, c. 232, s. 2; 1965, c. 55, s. 3; 1973, c. 507, s. 22; 1975, c. 716, s. 7; 1977, c. 464, s. 11; 1983, c. 717, s. 45; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1985, c. 757, s. 191.)

**Editor's Note.** — Session Laws 2009-266, s. 4, effective August 1, 2009, substituted "Transportation" for "Roads and Highways" in the chapter heading.

**§§ 136-4.1 through 136-5:** Repealed by Session Laws 1973, c. 507, s. 23.

## § 136-5.1. Transportation system.

For the purpose of this Chapter, transportation system is defined as all modes of transportation infrastructure owned and maintained by the North Carolina Department of Transportation, including roads, highways, rail, ferry, aviation, public transportation, and bicycle and pedestrian facilities. (2009-266, s. 5.)

**Editor's Note.** — Session Laws 2009-266, s. 4, effective August 1, 2009, substituted "Transportation" for "Roads and Highways" in the chapter heading.

Session Laws 2009-266, s. 28, made this section effective August 1, 2009.

## §§ 136-6 through 136-9: Repealed by Session Laws 1957, c. 65, s. 12.

## § 136-10. Audit and rules.

The operations of the Department of Transportation shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. Rules adopted by the Department of Transportation are subject to Chapter 150B of the General Statutes. (1921, c. 2, s. 24; C.S., s. 3846(m); 1933, c. 172, s. 7; 1957, c. 65, s. 4; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1983, c. 913, s. 25; 1991, c. 477, s. 5.)

### CASE NOTES

**Cited** in Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina DOT, 46 N.C. App. 350, 265 S.E.2d 890 (1980).

## § 136-11. Annual reports to Governor.

The Department of Transportation shall make to the Department of Administration, or to the Governor, a full report of its finances and the physical condition of buildings, depots and properties under its supervision and control, on the first day of July of each year, and at such other times as the Governor or Directors of the Budget may call for the same. (1933, c. 172, s. 11; 1957, c. 65, s. 11; c. 269, s. 1; c. 349, s. 7; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

### CASE NOTES

**Cited** in Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina DOT, 46 N.C. App. 350, 265 S.E.2d 890 (1980).

## § 136-11.1. Local consultation on transportation projects.

Prior to any action of the Board on a transportation project, the Department shall inform all municipalities and counties affected by a planned transportation project and request each affected municipality or county to submit within 45 days a written resolution expressing their views on the project. A municipality or county may designate a Transportation Advisory Committee to submit its response to the Department's request for a resolution. Upon receipt of a written resolution from all affected municipalities and counties or their designees, or the expiration of the 45-day period, whichever occurs first, the Board may take action. The Department and the Board shall consider, but shall not be bound by, the views of the affected municipalities and counties on each transportation project. The failure of a county or municipality to express its views within the time provided shall not prevent the Department or the Board from taking action. The Department shall not be required to send notice under this section if it has already received a written resolution from the affected county or municipality on the planned transportation project. "Action of the Board", as used in this section, means approval by the Board of: the Transportation Improvement Program and amendments to the Transportation Improvement Program; the Secondary Roads Paving Program and amendments to the Secondary Roads Paving Program; and individual applications for access and public service road projects, contingency projects, small urban projects, and spot safety projects that exceed one hundred fifty thousand dollars ($150,000). The 45-day notification provision may be waived upon a finding by the Secretary of Transportation that emergency action is required. Such findings must be reported to the Joint Legislative Transportation Oversight Committee. (1998-169, s. 3.)

**Legal Periodicals.** — See legislative survey, 21 Campbell L. Rev. 323 (1999).

## § 136-12. Reports to General Assembly; Transportation Improvement Program submitted to members and staff of General Assembly.

(a) The Department of Transportation shall, on or before the tenth day after the convening of each regular session of the General Assembly of North Carolina, make a full printed, detailed report to the General Assembly, showing the construction and maintenance work and the cost of the same, receipts of license fees, and disbursements of the Department of Transportation, and such other data as may be of interest in connection with the work of the Department of Transportation. A full account of each road project shall be kept by and under the direction of the Department of Transportation or its representatives, to ascertain at any time the expenditures and the liabilities against all projects; also records of contracts and force account work. The account records, together with all supporting documents, shall be open at all times to the inspection of the Governor or road authorities of any county, or their authorized representatives, and copies thereof shall be furnished such officials upon request.

(a1) The Department of Transportation shall report quarterly beginning on October 15, 1996, and then on the fifteenth of the month following the end of the fiscal quarter, to the Joint Legislative Transportation Oversight Committee on all projects to be built with funds obligated using the cash flow provisions of G.S. 143C-6-11. The report shall contain a list of the projects and the amount obligated in anticipation of revenues for each year of the project.

(b) At least 30 days before it approves a Transportation Improvement Program in accordance with G.S. 143B-350(f)(4) or approves interim changes to a Transportation Improvement Program, the Department shall submit the proposed Transportation Improvement Program or proposed interim changes to a Transportation Improvement Program to the following members and staff of the General Assembly:

(1) The Speaker and the Speaker Pro Tempore of the House of Representatives;
(2) The Lieutenant Governor and the President Pro Tempore of the Senate;
(3) The Chairs of the House and Senate Appropriations Committees;
(4) Each member of the Joint Legislative Transportation Oversight Committee; and

(5) The Fiscal Research Division of the Legislative Services Commission. (1921, c. 2, s. 23; C.S., s. 3846(l); 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1989, c. 692, s. 1.3; c. 770, s. 74.16; 1993, c. 321, s. 169.2(d); 1996, 2nd Ex. Sess., c. 18, s. 19.4(c); 2006-203, s. 74.)

**Cross References.** — As to periodic adjustment of permit fees to assure that revenue generated by the fees equals the cost of administration of Oversize/Overweight Permit Unit Program, see G.S. 20-119(e).

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 20.10 provides that the Departments of Transportation and Correction shall report, quarterly beginning October 1, 1994, to the Joint Legislative Transportation Oversight Committee on the implementation of the recommendations of the Inmate Labor Subcommittee.

Session Laws 1996, Second Extra Session, c. 18, s. 19.4(c) was codified as subsection (a1) of this section at the direction of the Revisor of Statutes.

Session Laws 1993, c. 561, s. 68, as amended by Session Laws 1995, c. 324, s. 18.28, and Session Laws 1996, Second Extra Session, c. 18, s. 19.6, provides for an appropriation to the Department of Transportation for the replacement of the wooded trestle over the Newport River on the Beaufort and Morehead Railroad with a concrete trestle, that construction shall be owned by the Department of Transportation, that the Department of Transportation may award a contract for the project in the 1996-2002 Transportation Improvement Program on a design-build basis, and that the Department of Transportation shall file a progress report every six months beginning on December 1, 1996, with the Joint Legislative Transportation Oversight Committee on the construction of the project.

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 74, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "G.S. 143C-6-11" for "G.S. 143-28.1" in subsection (a1).

### CASE NOTES

**Cited** in Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina DOT, 46 N.C. App. 350, 265 S.E.2d 890 (1980).

## § 136-12.1. Biennial report on off-premise sign regulatory program.

The Department of Transportation shall make a biennial report to the General Assembly beginning on January 1, 1993, on its Off-Premise Sign Regulatory Program.

The report shall include:

(1) The number of off-premise signs (billboards) that conform with State and local regulations and the number of off-premise signs that do not conform with State and local regulations in each county along federal-aid primary highways.

(2) The number of conforming and nonconforming off-premise signs on State-owned railroad right-of-way.

(3) The number of nonconforming off-premise signs removed during the fiscal year.

(4) The number of permitted tree cuttings and the number of illegal tree cuttings in front of off-premise signs.

(5) Expenses incurred in regulating off-premise signs and receipts from application and renewal permit fees. (1991, c. 689, s. 208.)

## § 136-13. Malfeasance of officers and employees of Department of Transportation, members of Board of Transportation, contractors, and others.

(a) It is unlawful for any person, firm, or corporation to directly or indirectly corruptly give, offer, or promise anything of value to any officer or employee of the Department of Transportation or member of the Board of Transportation, or to promise any officer or employee of the Department of Transportation or any member of the Board of Transportation to give anything of value to any other person with intent:

(1) To influence any official act of any officer or employee of the Department of Transportation or member of the Board of Transportation;
(2) To influence such member of the Board of Transportation, or any officer or employee of the Department of Transportation to commit or aid in committing, or collude in, or allow, any fraud, or to make opportunity for the commission of any fraud on the State of North Carolina; and
(3) To induce a member of the Board of Transportation, or any officer or employee of the Department of Transportation to do or omit to do any act in violation of his lawful duty.

(b) It shall be unlawful for any member of the Board of Transportation, or any officer or employee of the Department of Transportation, directly or indirectly, to corruptly ask, demand, exact, solicit, accept, receive, or agree to receive anything of value for himself or any other person or entity in return for:

(1) Being influenced in his performance of any official act;
(2) Being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or to make opportunity for the commission of any fraud on the State of North Carolina; and
(3) Being induced to do or omit to do any act in violation of his official duty.

(c) The violation of any of the provisions of this section shall be cause for forfeiture of public office and shall be a Class H felony which may include a fine of not more than twenty thousand dollars ($20,000) or three times the monetary equivalent of the thing of value whichever is greater. (1921, c. 2, s. 49; C.S., s. 3846(cc); 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1965, c. 55, s. 7; 1973, c. 507, s. 6; 1975, c. 716, s. 7; 1977, c. 464, ss. 7.1, 10, 10.1; 1979, c. 298, ss. 3, 4; 1993, c. 539, s. 1308; 1994, Ex. Sess., c. 24, s. 14(c).)

## § 136-13.1. Use of position to influence elections or political action.

No member of the Board of Transportation nor any officer or employee of the Department of Transportation shall be permitted to use his position to influence elections or the political action of any person. (1965, c. 55, s. 8; 1973, c. 507, s. 7; 1975, c. 716, s. 7; 1977, c. 464, ss. 7.1, 10.1; 1979, c. 298, s. 3.)

## § 136-13.2. Falsifying highway inspection reports.

(a) Any person who knowingly falsifies any inspection report or test report required by the Department of Transportation in connection with the construction of highways, shall be guilty of a Class H felony.

(b) Any person who directs a subordinate under his direct or indirect supervision to falsify an inspection report or test report required by the Department of Transportation in connection with the construction of highways, shall be guilty of a Class H felony.

(c) Repealed by Session Laws 1979, c. 786, s. 2, effective May 8, 1979. (1979, c. 523; c. 786, s. 2; 1981, c. 793, s. 1; 2005-96, s. 1.)

**Editor's Note.** — Subsections (a) and (b), as amended by Session Laws 2005-96, s. 1, effective December 1, 2005, to substitute the word "person" for other wording in those subsections, are applicable to offenses committed on or after that date.

## § 136-14. Members not eligible for other employment with Department; no sales to Department by employees; members not to sell or trade property with Department; profiting from official position; misuse of confidential information by Board members.

(a) No Board member shall be eligible to any other employment in connection with the Department.

(b) No Board member or any salaried employee of the Department shall furnish or sell any supplies or materials, directly or indirectly, to the Department.

(c) No Board member shall, directly or indirectly, engage in any transaction involving the sale of or trading of real or personal property with the Department.

(d) No Board member shall profit in any manner by reason of the Board member's official action or official position, except to receive salary, fees and allowances as by law provided.

(e) No Board member shall take any official action or use the Board member's official position to profit in any manner the Board member's immediate family, a business with which the Board member or the Board member's immediate family has a business association, or a client of the Board member or the Board member's immediate family with whom the Board member, or the Board member's immediate family, has an existing business relationship for matters before the Board.

(f) No Board member shall attempt to profit from a proposed project of the Department if the profit is greater than that which would be realized by other persons living in the area where the project is located. If the profit under this subsection would be greater for the Board member than other persons living in the area where the project is located not only shall the member abstain from voting on that issue, but once the conflict of interest is apparent, the member shall not discuss the project with any other Board member or other officer or employee of the Department except to state that a conflict of interest exists. Under this subsection a Board member is presumed to profit if the profit would be realized by a Board member's immediate family, a business with which the Board member or the Board member's immediate family has a business association, or a client of the Board member or the Board member's immediate family with whom the Board member, or the Board member's immediate family, has an existing business relationship for matters before the Board. Violation of this subsection shall be a Class I felony.

(g) No Board member, in contemplation of official action by the Board member, by the Board, or in reliance on information that was made known to the Board member in the Board member's official capacity and that has not been made public, shall commit any of the following acts:

(1) Acquire a pecuniary interest in any property, transaction, or enterprise or gain any pecuniary benefit that may be affected by such information or official action; or

(2) Intentionally aid another to do any of the above acts.

(h) As used in this section, the following terms mean:

(1) "Board". — The Board of Transportation.

(2) "Board member". — A member of the Board of Transportation.

(3) "Business association". — A director, employee, officer, or partner of a business entity, or owner of more than ten percent (10%) interest in any business entity.

(4) "Department". — The Department of Transportation.

(5) "Immediate family". — Spouse, children, parents, brothers, and sisters.

(6) "Official action". — Actions taken while a Board member related to or in connection with the person's duties as a Board member including, but not limited to, voting on matters before the Board, proposing or objecting to proposals for transportation actions by the Department or the Board, discussing transportation matters with other Board members or Department staff or employees in an effort to further the matter after the conflict of interest has been discovered, or taking actions in the course and scope of the position as a Board member and actions leading to or resulting in profit.

(7) "Profit". — Receive monetary or economic gain or benefit, including an increase in value whether or not recognized by sale or trade.

(i) Except as otherwise provided in this section, a violation of this section shall be a Class H felony which may include a fine of not more than twenty thousand dollars ($20,000), or three times the value of the transaction, whichever amount is greater. (1933, c. 172, s. 10; 1957, c. 65, s. 11; 1965, c. 55, s. 9; 1973, c. 507, s. 8; 1975, c. 716, s. 7; 1977, c. 464, ss. 7.1, 10.2; 1979, ch. 298, s. 3; 1985, c. 689, s. 28; 1993, c. 539, s. 1309; 1994, Ex. Sess., c. 24, s. 14(c); 1998-169, s. 4.)

## § 136-14.1. Transportation engineering divisions.

For purposes of administering transportation activities, the Department of Transportation shall have authority to designate boundaries of transportation engineering divisions for the proper administration of its duties. (1957, c. 65, s. 5; 1965, c. 55, s. 10; 1973, c. 507, s. 9; 1975, c. 716, s. 7; 1993, c. 483, s. 2.)

## § 136-14.2. Division engineer to manage personnel.

Except for general departmental policy applicable to all of the State the division engineer shall have authority over all divisional personnel matters and over Department employees in his division making personnel decisions. (1975, 2nd Sess., c. 983, s. 92.)

## § 136-15. Establishment of administrative districts.

The Department of Transportation may establish such administrative districts as in its opinion shall be necessary for the proper and efficient performance of highway duties. The Department may from time to time change the number of such districts, or it may change the territory embraced within the several districts, when in its opinion it is in the interest of efficiency and economy to make such change. (1931, c. 145, s. 5; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 10; 1975, c. 716, s. 7.)

## § 136-16. Funds and property converted to State Highway Fund.

Except as otherwise provided, all funds and property collected by the Department of Transportation, including the proceeds from the sale of real property originally purchased with funds from the State Highway Fund, shall be paid or converted into the State Highway Fund. (1919, c. 189, s. 8; C.S., s.

3595; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 2007-323, s. 27.15.)

**Legal Periodicals.** — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

### §§ 136-16.1 through 136-16.3: Reserved for future codification purposes.

### § 136-16.4. Continuing aviation appropriations.

There is appropriated from the Highway Fund to the Department of Transportation the sum of eleven million two hundred eighty-four thousand one hundred ninety-eight dollars ($11,284,198) for fiscal year 2005-2006 and the sum of twelve million nine hundred forty-five thousand sixty-six dollars ($12,945,066) for fiscal year 2006-2007. Each subsequent fiscal year, there is appropriated from the Highway Fund to the Department of Transportation the amount appropriated by this section to the Department of Transportation for the preceding fiscal year, plus or minus the percentage of the amount by which the collection of State sales and use taxes increased or decreased during the preceding fiscal year. The Department of Transportation may use funds appropriated under this section only for aviation purposes. (1987, c. 738, s. 170(a), (c); 1989, c. 500, s. 53; 1993, c. 321, s. 153(a); 2005-276, s. 28.12.)

### § 136-16.5. Purposes for continuing aviation appropriations.

The continuing aviation appropriations authorized by G.S. 136-16.4 shall be used in accordance with the provisions of Article 7 of Chapter 63 of the General Statutes. (1987, c. 738, s. 170(a), (c); 1989, c. 500, s. 53.)

### § 136-16.6. Continuing rail appropriations.

(a) There is annually credited to the Highway Fund one hundred percent (100%) of the annual dividends received by the State from its ownership of stock in the North Carolina Railroad Company for use by the Department of Transportation for railroad purposes.

(b) The Department of Transportation shall include in its annual budget the purposes for which the annual dividends received by the State from its ownership of stock in the North Carolina Railroad Company will be used.

These purposes may include the following project types to be included in the annual Transportation Improvement Program:

(1) Track and signal improvements for passenger service.
(2) Rail passenger stations and multimodal transportation centers.
(3) Grade crossing protection, elimination, and hazard removal.
(4) Rail rolling stock cars and locomotives.
(5) Rail rehabilitation.
(6) Industrial rail access.

The Department of Transportation shall use these funds to supplement but not supplant funds allocated for projects approved as part of the Transportation Improvement Program.

(c) There is annually appropriated to the Department of Transportation for railroad purposes, including capital contributions to the Beaufort and Morehead Railroad Company or any successor company, one hundred percent

(100%) of the funds credited to the Highway Fund pursuant to subsection (a) of this section. (1987, c. 738, s. 170(a), (c); 1989, c. 500, s. 53; 1991, c. 689, s. 65; 1995, c. 324, s. 18.2; 1996, 2nd Ex. Sess., c. 18, s. 19.12; 1997-443, s. 32.30(f).)

**Cross References.** — See G.S. 124-5.1(a), directing the application of dividends of the North Carolina Railroad Company received by the State to reduce obligations described in Session Laws 1997-443, s. 32.30(c), as amended by Session Laws 1999-237, s. 27.11(d). See also G.S. 124-5.1(b), regarding the cessation of accrual of interest on the remaining balance of obligations described in Session Laws 1997-443, s. 32.30(c), as amended by Session Laws 1999-237, s. 27.11(d), effective January 1, 2000.

**Editor's Note.** — Session Laws 1997-443, s. 32.30(a)-(e), as amended by Session Laws 1999-237, s. 27.11(d), provides that the General Assembly finds it advantageous for the State to acquire the outstanding shares of the North Carolina Railroad Company not held by the State, provides for $61,000,000 to be placed in a Railroad Reserve Account, and that if a majority of the outstanding shares held by shareholders other than the State are represented at a meeting where a plan for merger between the Beaufort and Morehead Railroad Company and the North Carolina Railroad Company is approved, the State shall invest that money on a one-time basis in obligations of the Beaufort and Morehead Railroad Company or its successor, and that the Director of the Budget shall recommend to the 2000 General Assembly a plan for the repayment of that loan. Furthermore, no stock owned by the State of North Carolina in the North Carolina Railroad Company shall be sold or transferred except with prior consent as part of a transaction relating to a plan of merger or consolidation of that company with another company; in accordance with this provision, the State Treasurer shall transfer the stock owned by the State of North Carolina to the Beaufort and Morehead Railroad Company.

Session Laws 1997-443, s. 32.30(g) provides that subsection (f), which amended this section, applies to funds previously appropriated under subsection (c).

Session Laws 1997-443, s. 32.30(h)-(i), provide that no monies appropriated for highway construction or maintenance may be used by the State or any of its political subdivisions to acquire stock in the North Carolina Railroad Company or make a capital contribution or loan to that company or the Beaufort and Morehead Railroad Company. Investments by the State in the Beaufort and Morehead Railroad Company or any successor company shall be recorded in the General Fund.

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

The preamble to Session Laws 2005-222, provides: "Whereas, expanding and upgrading passenger, freight, commuter, and short line rail service is important to the economy of North Carolina; and

"Whereas, the citizens of this State have stated their support for expanded passenger rail service through resolutions from over 100 cities, towns, and organizations submitted to the House Interim Committee on Expanding Rail Service in the fall of 2004; and

"Whereas, Congress is debating reauthorization of the federal Surface Transportation Program; and

"Whereas, Congress is considering new and innovative means of financing construction of transportation infrastructure, including highways, transit, intermodal, and rail projects; and

"Whereas, Congress is debating reform of the National Railroad Passenger Corporation, known as Amtrak, and the result may be more responsibilities for rail transferred to the states; and

"Whereas, it is in the best interest of the State of North Carolina to respond in a timely way to these proposed changes as they impact our transportation programs and economic development opportunities; and

"Whereas, many rail corridors in the State, such as the Wallace to Castle Hayne rail corridor, are in need of restoration and improvement; and

"Whereas, many rail initiatives in the State, including service to western and southeastern North Carolina, are in need of federal and State investment; Now, therefore, The General Assembly of North Carolina enacts:"

## § 136-16.7. Purposes for continuing rail appropriations.

The continuing rail appropriation authorized by G.S. 136-16.6 shall be used in accordance with the provisions of Article 2D of Chapter 136 of the General Statutes. (1987, c. 738, s. 170(a), (c); 1989, c. 500, s. 53.)

State Library of North Carolina
Raleigh

### § 136-16.8. Continuing appropriations for public transportation.

There is annually appropriated, beginning with the 1987-88 fiscal year, from the Highway Fund to the Department of Transportation for public transportation purposes the greater of one million six hundred forty-five thousand dollars ($1,645,000) or the amount derived by multiplying the number of vehicles estimated to be registered as of the first day of each fiscal year by fifty cents ($.50). (1987, c. 738, s. 170(a), (c); 1989, c. 500, s. 53.)

### § 136-16.9. Purposes for continuing public transportation appropriations.

The continuing public transportation appropriations authorized by G.S. 136-16.8 shall be used in accordance with the provisions of Article 2B of Chapter 136 of the General Statutes. (1987, c. 738, s. 170(a), (c); 1989, c. 500, s. 53.)

### § 136-16.10. Allocations by Department Controller to eliminate overdrafts.

The Controller of the Department of Transportation shall allocate at the beginning of each fiscal year from the various appropriations made to the Department of Transportation for State Construction, State Funds to Match Federal Highway Aid, State Maintenance, and Ferry Operations, sufficient funds to eliminate all overdrafts on State maintenance and construction projects, and these allocations shall not be diverted to other purposes. (1997-443, s. 32.3.)

## ARTICLE 2.

## *Powers and Duties of Department and Board of Transportation.*

**§ 136-17:** Repealed by Session Laws 1973, c. 507, s. 3.

**§ 136-17.1:** Repealed by Session Laws 1977, c. 464, s. 13.

### § 136-17.2. Members of the Board of Transportation represent entire State.

The chairman and members of the Board of Transportation shall represent the entire State in transportation matters and not represent any particular person, persons, or area. The Board shall, from time to time, provide that one or more of its members or representatives shall publicly hear any person or persons concerning transportation matters in each of said geographic areas of the State. (1973, c. 507, s. 3; 1977, c. 464, s. 7.1; 1987, c. 783, s. 3; 1993, c. 483, s. 3.)

**Local Modification.** — Village of Bald Head Island: 1997-324, s. 1.

**Editor's Note.** — Session Laws 1999-237, s. 27.3, provides that, notwithstanding any other provision of law, the Board of Transportation may award up to three contracts annually for construction of transportation projects on a design-build basis after a determination by the Department that delivery of the projects must be expedited and that it is not in the public interest to comply with normal design and construction contracting procedures. Prior to the award of a design-build contract, the Secretary of Transportation is to report to the Joint

Legislative Transportation Oversight Committee and to the Joint Legislative Commission on Governmental Operations on the nature and scope of the project and the reasons an award on a design-build basis will best serve the public interest.

Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4, contains a severability clause.

## § 136-17.2A. Distribution formula for funds expended on Intrastate System and Transportation Improvement Program.

(a) Funds expended for the Intrastate System projects listed in G.S. 136-179 and both State and federal-aid funds expended under the Transportation Improvement Program, other than federal congestion mitigation and air quality improvement program funds appropriated to the State by the United States pursuant to 23 U.S.C. § 104(b)(2) and 23 U.S.C. § 149, funds expended on an urban loop project listed in G.S. 136-180 and funds received through competitive awards or discretionary grants through federal appropriations either for local governments, transportation authorities, transit authorities, or the Department, shall be distributed throughout the State in accordance with this section.

(1) Distribution Region A consists of the following counties: Bertie, Camden, Chowan, Currituck, Dare, Edgecombe, Gates, Halifax, Hertford, Hyde, Johnston, Martin, Nash, Northampton, Pasquotank, Perquimans, Tyrrell, Washington, Wayne, and Wilson.

(2) Distribution Region B consists of the following counties: Beaufort, Brunswick, Carteret, Craven, Duplin, Greene, Jones, Lenoir, New Hanover, Onslow, Pamlico, Pender, Pitt, and Sampson.

(3) Distribution Region C consists of the following counties: Bladen, Columbus, Cumberland, Durham, Franklin, Granville, Harnett, Person, Robeson, Vance, Wake, and Warren.

(4) Distribution Region D consists of the following counties: Alamance, Caswell, Davidson, Davie, Forsyth, Guilford, Orange, Rockingham, Rowan, and Stokes.

(5) Distribution Region E consists of the following counties: Anson, Cabarrus, Chatham, Hoke, Lee, Mecklenburg, Montgomery, Moore, Randolph, Richmond, Scotland, Stanly, and Union.

(6) Distribution Region F consists of the following counties: Alexander, Alleghany, Ashe, Avery, Caldwell, Catawba, Cleveland, Gaston, Iredell, Lincoln, Surry, Watauga, Wilkes, and Yadkin.

(7) Distribution Region G consists of the following counties: Buncombe, Burke, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Madison, McDowell, Mitchell, Polk, Rutherford, Swain, Transylvania, and Yancey.

(b) Until ninety percent (90%) of the mileage of the Intrastate System projects listed in G.S. 136-179 is completed, the Secretary of Transportation shall, on or before October 1 of each year, calculate the estimated amount of funds subject to this section that will be available for the next seven program years beginning that October 1. The Secretary shall then calculate a tentative percentage share for each distribution region by multiplying the total estimated amount by a factor that is based:

(1) Twenty-five percent (25%) on the estimated number of miles to complete the Intrastate System projects in that distribution region

compared to the estimated number of miles to complete the total Intrastate System;

(2) Fifty percent (50%) on the estimated population of the distribution region compared to the total estimated population of the State; and

(3) Twenty-five percent (25%) on the fraction one-seventh, which provides an equal share based on the number of distribution regions.

(c) When ninety percent (90%) of the mileage of the Intrastate System projects listed in G.S. 136-179 is completed, the Secretary of Transportation shall, on or before October 1 of each year, calculate the estimated amount of funds subject to this section that will be available for the next seven program years beginning that October 1. The Secretary shall then calculate a tentative percentage share for each distribution region by multiplying the total estimated amount by a factor that is based:

(1) Sixty-six percent (66%) on the estimated population of the distribution region compared to the total estimated population of the State; and

(2) Thirty-four percent (34%) on the fraction one-seventh, which provides an equal share based on the number of distribution regions.

(d) In each fiscal year, the Department shall, as nearly as practicable, expend in a distribution region an amount equal to that region's tentative percentage share of the funds that are subject to this section and are available for that fiscal year. In any consecutive seven-year period, the amount expended in a distribution region must be between ninety percent (90%) and one hundred ten percent (110%) of the sum of the amounts established under this subsection as the target amounts to be expended in the region for those seven years.

(e) In making the calculation under this section, the Secretary shall use the most recent estimates of population certified by the State Budget Officer.

(f) In developing the schedules of improvements to be funded from the Trust Fund and of improvements to be made under the Transportation Improvement Program, the Board of Transportation shall consider the highway needs of every county in a distribution region and shall make every reasonable effort to schedule the construction of highway improvements in a manner that addresses the needs of every county in the region in an equitable and timely manner.

(g) On or before December 1, 1999, the Secretary shall submit to the General Assembly a report of allocations, obligations, and actual yearly expenditures for each distribution region, covering fiscal years 1989-90 through 1997-98. On or before December 1, 2000, and every two years thereafter, the Secretary shall submit to the General Assembly a report of allocations and actual expenditures for the preceding two fiscal years. At any time in which the report indicates that allocations and expenditures by distribution region do not comply with the provisions of subsection (d) of this section, the Secretary shall also submit a plan to correct the imbalance.

(h) Each year, the Secretary shall calculate the amount of funds allocated in that year to each division, the amount of funds obligated, and the amount the obligations exceeded or were below the allocation. The target amounts obtained according to subsection (b) of this section shall be adjusted to account for any differences between allocations and obligations reported for the previous year. The new target amounts shall be used to fulfill the requirements of subsection (d) of this section for the next update of the Transportation Improvement Program. The adjustment to the target amount shall be allocated by division.

(i) All funds used in repayment of "GARVEE" bonds issued pursuant to G.S. 136-18(12b) shall be subject to the provisions of this section. (1989, c. 692, s. 1.4; c. 770, s. 74.7; 1999-237, ss. 27.19, 27.20(a); 1999-422, s. 2; 2000-134, s. 22; 2005-403, s. 3; 2009-497, s. 1.)

**Effect of Amendments.** — Session Laws 2009-497, s. 1, effective August 26, 2009, in subsection (i), substituted "used in repayment of" for derived from" and substituted "subject to the provisions of" for "distributed in accordance with".

## § 136-18. Powers of Department of Transportation.

The said Department of Transportation is vested with the following powers:

(1) The general supervision over all matters relating to the construction of the State highways, letting of contracts therefor, and the selection of materials to be used in the construction of State highways under the authority of this Chapter.

(2) To take over and assume exclusive control for the benefit of the State of any existing county or township roads, and to locate and acquire rights-of-way for any new roads that may be necessary for a State highway system, and subject to the provisions of G.S. 136-19.5(a) and (b) also locate and acquire such additional rights-of-way as may be necessary for the present or future relocation or initial location, above or below ground, of telephone, telegraph, broadband communications, electric and other lines, as well as gas, water, sewerage, oil and other pipelines, to be operated by public utilities as defined in G.S. 62-3(23) and which are regulated under Chapter 62 of the General Statutes, or by municipalities, counties, any entity created by one or more political subdivisions for the purpose of supplying any such utility services, electric membership corporations, telephone membership corporations, or any combination thereof, with full power to widen, relocate, change or alter the grade or location thereof and to change or relocate any existing roads that the Department of Transportation may now own or may acquire; to acquire by gift, purchase, or otherwise, any road or highway, or tract of land or other property whatsoever that may be necessary for a State transportation system and adjacent utility rights-of-way: Provided, all changes or alterations authorized by this subdivision shall be subject to the provisions of G.S. 136-54 to 136-63, to the extent that said sections are applicable: Provided, that nothing in this Chapter shall be construed to authorize or permit the Department of Transportation to allow or pay anything to any county, township, city or town, or to any board of commissioners or governing body thereof, for any existing road or part of any road heretofore constructed by any such county, township, city or town, unless a contract has already been entered into with the Department of Transportation.

(3) To provide for such road materials as may be necessary to carry on the work of the Department of Transportation, either by gift, purchase, or condemnation: Provided, that when any person, firm or corporation owning a deposit of sand, gravel or other material, necessary, for the construction of the system of State highways provided herein, has entered into a contract to furnish the Department of Transportation any of such material, at a price to be fixed by said Department of Transportation, thereafter the Department of Transportation shall have the right to condemn the necessary right-of-way under the provisions of Article 9 of Chapter 136, to connect said deposit with any part of the system of State highways or public carrier, provided that easements to material deposits, condemned under this Article shall not become a public road and the condemned easement shall be returned to the owner as soon as the deposits are exhausted or abandoned by the Department of Transportation.

(4) To enforce by mandamus or other proper legal remedies all legal rights or causes of action of the Department of Transportation with other public bodies, corporations, or persons.

(5) To make rules, regulations and ordinances for the use of, and to police traffic on, the State highways, and to prevent their abuse by individuals, corporations and public corporations, by trucks, tractors, trailers or other heavy or destructive vehicles or machinery, or by any other means whatsoever, and to provide ample means for the enforcement of same; and the violation of any of the rules, regulations or ordinances so prescribed by the Department of Transportation shall constitute a Class 1 misdemeanor: Provided, no rules, regulations or ordinances shall be made that will conflict with any statute now in force or any ordinance of incorporated cities or towns, except the Department of Transportation may regulate parking upon any street which forms a link in the State highway system, if said street be maintained with State highway funds.

(6) To establish a traffic census to secure information about the relative use, cost, value, importance, and necessity of roads forming a part of the State highway system, which information shall be a part of the public records of the State, and upon which information the Department of Transportation shall, after due deliberation and in accordance with these established facts, proceed to order the construction of the particular highway or highways.

(7) To assume full and exclusive responsibility for the maintenance of all roads other than streets in towns and cities, forming a part of the State highway system from date of acquiring said roads. The Department of Transportation shall have authority to maintain all streets constructed by the Department of Transportation in towns of less than 3,000 population by the last census, and such other streets as may be constructed in towns and cities at the expense of the Department of Transportation, whenever in the opinion of the Department of Transportation it is necessary and proper so to do.

(8) To give suitable names to State highways and change the names as determined by the Board of Transportation of any highways that shall become a part of the State system of highways.

(9) To employ appropriate means for properly selecting, planting and protecting trees, shrubs, vines, grasses or legumes in the highway right-of-way in the promotion of erosion control, landscaping and general protection of said highways; to acquire by gift or otherwise land for and to construct, operate and maintain roadside parks, picnic areas, picnic tables, scenic overlooks and other appropriate turnouts for the safety and convenience of highway users; and to cooperate with municipal or county authorities, federal agencies, civic bodies and individuals in the furtherance of those objectives. None of the roadside parks, picnic areas, picnic tables, scenic overlooks or other turnouts, or any part of the highway right-of-way shall be used for commercial purposes except (i) for materials displayed in welcome centers in accordance with G.S. 136-89.56, and (ii) for vending machines permitted by the Department of Transportation and placed by the Division of Services for the Blind, Department of Health and Human Services, as the State licensing agency designated pursuant to Section 2(a)(5) of the Randolph-Sheppard Act (20 USC 107a(a)(5)). The Department of Transportation shall regulate the placing of the vending machines in highway rest areas and shall regulate the articles to be dispensed. Every other use or attempted use of any of these areas for commercial purposes shall constitute a Class 1 misdemeanor and each day's use shall constitute a separate offense.

(10) To make proper and reasonable rules, regulations and ordinances for the placing or erection of telephone, telegraph, electric and other

lines, above or below ground, signboards, fences, gas, water, sewerage, oil, or other pipelines, and other similar obstructions that may, in the opinion of the Department of Transportation, contribute to the hazard upon any of the said highways or in any way interfere with the same, and to make reasonable rules and regulations for the proper control thereof. And whenever the order of the said Department of Transportation shall require the removal of, or changes in, the location of telephone, telegraph, electric or other lines, signboards, fences, gas, water, sewerage, oil, or other pipelines, or other similar obstructions, the owners thereof shall at their own expense, except as provided in G.S. 136-19.5(c), move or change the same to conform to the order of said Department of Transportation. Any violation of such rules and regulations or noncompliance with such orders shall constitute a Class 1 misdemeanor.

(11) To regulate, abandon and close to use, grade crossings on any road designated as part of the State highway system, and whenever a public highway has been designated as part of the State highway system and the Department of Transportation, in order to avoid a grade crossing or crossings with a railroad or railroads, continues or constructs the said road on one side of the railroad or railroads, the Department of Transportation shall have power to abandon and close to use such grade crossings; and whenever an underpass or overhead bridge is substituted for a grade crossing, the Department of Transportation shall have power to close to use and abandon such grade crossing and any other crossing adjacent thereto.

(12) The Department of Transportation shall have such powers as are necessary to comply fully with the provisions of the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991), as amended, and all other federal aid acts and programs the Department is authorized to administer. The said Department of Transportation is hereby authorized to enter into all contracts and agreements with the United States government relating to survey, construction, improvement and maintenance of roads, urban area traffic operations studies and improvement projects on the streets on the State highway system and on the municipal system in urban areas, under the provisions of the present or future congressional enactments, to submit such scheme or program of construction or improvement and maintenance as may be required by the Secretary of Transportation or otherwise provided by federal acts, and to do all other things necessary to carry out fully the cooperation contemplated and provided for by present or future aid acts of Congress for the construction or improvement and maintenance of federal aid of State highways. The good faith and credit of the State are further hereby pledged to make available funds necessary to meet the requirements of the acts of Congress, present or future, appropriating money to construct and improve rural post roads and apportioned to this State during each of the years for which federal funds are now or may hereafter be apportioned by the said act or acts, to maintain the roads constructed or improved with the aid of funds so appropriated and to make adequate provisions for carrying out such construction and maintenance. The good faith and credit of the State are further pledged to maintain such roads now built with federal aid and hereafter to be built and to make adequate provisions for carrying out such maintenance. Upon request of the Department of Transportation and in order to enable it to meet the requirements of acts of Congress with respect to federal aid funds apportioned to the State of North

Carolina, the State Treasurer is hereby authorized, with the approval of the Governor and Council of State, to issue short term notes from time to time, and in anticipation of State highway revenue, and to be payable out of State highway revenue for such sums as may be necessary to enable the Department of Transportation to meet the requirements of said federal aid appropriations, but in no event shall the outstanding notes under the provisions of this section amount to more than two million dollars ($2,000,000).

(12a) The Department of Transportation shall have such powers as are necessary to establish, administer, and receive federal funds for a transportation infrastructure banking program as authorized by the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102-240, as amended, and the National Highway System Designation Act of 1995, Pub. L. 104-59, as amended. The Department of Transportation is authorized to apply for, receive, administer, and comply with all conditions and requirements related to federal financial assistance necessary to fund the infrastructure banking program. The infrastructure banking program established by the Department of Transportation may utilize federal and available State funds for the purpose of providing loans or other financial assistance to governmental units, including toll authorities, to finance the costs of transportation projects authorized by the above federal aid acts. Such loans or other financial assistance shall be subject to repayment and conditioned upon the establishment of such security and the payment of such fees and interest rates as the Department of Transportation may deem necessary. The Department of Transportation is authorized to apply a municipality's share of funds allocated under G.S. 136-41.1 or G.S. 136-44.20 as necessary to ensure repayment of funds advanced under the infrastructure banking program. The Department of Transportation shall establish jointly, with the State Treasurer, a separate infrastructure banking account with necessary fiscal controls and accounting procedures. Funds credited to this account shall not revert, and interest and other investment income shall accrue to the account and may be used to provide loans and other financial assistance as provided under this subdivision. The Department of Transportation may establish such rules and policies as are necessary to establish and administer the infrastructure banking program. The infrastructure banking program authorized under this subdivision shall not modify the regional distribution formula for the distribution of funds established by G.S. 136-17.2A. Governmental units may apply for loans and execute debt instruments payable to the State in order to obtain loans or other financial assistance provided for in this subdivision. The Department of Transportation shall require that applicants shall pledge as security for such obligations revenues derived from operation of the benefited facilities or systems, other sources of revenue, or their faith and credit, or any combination thereof. The faith and credit of such governmental units shall not be pledged or be deemed to have been pledged unless the requirements of Article 4, Chapter 159 of the General Statutes have been met. The State Treasurer, with the assistance of the Local Government Commission, shall develop and adopt appropriate debt instruments for use under this subdivision. The Local Government Commission shall develop and adopt appropriate procedures for the delivery of debt instruments to the State without any public bidding therefor. The Local Government Commission shall review and approve proposed loans to applicants pursuant to this subdivision under the provisions of Articles 4 and 5, Chapter 159 of the General Statutes, as if the issuance of bonds was proposed, so far as those provisions are applicable. Loans authorized by this subdivision shall be outstanding debt for the purpose of Article 10, Chapter 159 of the General Statutes.

(12b) To issue "GARVEE" bonds (Grant Anticipation Revenue Vehicles) or other eligible debt-financing instruments to finance federal-aid highway projects using federal funds to pay a portion of principal, interest, and related bond issuance costs, as authorized by 23 U.S.C. § 122, as amended (the National Highway System Designation Act of 1995, Pub. L. 104-59). These bonds shall be issued by the State Treasurer on behalf of the Department and shall be issued pursuant to an order adopted by the Council of State under G.S. 159-88. The State Treasurer shall develop and adopt appropriate debt instruments, consistent with the terms of the State and Local Government Revenue Bond Act, Article 5 of Chapter 159 of the General Statutes, for use under this subdivision. Prior to issuance of any "GARVEE" or other eligible debt instrument using federal funds to pay a portion of principal, interest, and related bond issuance costs, the State Treasurer shall determine (i) that the total outstanding principal of such debt does not exceed the total amount of federal transportation funds authorized to the State in the prior federal fiscal year; or (ii) that the maximum annual principal and interest of such debt does not exceed fifteen percent (15%) of the expected average annual federal revenue shown for the seven-year period in the most recently adopted Transportation Improvement Program. Notes issued under the provisions of this subdivision may not be deemed to constitute a debt or liability of the State or of any political subdivision thereof, or a pledge of the full faith and credit of the State or of any political subdivision thereof, but shall be payable solely from the funds and revenues pledged therefor. All the notes shall contain on their face a statement to the effect that the State of North Carolina shall not be obligated to pay the principal or the interest on the notes, except from the federal transportation fund revenues as shall be provided by the documents governing the revenue note issuance, and that neither the faith and credit nor the taxing power of the State of North Carolina or of any of its political subdivisions is pledged to the payment of the principal or interest on the notes. The issuance of notes under this Part shall not directly or indirectly or contingently obligate the State or any of its political subdivisions to levy or to pledge any form of taxation whatever or to make any appropriation for their payment.

(13) The Department of Transportation may construct and maintain all walkways and driveways within the Mansion Square in the City of Raleigh and the Western Residence of the Governor in the City of Asheville including the approaches connecting with the city streets, and any funds expended therefor shall be a charge against general maintenance.

(14) The Department of Transportation shall have authority to provide roads for the connection of airports in the State with the public highway system, and to mark the highways and erect signals along the same for the guidance and protection of aircraft.

(15) The Department of Transportation shall have authority to provide facilities for the use of waterborne traffic and recreational uses by establishing connections between the highway system and the navigable and nonnavigable waters of the State by means of connecting roads and piers. Such facilities for recreational purposes shall be funded from funds available for safety or enhancement purposes.

(16) The Department of Transportation, pursuant to a resolution of the Board of Transportation, shall have authority, under the power of eminent domain and under the same procedure as provided for the acquirement of rights-of-way, to acquire title in fee simple to parcels of land for the purpose of exchanging the same for other real property to be used for the establishment of rights-of-way or for the widening of existing rights-of-way or the clearing of obstructions that, in the opinion of the Department of Transportation, constitute dangerous hazards at intersections. Real property may be acquired for such purposes only when the owner of the property needed by the Department of Transportation has agreed in writing to accept the property so acquired in exchange for that to be used by the Department of Transportation, and when, in the opinion of the Department of Transportation, an economy in the expenditure of public funds and the improvement and convenience and safety of the highway can be effected thereby.

(17) The Department of Transportation is hereby authorized and required to maintain and keep in repair, sufficient to accommodate the public school buses, roads leading from the state-maintained public roads to all public schools and public school buildings to which children are transported on public school buses to and from their homes. Said Department of Transportation is further authorized to construct, pave, and maintain school bus driveways and sufficient parking facilities for the school buses at those schools. The Department of Transportation is further authorized to construct, pave, and maintain all other driveways and entrances to the public schools leading from public roads not required in the preceding portion of this subdivision.

(18) To cooperate with appropriate agencies of the United States in acquiring rights-of-way for and in the construction and maintenance of flight strips or emergency landing fields for aircraft adjacent to State highways.

(19) To prohibit the erection of any informational, regulatory, or warning signs within the right-of-way of any highway project built within the corporate limits of any municipality in the State where the funds for such construction are derived in whole or in part from federal appropriations expended by the Department of Transportation, unless such signs have first been approved by the Department of Transportation.

(20) The Department of Transportation is hereby authorized to maintain and keep in repair a suitable way of ingress and egress to all public or church cemeteries or burial grounds in the State notwithstanding the fact that said road is not a part of the state-maintained system of roads. For the purpose of this subdivision a public or church cemetery or burial ground shall be defined as a cemetery or burial ground in which there are buried or permitted to be buried deceased persons of the community in which said cemetery or burial ground is located, but shall not mean a privately owned cemetery operated for profit or family burial plots.

(21) The Department of Transportation is hereby authorized and directed to remove all dead animals from the traveled portion and rights-of-way of all primary and secondary roads and to dispose of such animals by burial or otherwise. In cases where there is evidence of ownership upon the body of any dead dog, the Department of Transportation shall take reasonable steps to notify the owner thereof by mail or other means.

(22) No airport or aircraft landing area shall be constructed or altered where such construction or alteration when undertaken or completed

may reasonably affect motor vehicle operation and safety on adjoining public roads except in accordance with a written permit from the Department of Transportation or its duly authorized officers. The Department of Transportation is authorized and empowered to regulate airport and aircraft landing area construction and alteration in order to preserve safe clearances between highways and airways and the Department of Transportation is authorized and empowered to make rules, regulations, and ordinances for the preservation of safe clearances between highways and airways. The Department of Transportation shall be responsible for determining safe clearances and shall fix standards for said determination which shall not exceed the standards adopted for similar purposes by the United States Bureau of Public Roads under the Federal Aid Highway Act of 1958. Any person, firm, corporation or airport authority constructing or altering an airport or aircraft landing area without obtaining a written permit as herein provided, or not in compliance with the terms of such permit, or violating the provisions of the rules, regulations or ordinances promulgated under the authority of this section shall be guilty of a Class 1 misdemeanor; provided, that this subdivision shall not apply to publicly owned and operated airports and aircraft landing areas receiving federal funds and subject to regulation by the Federal Aviation Authority.

(23) When in the opinion of the Department of Transportation an economy in the expenditure of public funds can be effected thereby, the Department of Transportation shall have authority to enter into agreements with adjoining states regarding the planning, location, engineering, right-of-way acquisition and construction of roads and bridges connecting the North Carolina State highway system with public roads in adjoining states, and the Department of Transportation shall have authority to do planning, surveying, locating, engineering, right-of-way acquisition and construction on short segments of roads and bridges in adjoining states with the cost of said work to be reimbursed by the adjoining state, and may also enter into agreements with adjoining states providing for the performance of and reimbursement to the adjoining state of the cost of such work done within the State of North Carolina by the adjoining state: Provided, that the Department of Transportation shall retain the right to approve any contract for work to be done in this State by an adjoining state for which the adjoining state is to be reimbursed.

(24) The Department of Transportation is further authorized to pave driveways leading from state-maintained roads to rural fire district firehouses which are approved by the North Carolina Fire Insurance Rating Bureau and to facilities of rescue squads furnishing ambulance services which are approved by the North Carolina State Association of Rescue Squads, Inc.

(25) The Department of Transportation is hereby authorized and directed to design, construct, repair, and maintain paved streets and roads upon the campus of each of the State's institutions of higher education, at state-owned hospitals for the treatment of tuberculosis, state-owned orthopedic hospitals, juvenile correction centers, mental health hospitals and retarded centers, schools for the deaf, and schools for the blind, when such construction, maintenance, or repairs have been authorized by the General Assembly in the appropriations bills enacted by the General Assembly. Cost for such construction, maintenance, and repairs shall be borne by the Highway Fund. Upon the General Assembly authorizing the construction, repair, or main-

tenance of a paved road or drive upon any of the above-mentioned institutions, the Department of Transportation shall give such project priority to insure that it shall be accomplished as soon as feasible, at the minimum cost to the State, and in any event during the biennium for which the authorization shall have been given by the General Assembly.

(26) The Department of Transportation, at the request of a representative from a board of county commissioners, is hereby authorized to acquire by condemnation new or additional right-of-way to construct, pave or otherwise improve a designated State-maintained secondary road upon presentation by said board to the Department of Transportation of a duly verified copy of the minutes of its meeting showing approval of such request by a majority of its members and by the further presentation of a petition requesting such improvement executed by the abutting owners whose frontage on said secondary road shall equal or exceed seventy-five percent (75%) of the linear front footage along the secondary road sought to be improved. This subdivision shall not be construed to limit the authority of the Department of Transportation to exercise the power of eminent domain.

(27) The Department of Transportation is authorized to establish policies and promulgate rules providing for voluntary local government, property owner or highway user participation in the costs of maintenance or improvement of roads which would not otherwise be necessary or would not otherwise be performed by the Department of Transportation and which will result in a benefit to the property owner or highway user. By way of illustration and not as a limitation, such costs include those incurred in connection with drainage improvements or maintenance, driveway connections, dust control on unpaved roads, surfacing or paving of roads and the acquisition of rights-of-way. Local government, property owner and highway user participation can be in the form of materials, money, or land (for right-of-way) as deemed appropriate by the Department of Transportation. The authority of this section shall not be used to authorize, construct or maintain toll roads or bridges.

(28) The Department of Transportation may obtain land, either by gift, lease or purchase which shall be used for the construction and maintenance of ridesharing parking lots. The Department may design, construct, repair, and maintain ridesharing parking facilities.

(29) The Department of Transportation may establish policies and adopt rules about the size, location, direction of traffic flow, and the construction of driveway connections into any street or highway which is a part of the State Highway System. The Department of Transportation may require the construction and public dedication of acceleration and deceleration lanes, and traffic storage lanes and medians by others for the driveway connections into any United States route, or North Carolina route, and on any secondary road route with an average daily traffic volume of 4,000 vehicles per day or more.

(29a) To coordinate with all public and private entities planning schools to provide written recommendations and evaluations of driveway access and traffic operational and safety impacts on the State highway system resulting from the development of the proposed sites. All public and private entities shall, upon acquiring land for a new school or prior to beginning construction of a new school, relocating a school, or expanding an existing school, request from the Department a written evaluation and written recommendations to ensure that all proposed access points comply with the criteria in the current North Carolina Department of Transportation "Policy on Street and Driveway Access". The Department shall provide the written evaluation and recommendations within a reasonable time, which shall not exceed 60 days. This subdivision shall not be construed to require the public or private entities planning schools to meet the recommendations made by the Department, except those highway improvements that are required for safe ingress and egress to the State highway system.

(30) Consistent with G.S. 130A-309.14(a1), the Department of Transportation shall review and revise its bid procedures and specifications set forth in Chapter 136 of the General Statutes to encourage the purchase or use of reusable, refillable, repairable, more durable, and less toxic supplies and products. The Department of Transportation shall require the purchase or use of such supplies and products in the construction and maintenance of highways and bridges to the extent that the use is practicable and cost-effective. The Department shall prepare an annual report on October 1 of each year to the Environmental Review Commission as required under G.S. 130A-309.14(a1).

(31) The Department of Transportation is authorized to designate portions of highways as scenic highways, and combinations of portions of highways as scenic byways, for portions of those highways that possess unusual, exceptional, or distinctive scenic, recreational, historical, educational, scientific, geological, natural, wildlife, cultural or ethnic features. The Department shall remove, upon application, from any existing or future scenic highway or scenic byway designation, highway sections that:

a. Have no scenic value,
b. Have been designated or would be so designated solely to preserve system continuity, and
c. Are adjacent to property on which is located one or more permanent structures devoted to a commercial or industrial activity and on which a commercial or industrial activity is actually conducted, in an unzoned area or an area zoned commercial or industrial pursuant to a State or local zoning ordinance or regulation, except for commercial activity related to tourism or recreation.

The Department shall adopt rules and regulations setting forth the criteria and procedures for the designation of scenic highways and scenic byways under this subsection.

Those portions of highways designated as scenic by the Department prior to July 1, 1993, are considered to be designated as scenic highways and scenic byways under this subsection but the Department shall remove from this designation portions of those highway sections that meet the criteria set forth in this subsection, if requested.

(32) The Department of Transportation may perform dredging services, on a cost reimbursement basis, for a unit of local government if the unit cannot obtain the services from a private company at a reasonable cost. A unit of local government is considered to be unable to obtain dredging services at a reasonable cost if it solicits bids for the dredging services in accordance with Article 8 of Chapter 143 of the General Statutes and does not receive a bid, considered by the Department of Transportation Engineering Staff, to be reasonable.

(33) The Department of Transportation is empowered and directed, from time to time, to carefully examine into and inspect the condition of

each railroad, its equipment and facilities, in regard to the safety and convenience of the public and the railroad employees. If the Department finds any equipment or facilities to be unsafe, it shall at once notify the railroad company and require the company to repair the equipment or facilities.

(34) The Department of Transportation may conduct, in a manner consistent with federal law, a program of accident prevention and public safety covering all railroads and may investigate the cause of any railroad accident. In order to facilitate this program, any railroad involved in an accident that must be reported to the Federal Railroad Administration shall also notify the Department of Transportation of the occurrence of the accident.

(35) To establish rural planning organizations, as provided in Article 17 of this Chapter.

(36) To oversee the safety of fixed guideway transit systems in the State not regulated by the Federal Railroad Administration, pursuant to the Intermodal Surface Transportation Efficiency Act of 1991 (49 U.S.C. § 5330). The Department shall adopt rules in conformance with 49 U.S.C. § 5330 concerning its oversight of the safety of fixed guideway transit systems.

(37) To permit private use of and encroachment upon the right-of-way of a State highway or road for the purpose of construction and maintenance of a privately owned bridge for pedestrians or motor vehicles, if the bridge shall not unreasonably interfere with or obstruct the public use of the right-of-way. Any agreement for an encroachment authorized by this subdivision shall be approved by the Board of Transportation, upon a finding that the encroachment is necessary and appropriate, in the sole discretion of the Board. Locations, plans, and specifications for any pedestrian or vehicular bridge authorized by the Board for construction pursuant to this subdivision shall be approved by the Department of Transportation. For any bridge subject to this subdivision, the Department shall retain the right to reject any plans, specifications, or materials used or proposed to be used, inspect and approve all materials to be used, inspect the construction, maintenance, or repair, and require the replacement, reconstruction, repair, or demolition of any partially or wholly completed bridge that, in the sole discretion of the Department, is unsafe or substandard in design or construction. An encroachment agreement authorized by this subdivision may include a requirement to purchase and maintain liability insurance in an amount determined by the Department of Transportation. The Department shall ensure that any bridge constructed pursuant to this subdivision is regularly inspected for safety. The owner shall have the bridge inspected every two years by a qualified private engineering firm based on National Bridge Inspection Standards and shall provide the Department copies of the Bridge Inspection Reports where they shall be kept on file. Any bridge authorized and constructed pursuant to this subdivision shall be subject to all other rules and conditions of the Department of Transportation for encroachments.

(38) To enter into agreements with municipalities, counties, governmental entities, or nonprofit corporations to receive funds for the purpose of advancing the construction schedule of a project identified in the Transportation Improvement Program. If these funds are subject to repayment by the Department, prior to receipt of funds, reimbursement of all funds received by the Department shall be shown in the existing Transportation Improvement Program and shall be reimbursed within seven years of receipt.

(39) To enter into partnership agreements with the North Carolina Turnpike Authority, private entities, and authorized political subdivisions to finance, by tolls, contracts, and other financing methods authorized by law, the cost of acquiring, constructing, equipping, maintaining, and operating transportation infrastructure in this State, and to plan, design, develop, acquire, construct, equip, maintain, and operate transportation infrastructure in this State. An agreement entered into under this subdivision requires the concurrence of the Board of Transportation. The Department shall report to the Chairs of the Joint Legislative Transportation Oversight Committee, the Chairs of the House of Representatives Appropriations Subcommittee on Transportation, and the Chairs of the Senate Appropriations Committee on the Department of Transportation, at the same time it notifies the Board of Transportation of any proposed agreement under this subdivision. Any contracts for construction of highways, roads, streets, and bridges which are awarded pursuant to an agreement entered into under this section shall comply with the competitive bidding requirements of Article 2 of this Chapter.

(40) To expand public access to coastal waters in its road project planning and construction programs. The Department shall work with the Wildlife Resources Commission, other State agencies, and other government entities to address public access to coastal waters along the roadways, bridges, and other transportation infrastructure owned or maintained by the Department. The Department shall adhere to all applicable design standards and guidelines in implementation of this enhanced access. The Department shall report on its progress in expanding public access to coastal waters to the Joint Legislative Commission on Seafood and Aquaculture and to the Joint Legislative Transportation Oversight Commission no later than March 1 of each year.

(41) The Department shall, prior to the beginning of construction, determine whether all sidewalks and other facilities primarily intended for the use of pedestrians and bicycles that are to be constructed within the right-of-way of a public street or highway that is a part of the State highway system or an urban highway system must be constructed of permeable pavement. "Permeable pavement" means paving material that absorbs water or allows water to infiltrate through the paving material. Permeable pavement materials include porous concrete, permeable interlocking concrete pavers, concrete grid pavers, porous asphalt, and any other material with similar characteristics. Compacted gravel shall not be considered permeable pavement. (1921, c. 2, s. 10; 1923, c. 160, s. 1; c. 247; C.S., s. 3846(j); 1929, c. 138, s. 1; 1931, c. 145, ss. 21, 25; 1933, c. 172; c. 517, c. 1; 1935, c. 213, s. 1; c. 301; 1937, c. 297, s. 2; c. 407, s. 80; 1941, c. 47; c. 217, s. 6; 1943, c. 410; 1945, c. 842; 1951, c. 372; 1953, c. 437; 1957, c. 65, s. 11; c. 349, s. 9; 1959, c. 557; 1963, cc. 520, 1155; 1965, c. 879, s. 1; 1967, c. 1129; 1969, c. 794, s. 2; 1971, cc. 289, 291, 292, 977; 1973, c. 507, s. 5; 1977, c. 460, ss. 1, 2; c. 464, ss. 7.1, 14, 42; 1981, c. 682, s. 19; 1983, c. 84; c. 102; 1985, c. 718, ss. 1, 6; 1987, c. 311; c. 417, ss. 1, 2; 1989, c. 158; 1989 (Reg. Sess. 1990), c. 962, s. 1; 1993, c. 197, s. 2; c. 488, s. 1; c. 524, s. 4; c. 539, ss. 974-977; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 247, s. 1; c. 507, s. 18.2; 1995 (Reg. Sess., 1996), c. 673, s. 4; 1996, 2nd Ex. Sess., c. 18, s. 19.10(a); 1997-428, s. 1; 1997-443, s. 11A.118(a); 2000-123, s. 1; 2000-140, s. 102; 2001-424, s. 27.27; 2003-184, s. 1; 2003-267, s. 1; 2004-168, s. 1; 2005-403, s. 2; 2006-230, s. 1(a); 2007-428, s. 1; 2007-439, s. 1; 2007-485, s. 3.1; 2008-164, s. 1; 2008-180, ss. 2, 8; 2009-266, s. 6; 2009-451, s. 25.6(a).)

**Cross References.** — As to motor vehicles generally, see Chapter 20. As to authority to designate and mark truck routes, see G.S. 20-141(i). As to the Utilities Commission generally, see Chapter 62. As to Department's power of eminent domain, see G.S. 136-19. As to power to determine the maximum load limit for bridges, see G.S. 136-72. As to authority of Department to cooperate with counties in establishing and operating solid waste disposal facilities, see G.S. 153A-291. As to sale, lease, exchange and joint use of governmental property by State and local governmental units, see G.S. 160A-274.

**Editor's Note.** — Session Laws 1977, c. 460, s. 2, as amended by Session Laws 1977, c. 780, s. 1, provided: "This act [which added subdivision (26) of this section] shall not be construed to limit the authority of the Department of Transportation to exercise the power of eminent domain."

Session Laws 1995 (Reg. Sess., 1996), c. 673, s. 1, provides: "The statutory authority, powers, duties, and functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds, including the functions of budgeting and purchasing, of the Rail Safety Section of the Transportation Division of the North Carolina Utilities Commission, is transferred to the Department of Transportation."

Session Laws 2004-199, s. 61, provides: "The Department of Transportation shall install highway directional guide signs at limited-access highway terminals for the nonresidential campuses of colleges or universities located in North Carolina, if the nonresidential campus is located within one mile from the limited-access highway terminal and if the college or university is licensed by the Board of Governors of The University of North Carolina, offers both undergraduate and graduate degree programs, and has a minimum of 350 students enrolled at the nonresidential campus. The college or university requesting the sign installment shall pay for all charges related to the construction of the sign."

Session Laws 2007-323, s. 27.9(a)-(c), provides: "(a) The Department of Transportation may continue the productivity pilot programs in the road oil, bridge inspection and pavement markings units implemented under Section 29.3 of S.L. 2003-284 and Section 28.9 of S.L. 2005-276. The Department of Transportation may expend up to one-half of one percent (0.50%) of the budget allocation for these programs for employee incentive payments to maintain the increased efficiency and productivity under these programs.

"(b) The Department of Transportation may establish up to two additional pilot programs to test incentive pay for employees as a means of increasing and maintaining efficiency and productivity.

"These programs may be selected by the Department of Transportation. Up to one-half of one percent (0.50%) of the budget allocation for these programs may be used to provide employee incentive payments.

"Incentive payments shall be based on quantifiable measures and production schedules determined prior to the implementation of the pilot programs. Pilot programs implemented under this subsection shall last no more than two years.

"(c) The Department of Transportation shall report to the Joint Legislative Transportation Oversight Committee on the pilot programs developed under this section at least 30 days prior to their implementation.'"

For prior similar provisions, see Session Laws 2003-284, s. 29.3, and Session Laws 2005-276, s. 28.9(a), (b).

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'. "

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2007-485, s. 3.2, provides: "The first report required by G.S. 136-18, as enacted by this section, is due no later than March 1, 2008."

Session Laws 2008-107, s. 25.2, provides: "(a) The Department of Transportation shall cease annual production of the North Carolina State Transportation Map and Coastal Boating Guide and shall produce a biennial North Carolina State Transportation Map and may provide funding for a biennial Coastal Boating Guide, in conjunction with the Wildlife Resources Commission, beginning in the 2008-2009 fiscal year.

"(b) The Department shall provide a written report to the Joint Legislative Transportation Oversight Committee on the biennial map production plan and identify any cost savings for nonproduction years. The report shall also include historical budget and production information for the past five years. The report is due by March 1, 2009."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2008-164, s. 1, effective August 3, 2008, in subdivision (39), added "and to plan, design, develop, acquire, construct, equip, maintain, and operate highways, roads, streets, bridges, and existing rail, as well as properties adjoining existing rail lines in this State" at the end of the first sentence, and added the last sentence.

Session Laws 2008-180, ss. 2 and 8, effective August 4, 2008, in subdivision (2), inserted "broadband communications"; and in subdivision (27), inserted "local government" in the first sentence, and inserted "Local government" at the beginning of the next-to-last sentence.

Session Laws 2009-266, s. 6, effective August 1, 2009, substituted "State transportation system" for "State highway system" just before the first proviso in subdivision (2); and in subdivision (39), in the first sentence, deleted "with priority given to highways, roads, streets, and bridges" preceding "and to plan" near the middle, and substituted "transportation infrastructure" for "highways, roads, streets, bridges, and existing rail, as well as properties adjoining existing rail lines" near the end.

Session Laws 2009-451, s. 25.6(a), effective October 1, 2009, and applicable to facilities constructed on or after that date, added subdivision (41).

**Legal Periodicals.** — For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

For survey of 1977 law on property, see 56 N.C.L. Rev. 1111 (1978).

For survey of 1984 administrative law, "A Declining Role for the Attorney General," see 63 N.C.L. Rev. 1051 (1985).

For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

## CASE NOTES

I. General Consideration.
II. Power of Eminent Domain.

### I. GENERAL CONSIDERATION.

**Department of Transportation Has Exclusive Control of Highway System.** — The State Highway Commission (now Department of Transportation) has been granted exclusive control over the State highway system. Van Leuven v. Akers Motor Lines, 261 N.C. 539, 135 S.E.2d 640 (1964).

**The word "highway" includes the word "ferry,"** a public ferry being merely a part of a highway. Wilmington Shipyard, Inc. v. North Carolina State Hwy. Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

**Powers of Department Are Incidental to Purpose for Which It Was Created.** — The State Highway Commission (now Department of Transportation) is the State agency created for the purpose of constructing and maintaining public highways. All the other powers it possesses are incidental to the purpose for which it was created. De Bruhl v. State Hwy. & Pub. Works Comm'n, 245 N.C. 139, 95 S.E.2d 553 (1956); C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

The Commission (now Department) is vested with the power of "general supervision over all matters relating to the construction of the State highways ...." All the other powers it possesses are incidental to the purpose for which it was created. State Hwy. Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

**Powers Implied from General Authority Given and Duty Imposed.** — Where a course of action is reasonably necessary for the effective prosecution of the State Highway Commission's (now Department of Transportation's) obligation to supervise the construction, repair and maintenance of public highways, the power to take such action must be implied from the general authority given and the duty imposed. C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

**Right to Sue and Be Sued.** — The statutes creating the State Highway Commission (now Department of Transportation) enumerate its powers and duties in the construction, maintenance, etc., of highways for public benefit, without either expressly or impliedly giving it the right to sue and be sued, but manifestly it is an agency of the State for the purpose of exercising administrative and governmental functions. Carpenter v. Atlanta & Charlotte Air Line Ry., 184 N.C. 400, 114 S.E. 693 (1922).

The State Highway Commission (now Department of Transportation) cannot be sued for tort or trespass, even though the trespass allegedly occurs in the building of a public highway. Moore v. Clark, 235 N.C. 364, 70 S.E.2d 182 (1952).

**Suit for Injunction Will Not Lie.** — Plaintiffs sued the State Highway and Public Works Commission (now Department of Transportation) to enjoin it from enforcing its ordinance restricting the placing of advertising signs along the State highways, alleging that the ordinance was in excess of the authority vested in the Commission (now Department) and was unconstitutional. It was held that defendant's demurrer was properly sustained, since injunction will not lie against a State agency to prevent it from committing a wrong. Schloss v. State Hwy. & Pub. Works Comm'n, 230 N.C. 489, 53 S.E.2d 517 (1949). See Moore v. Clark, 235 N.C. 364, 70 S.E.2d 182 (1952).

**The Department of Transportation has the statutory authority to determine the nature and extent of the property required for its purposes.** Frink v. North Carolina Bd. of Transp., 27 N.C. App. 207, 218 S.E.2d 713 (1975).

**Power to Acquire Residences.** — The State Highway Commission (now Department of Transportation) does not have authority to acquire residences, either by purchase or by eminent domain, unless such residence is needed for construction or maintenance of the highway system. De Bruhl v. State Hwy. & Pub. Works Comm'n, 245 N.C. 139, 95 S.E.2d 553 (1956).

**Statutes Give Broad Discretion in Changing Roads.** — Subdivision (2) of this section and G.S. 136-45 give broad discretionary powers to the State Highway Commission (now Department of Transportation) in establishing, altering, and changing the route of county roads that are or are proposed to be absorbed in the State highway system of public roads. Road Comm'n v. State Hwy. Comm'n, 185 N.C. 56, 115 S.E. 886 (1923).

**Construction of New Roads.** — In view of subdivision (2) of this section the State Highway Commission (now Department of Transportation) may construct new roads. Board of Comm'rs v. State Hwy. Comm'n, 195 N.C. 26, 141 S.E. 539 (1928).

**Protecting Integrity of Rights-of-Way.** — It is clear that the authority and powers set forth in subsection (10) of this section are intended to allow the Department of Transportation (DOT) to protect the integrity of its rights-of-way, which are there to begin with to accommodate the construction and maintenance of roads and highways. Baldwin v. GTE S., Inc., 110 N.C. App. 54, 428 S.E.2d 857, cert. denied, 334 N.C. 619, 435 S.E.2d 331 (1993), rev'd on other grounds, 335 N.C. 544, 439 S.E.2d 108 (1994).

**Department May Control Use of Land Embraced by Easement.** — The effect of this section is to give dominance to the easement acquired by the State. Under the terms thereof the Highway Commission (now Department of Transportation) has authority to control the uses to which the land embraced within the easement may be put. If it deems it wise or expedient so to do in the interest of the traveling public, it may altogether exclude the imposition of any additional easement or burden. It may not be held that the legislature intended thereby to declare that the construction and maintenance of a telephone line is a legitimate highway purpose and embraced within the easement acquired for highway use. The Commission (now Department) is merely authorized to do whatever is necessary to be done in order to make a safe, convenient, public way for travel, including the right, if necessary, to exclude the owner and others from using any part of the surface of the way for any permanent or private purpose. Hildebrand v. Southern Bell Tel. & Tel. Co., 219 N.C. 402, 14 S.E.2d 252 (1941).

**Use of Right-of-Way by Owner of Fee.** — Except for the purpose of ingress and egress the owner of the fee uses the same, whether for building or cultivation, by permission and not as a matter of right. Hildebrand v. Southern Bell Tel. & Tel. Co., 219 N.C. 402, 14 S.E.2d 252 (1941).

**Use by Telephone and Telegraph Companies.** — The Commission (now Department of Transportation) has been granted exclusive control over the State highway system and may in its discretion authorize the use of a highway right-of-way by telephone and telegraph companies, and prescribe the manner and extent of such use, subject to the right of the owner of the servient estate to payment of compensation for the additional burden. Hildebrand v. Southern Bell Tel. & Tel. Co., 221 N.C. 10, 18 S.E.2d 827 (1942). See also Hildebrand v. Southern Bell Tel. & Tel. Co., 219 N.C. 402, 14 S.E.2d 252 (1941); Van Leuven v. Akers Motor Lines, 261 N.C. 539, 135 S.E.2d 640 (1964).

The State Highway Commission (now Department of Transportation) has full authority to make proper and reasonable rules, regulations and ordinances for the placing or erection of telephone, telegraph or other poles within the right-of-way, and it may, at any time, require the removal of, change in, or relocation of any such poles. Van Leuven v. Akers Motor Lines, 261 N.C. 539, 135 S.E.2d 640 (1964).

**Pedestrian Member of Protected Class.** — Plaintiff, as a pedestrian lawfully and properly using a telephone booth, was a member of the Class A regulation prohibiting installation of phone booths in rights-of-way was intended to protect. Baldwin v. GTE S., Inc., 335 N.C. 544, 439 S.E.2d 108 (1994).

**Regulation and Closing of Grade Crossings.** — The Highway Commission (now Department of Transportation) is authorized to regulate, abandon, and close grade crossings and intersections. Snow v. North Carolina State Hwy. Comm'n, 262 N.C. 169, 136 S.E.2d 678 (1964).

**Duty to Post Adequate Signage at Railroad Grade Crossing.** — North Carolina Department of Transportation was liable under the Tort Claims Act, G.S. 143-291 et seq., for failing to post adequate signage at a railroad crossing that was difficult to cross for low vehicles due to the grade of the road, because it had a duty to put up signs to warn of the risk, pursuant to G.S. 136-18(5), and it instead chose to direct trucks on an alternate route after finding that signs often went unheeded; despite the alternate route recommendation, the Department had a duty to warn drivers of the crossing, the failure to post such warnings was a breach of its duty and was the proximate cause of a truck driver's tractor-trailer getting stuck on the crossing and thereafter hit by a train, and there was no contributory negligence by the truck driver who bypassed the alternate route because there were no warning signs or weight limit signs posted pursuant to G.S 20-116(h). Smith v. N.C. DOT, 156 N.C. App. 92, 576 S.E.2d 345, 2003 N.C. App. LEXIS 83 (2003).

**County Commissioners May Not Reopen Abandoned Grade Crossing.** — The commissioners of a county are without power to order a grade crossing abandoned by the Highway Commission (now Department of Transportation) reopened to the public, and this power is not given the county by G.S. 136-67. Rockingham County v. Norfolk & W. Ry., 197 N.C. 116, 147 S.E. 832 (1929).

**Liability of Town for Injury Caused by Dangerous Condition on Street.** — Where the State Highway Commission (now Department of Transportation) has taken over the construction of a town street and bridge, the town is not thereby relieved of liability for an injury proximately caused by a dangerous condition of the street at the bridge, when the town had implied notice of such condition, which had existed for several months, as subdivision (7) of this section expressly excepts from its provisions streets in towns and cities. Pickett v. Carolina & N.W. Ry., 200 N.C. 750, 158 S.E. 398 (1931).

**Liability of Contractor Constructing Road Under Contract with Department.** — One who contracts with a public body for the performance of public work is entitled to share the immunity of the public body from liability for incidental injuries necessarily involved in the performance of the contract, where he is not guilty of negligence. Gilliam v. Propst Constr. Co., 256 N.C. 197, 123 S.E.2d 504 (1962).

Defendant contractor owed plaintiff no duty to warn the public that a road constructed in accordance with the State Highway Commission's (now Department of Transportation's) plans could not be used at a speed in excess of 25 m.p.h., when the Commission (now Department) had accepted the work by directing that the road be opened for traffic, posting such signs thereon as it deemed proper. Gilliam v. Propst Constr. Co., 256 N.C. 197, 123 S.E.2d 504 (1962).

**Violation of Administrative Regulation Is Negligence Per Se.** — When the violation of an administrative regulation enacted for safety purposes is criminal (subsection (10)), that violation is negligence per se in a civil trial unless otherwise provided. Baldwin v. GTE S., Inc., 335 N.C. 544, 439 S.E.2d 108 (1994).

**Requirements as to Signs and Flagmen Did Not Give Contractor Right-of-Way.** — Where a contractor for the improvement of an airport was granted permission by the Highway Commission (now Department of Transportation) to construct a dirt ramp over the highway to protect it from heavy equipment, the Commission's (now Department's) requirements with reference to signs and flagmen were primarily for the protection of the users of the highway and did not confer on the contractor special privileges in respect to right-of-way. C.C. Mangum, Inc. v. Gasperson, 262 N.C. 32, 136 S.E.2d 234 (1964).

**Judicial Notice of Highway Ordinance.** — An ordinance of the Highway Commission (now Department of Transportation) does not come within that class of legislative enactments of which the courts will take judicial notice. State v. Toler, 195 N.C. 481, 142 S.E. 715 (1928).

**Inspection of Equipment and Facilities.** — As to the jurisdiction of the Utilities Commission to require rail carrier to open drainage ditches along its tracks and to keep its drainage ditches open, see State ex rel. Utils. Comm'n v. Seaboard C.L.R.R., 62 N.C. App. 631, 303 S.E.2d 549 (1983).

**Applied** in Cahoon v. Roughton, 215 N.C. 116, 1 S.E.2d 362 (1939); as to subdivision (7), in Shaver Motor Co. v. City of Statesville, 237 N.C. 467, 75 S.E.2d 324 (1953); North Carolina State Hwy. Comm'n v. Asheville School, Inc., 5 N.C. App. 684, 169 S.E.2d 193 (1969); North Carolina State Hwy. Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970); Tice v. DOT, 67 N.C. App. 48, 312 S.E.2d 241 (1984); Welch Contr., Inc. v. N.C. DOT, 175 N.C. App. 45, 622 S.E.2d 691, 2005 N.C. App. LEXIS 2725 (2005).

**Cited** in Radford v. Young, 194 N.C. 747, 140 S.E. 806 (1927); State v. Henderson, 207 N.C. 258, 176 S.E. 758 (1934); Wood v. Carolina Tel. & Tel. Co., 228 N.C. 605, 46 S.E.2d 717 (1948); Smith v. State Hwy. Comm'n, 257 N.C. 410, 126 S.E.2d 87 (1962); North Carolina Tpk. Auth. v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965); Watkins v. Lambe-Young, Inc., 37 N.C.

App. 30, 245 S.E.2d 202 (1978); DOT v. Overton, 111 N.C. App. 857, 433 S.E.2d 471 (1993); DOT v. Rowe, 138 N.C. App. 329, 531 S.E.2d 836, 2000 N.C. App. LEXIS 615 (2000); Rifenburg Constr., Inc. v. Brier Creek Assocs., L.P., 160 N.C. App. 626, 586 S.E.2d 812, 2003 N.C. App. LEXIS 1926 (2003); Town of Highlands v. Hendricks, 164 N.C. App. 474, 596 S.E.2d 440, 2004 N.C. App. LEXIS 1009 (2004); DOT v. M.M. Fowler, Inc., 361 N.C. 1, 637 S.E.2d 885, 2006 N.C. LEXIS 1299 (2006).

## II. POWER OF EMINENT DOMAIN.

**Department Has No Power to Condemn Property for Private Road.** — This section and G.S. 136-45 vest in the State Highway Commission (now Department of Transportation) broad discretionary powers in establishing, constructing, and maintaining highways as part of a statewide system of hard-surfaced and other dependable highways, but the State Commission (now Department) has no power to condemn private property to construct a road for the private use of any person or group of persons, and if it does so, it is an arbitrary act and an abuse of the discretion vested in the Commission (now Department). State Hwy. Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

**Condemnation or Curtailment of Abutting Landowner's Right of Access to Limited-Access Highway.** — The power and authority vested in the State Highway and Public Works Commission (now Department of Transportation) by virtue of the statutes enacted by the General Assembly, to acquire by gift, purchase, or otherwise, any road or highway, or tract of land or other property whatsoever that may be necessary for a State highway system, to condemn private property as it may deem necessary and suitable for road construction, to make rules, regulations and ordinances for the use of, and to police traffic on, the State highways, and to have such powers as are necessary to comply fully with the provisions of the present or future federal aid grants, is expressed in language broad and extensive and general and comprehensive enough and the object so general and prospective in operation as to authorize the Commission (now Department) to exercise the power of eminent domain to condemn or severely curtail an abutting landowner's right of access to a State public highway adjacent to his property for the construction or reconstruction, maintenance and repair of a limited-access highway upon the payment of just compensation. Hedrick v. Graham, 245 N.C. 249, 96 S.E.2d 129 (1957).

**Owner of Land Subject to Highway Easement Is Entitled to Nominal Damages for Encroachment.** — It may be conceded that an easement acquired by the State for a public highway is, under existing law, so extensive in nature, and the control exercised by the State Highway Commission (now Department of Transportation) is so exclusive in extent, that the subservient estate in the land, from a practical standpoint, amounts to little more than the right of reverter in the event the easement is abandoned. Nevertheless, the subservient estate still exists, and any encroachment thereon entitles the owner to nominal damages at least. Van Leuven v. Akers Motor Lines, 261 N.C. 539, 135 S.E.2d 640 (1964).

**Substitute Condemnation Described.** — Substitute condemnation, provided for by subdivision (16) of this section, is a transaction in which the State or an agency with the power of eminent domain takes land under an agreement to compensate its owner with land to be taken in condemnation proceedings from a third person, instead of with money. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

**When Substitute Condemnation Is Valid.** — Substitute condemnation, provided for by subdivision (16) of this section, is a valid exercise of a power of eminent domain only when the substitution of other property is the sole method by which the owner of land taken for public use can be justly compensated and the practical problems resulting from the taking can be solved. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

Substitute condemnation of land for exchange under subdivision (16) of this section can only be justified when the property for which it is substituted accomplishes the public purpose for which it was taken, and the cost is not disproportionate to the benefit derived. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

**Prohibition Against Taking Property for Private Uses Applies to Subdivision (16).** — Any exercise of the power of eminent domain under subdivision (16) of this section is subject to the constitutional prohibition against the taking of property for private uses. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

**Value of Land Condemned Under Subdivision (16).** — See North Carolina State Hwy. Comm'n v. Helderman, 285 N.C. 645, 207 S.E.2d 720 (1974).

**Condemnation of Property for Exchange for Railroad Right-of-Way.** — Under subdivision (16) of this section, the State Highway Commission (now Department) is without authority to condemn land in fee simple for the purpose of exchanging it for railroad right-of-way property to be used in a highway construction project. The Commission (now Department) may only condemn an easement to be used for railroad purposes. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

**The obstruction of view of plaintiff's billboards due to the vegetation and trees** planted by Department of Transporation (DOT) as part of the highway beautification project did not amount to a taking of plaintiff's property. Adams Outdoor Adv. v. North Carolina DOT, 112 N.C. App. 120, 434 S.E.2d 666 (1993).

### OPINIONS OF ATTORNEY GENERAL

**State Highway Commission (Now Department of Transportation) May Dispose of Abandoned, Junked Motor Vehicles.** — See opinion of Attorney General to Mr. F. L. Hutchinson, Division Engineer, State Highway Commission, 40 N.C.A.G. 437 (1969). 309 N.C. 324, 307 S.E.2d 168 (1983), cert. denied and appeal dismissed.

**Regulatory Authority over State Highway System Streets.** — The Department of Transportation is vested with general regulatory authority over the use of State Highway System streets. The general grant of authority to municipalities over streets is subordinate to the Department of Transportation's rights and duties to maintain the State Highway System. See opinion of the Attorney General to Mr. Ralph D. Karpinos, Town Attorney, Chapel Hill, N.C., 58 N.C.A.G. 17 (Feb. 26, 1988).

## § 136-18.01. Consultation required for welcome and visitor centers.

The Department of Commerce and the Department of Transportation shall consult with the Joint Legislative Commission on Governmental Operations and the House and Senate Appropriations Subcommittees on Natural and Economic Resources before beginning the design or construction of any new welcome center or visitor center buildings. (2007-356, s. 1.)

**Editor's Note.** — Session Laws 2007-356, s. 1, was codified as this section at the direction of the Revisor of Statutes.

Session Laws 2007-356, s. 2 provides: "The Department of Commerce and the Department of Transportation shall immediately cease the planning, design, or construction of any new welcome center buildings in Randolph County and shall not resume the planning, design, or construction of any new welcome center buildings in that county before consulting with the Joint Legislative Commission on Governmental Operations and the House and Senate Appropriations Subcommittees on Natural and Economic Resources."

Session Laws 2007-356, s. 3, as amended by Session Laws 2008-107, s. 13.3, provides: "Nothing in this act shall be interpreted to prohibit or restrict the Department of Transportation from constructing visitor center buildings in Randolph County and Wilkes County that were in the planning, design, or construction phase prior to the effective date of this act."

Session Laws 2007-356, s. 4, made this section effective August 17, 2007.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

**§ 136-18.1:** Repealed by Session Laws 1999-29, s. 1.

## § 136-18.2. Seed planted by Department of Transportation to be approved by Department of Agriculture and Consumer Services.

The Department of Transportation shall not cause any seed to be planted on or along any highway or road right-of-way unless and until such seed has been approved by the Department of Agriculture and Consumer Services as provided for in the rules and regulations of the Department of Agriculture and Consumer Services for such seed. (1957, c. 1002; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1997-261, s. 88.)

## § 136-18.3. Location of garbage collection containers by counties and municipalities.

(a) The Department of Transportation is authorized to issue permits to counties and municipalities for the location of containers on rights-of-way of state-maintained highways for the collection of garbage. Such containers may be located on highway rights-of-way only when authorized in writing by the State Highway Administrator in accordance with rules and regulations promulgated by the Department of Transportation. Such rules and regulations shall take into consideration the safety of travelers on the highway and the elimination of unsightly conditions and health hazards. Such containers shall not be located on fully controlled-access highways.

(b) The provisions of G.S. 14-399, which make it a misdemeanor to place garbage on highway rights-of-way, shall not apply to persons placing garbage in containers in accordance with rules and regulations promulgated by the Department of Transportation.

(c) The written authority granted by the Department of Transportation shall be no guarantee that the State system highway rights-of-way on which the containers are authorized to be located is owned by the Department of Transportation, and the issuance of such written authority shall be granted only when the county or municipality certifies that written permission to locate the refuse container has been obtained from the owner of the underlying fee if the owner can be determined and located.

(d) Whenever any municipality or county fails to comply with the rules and regulations promulgated by the Department of Transportation or whenever they fail or refuse to comply with any order of the Department of Transportation for the removal or change in the location of a container, then the permit of such county or municipality shall be revoked. The location of such garbage containers on highway rights-of-way after such order for removal or change is unauthorized and illegal; the Department of Transportation shall have the authority to remove such unauthorized or illegal containers and charge the expense of such removal to the county or municipality failing to comply with the order of the Department of Transportation. (1973, c. 1381; 1977, c. 464, s. 7.1.)

## § 136-18.4. Provision and marking of "pull-off" areas.

The Department of Transportation is hereby authorized and directed (i) to provide as needed within its right-of-way, adjacent to long sections of two-lane primary highway having a steep uphill grade or numerous curves, areas on which buses, trucks and other slow-moving vehicles can pull over so that faster moving traffic may proceed unimpeded and (ii) to erect appropriate and adequate signs along such sections of highway and at the pull-off areas. A driver of a truck, bus, or other slow-moving vehicle who fails to use an area so provided and thereby impedes faster moving traffic following his vehicle shall be guilty of a Class 3 misdemeanor. (1975, c. 704; 1977, c. 464, s. 7.1; 1993, c. 539, s. 978; 1994, Ex. Sess., c. 24, s. 14(c).)

## § 136-18.5. Wesley D. Webster Highway.

State Highway 704 shall be known as the "Wesley D. Webster Highway". (1983 (Reg. Sess., 1984), c. 974.)

## § 136-18.5A. Purple Heart Memorial Highway.

Interstate Highway 95 in North Carolina is designated as the "Purple Heart Memorial Highway" to pay tribute to the many North Carolinians who have been awarded the Purple Heart medal after being wounded or killed in action against the enemy. (2002-86, s. 2(a).)

**Editor's Note.** — Session Laws 2002-86, s. 2(b), provides: "The Department of Transportation shall, with the assistance of the Military Order of the Purple Heart and the Division of Veterans Affairs, design and place appropriate signage on Interstate Highway 95 at suitable locations, consistent with State and federal regulations, near the South Carolina and Virginia borders and at the intersection of Interstate Highway 40, implementing Section 2(a) of this act."

Session Laws 2002-86, s. 2(c), provides: "The Department of Transportation shall calculate the costs of designing and placing the signs required by Section 2(b) of this act, and the Military Order of the Purple Heart shall pay those costs to the Department prior to the erection of the signs."

## § 136-18.5B. Dale Earnhardt Highway.

The Board of Transportation shall designate State Highway 136 in Iredell and Cabarrus counties as State Highway 3, which shall be known as the "Dale Earnhardt Highway". (2002-170, s. 4.)

**Editor's Note.** — This section was enacted as G.S. 136-18.5.1 and was redesignated as G.S. 136-18.5B at the direction of the Revisor of Statutes.

Session Laws 2002-170, s. 5, provides: "State Highway 3 in Currituck County shall be designated as State Highway 136."

## § 136-18.5C. The U.S. Marine Corps Highway: Home of Carolina-Based Marines since 1941.

U.S. Highway 17 running between the Town of Holly Ridge and the Town of Edenton, and the portion of U.S. Highway 70 running between the intersection of U.S. Highway 70 and N.C. Highway 101 near Cherry Point Marine Corps Air Station and the intersection of U.S. Highway 70 and U.S. Highway 17 is designated as "The U.S. Marine Corps Highway: Home of Carolina-Based Marines since 1941" in light of the historical contributions of the United States Marine Corps. (2009-198, s. 1.)

**Editor's Note.** — Session Laws 2009-198, s. 1, was codified as this section at the direction of the Revisor of Statutes. Session Laws 2009-198, s. 3, made this section effective June 26, 2009.

The preamble to Session Laws 2009-198, provides: "Whereas, during 1940, amid the escalating mobilization of World War II, the 1st Marine Division and the 1st Marine Air Wings of the United States Marine Corps were in need of an operational staging area on the east coast of the United States; and

"Whereas, in the summer of 1940, Major John C. McQueen and his pilot, Captain Verne McCaul, on the orders of then Major General Thomas Holcomb, Marine Corps Commandant, undertook an aerial survey that covered the Atlantic and Gulf Coasts from Norfolk, Virginia, to Corpus Christi, Texas, and determined that 14 miles of beach in Onslow County, North Carolina, was the only suitable location for a Marine Corps base in the Eastern United States; and

"Whereas, in February 1941, President Roosevelt authorized an initial outlay of $1,500,000 for the survey and purchase of a 174-square-mile tract near Jacksonville, North Carolina, and on April 5, 1941, the United States Congress authorized $14,575,000 for the base's construction; and

"Whereas, on May 1, 1941, the Marine Barracks New River was formally established as a major amphibious training ground and has grown since into the Marine Corps Base, Camp Lejeune, partly bounded by U.S. Highway 17 in Jacksonville, North Carolina; and

"Whereas, from April 1942 until desegregation of the Marine Corps in 1949, Montford

Point Camp in North Carolina was the exclusive training grounds for African-American Marines; and

"Whereas, from 1943 until passage of the Women's Armed Service Integration Act in 1948, the New River Base was the principal training center for the women Marines, having trained over 20,000 women Marines; and

"Whereas, in 1944 the United States Marine Corps assumed control of Camp Davis at Holly Ridge when the United States Army declared it excess to their needs and utilized it to train the Royal Netherlands Marine Corps; and

"Whereas, other sites along or near U.S. Highway 17 in Eastern North Carolina have historical significance to the United States Marine Corps, including major air stations at Cherry Point and Edenton, North Carolina, and auxiliary or outlying landing fields at Atlantic Beach, Beaufort, Bogue, Greenville, Manteo, New River, Oak Grove, Washington, and Wilson; and

"Whereas, the Museum of the Marine currently being planned at Camp Lejeune in Jacksonville, North Carolina, will honor the history of the Carolina-based Marines from World War II to the present and highlight the many historically significant locations along U.S. Highway 17; and

"Whereas, estimates show that the Museum of the Marine has the potential to draw 100,000 visitors each year, and the designation of U.S. Highway 17 as a scenic byway will add to this attraction; and

"Whereas, the General Assembly desires to honor the United States Marine Corps' large and enduring military presence at locations in Eastern North Carolina along U.S. Highway 17; Now, therefore,

"The General Assembly of North Carolina enacts:"

Session Laws 2009-198, ss. 2 and 2.1, provide: "SECTION 2. The Department of Transportation shall collaborate with the Highway 17 Association, the Department of Commerce, and the Department of Cultural Resources concerning the appropriate signage along the Highway designated in this act, in order to maximize the economic development opportunities along the route of the Highway. The Department of Transportation may contract with nongovernmental entities to produce, install, and maintain the signs.

"SECTION 2.1. No State funds shall be expended to purchase signage or for any other purpose authorized by this act. All costs shall be paid by the Marine Corps Parkway Association."

## § 136-18.6. Cutting down trees.

Except in the process of an authorized construction, maintenance or safety project, the Department shall not cut down trees unless:

(1) The trees pose a potential danger to persons or property; or

(2) The cutting down of the trees is approved by the appropriate District Engineer. (1989, c. 63, s. 1.)

## § 136-18.7. Fees.

The fee for a selective vegetation removal permit issued pursuant to G.S. 136-18(5), (7), and (9) is two hundred dollars ($200.00). (1999-404, s. 5.)

## § 136-19. Acquisition of land and deposits of materials; condemnation proceedings; federal parkways.

(a) The Department of Transportation is vested with the power to acquire either in the nature of an appropriate easement or in fee simple such rights-of-way and title to such land, gravel, gravel beds or bars, sand, sand beds or bars, rock, stone, boulders, quarries, or quarry beds, lime or other earth or mineral deposits or formations, and such standing timber as it may deem necessary and suitable for transportation infrastructure construction, including road construction, maintenance, and repair, and the necessary approaches and ways through, and a sufficient amount of land surrounding and adjacent thereto, as it may determine to enable it to properly prosecute the work, by purchase, donation, or condemnation, in the manner hereinafter set out. If the Department of Transportation acquires by purchase, donation, or condemnation part of a tract of land in fee simple for highway right-of-way as authorized by this section and the Department of Transportation later determines that the property acquired for transportation infrastructure, including highway right-of-way, or a part of that property, is no longer needed for infrastructure right-of-way, then the Department shall give first consideration to any offer to purchase the property made by the former owner. The Department may refuse any offer that is less than the current market value of the property, as determined by the Department. Unless the Department acquired an entire lot, block, or tract of land belonging to the former owner, the former owner must own the remainder of the lot, block, or tract of land from which the property was acquired to receive first consideration by the Department of their offer to purchase the property.

(b) Notwithstanding the provisions of subsection (a), if the Department acquires the property by condemnation and determines that the property or a part of that property is no longer needed for highway right-of-way or other transportation projects, the Department of Transportation may reconvey the property to the former owner upon payment by the former owner of the full price paid to the owner when the property was taken, the cost of any improvements, together with interest at the legal rate to the date when the decision was made to offer the return of the property. Unless the Department acquired an entire lot, block, or tract of land belonging to the former owner, the former owner must own the remainder of the lot, block, or tract of land from which the property was acquired to purchase the property pursuant to this subsection.

(c) The requirements of this section for reconveying property to the former owner, regardless of whether such property was acquired by purchase, donation, or condemnation, shall not apply to property acquired outside the right-of-way as an “uneconomic remnant” or “residue”.

(d) The Department of Transportation is also vested with the power to acquire such additional land alongside of the rights-of-way for transportation projects, including roads as in its opinion may be necessary and proper for the protection of the transportation projects, including roads and roadways, and such additional area as may be necessary as by it determined for approaches to and from such material and other requisite area as may be desired by it for working purposes. The Department of Transportation may, in its discretion, with the consent of the landowner, acquire in fee simple an entire lot, block or tract of land, if by so doing, the interest of the public will be best served, even though said entire lot, block or tract is not immediately needed for right-of-way purposes.

(e) Notwithstanding any other provisions of law or eminent domain powers of utility companies, utility membership corporations, municipalities, counties, entities created by political subdivisions, or any combination thereof, and in order to prevent undue delay of highway projects because of utility conflicts, the Department of Transportation may condemn or acquire property in fee or appropriate easements necessary to provide transportation project rights-of-way for the relocation of utilities when required in the construction, reconstruction, or rehabilitation of a State transportation project. The Department of Transportation shall also have the authority, subject to the provisions of G.S. 136-19.5(a) and (b), to, in its discretion, acquire rights-of-way necessary for the present or future placement of utilities as described in G.S. 136-18(2).

(f) Whenever the Department of Transportation and the owner or owners of the lands, materials, and timber required by the Department of Transportation to carry on the work as herein provided for, are unable to agree as to the price thereof, the Department of Transportation is hereby vested with the power to condemn the lands, materials, and timber and in so doing the ways, means, methods, and procedure of Article 9 of this Chapter shall be used by it exclusively.

(g) The Department of Transportation shall have the same authority, under the same provisions of law provided for construction of State transportation projects, for acquirement of all rights-of-way and easements necessary to comply with the rules and regulations of the United States government for the construction of federal parkways and entrance roads to federal parks in the State of North Carolina. The acquirement of a total of 125 acres per mile of said parkways, including roadway and recreational, and scenic areas on either side thereof, shall be deemed a reasonable area for said purpose. The right-of-way acquired or appropriated may, at the option of the Department of Transportation, be a fee-simple title. The said Department of Transportation is hereby authorized to convey such title so acquired to the United States government, or its appropriate agency, free and clear of all claims for compensation. All compensation contracted to be paid or legally assessed shall be a valid claim against the Department of Transportation, payable out of the State Highway Fund. Any conveyance to the United States Department of Interior of land acquired as provided by this section shall contain a provision whereby the State of North Carolina shall retain concurrent jurisdiction over the areas conveyed. The Governor is further authorized to grant concurrent jurisdiction to lands already conveyed to the United States Department of Interior for parkways and entrances to parkways.

(h) The action of the Department of Transportation heretofore taken in the acquirement of areas for the Blue Ridge Parkway in accordance with the rules and regulations of the United States government is hereby ratified and approved and declared to be a reasonable exercise of the discretion vested in the said Department of Transportation in furtherance of the public interest.

(i) When areas have been tentatively designated by the United States government to be included within a parkway, but the final survey necessary for the filing of maps as provided in this section has not yet been made, no person shall cut or remove any timber from said areas pending the filing of said maps after receiving notice from the Department of Transportation that such area is under investigation; and any property owner who suffers loss by reason of the restraint upon his right to use the said timber pending such investigation shall be entitled to recover compensation from the Department of Transportation for the temporary appropriation of his property, in the event the same is not finally included within the appropriated area, and the provisions of this section may be enforced under the same law now applicable for the adjustment of compensation in the acquirement of rights-of-way on other property by the Department of Transportation. (1921, c. 2, s. 22; 1923, c. 160, s. 6; C.S., s. 3846(bb); 1931, c. 145, s. 23; 1933, c. 172, s. 17; 1935, c. 2; 1937, c. 42; 1949, c. 1115; 1953, c. 217; 1957, c. 65, s. 11; 1959, c. 1025, s. 1; cc. 1127, 1128; 1963, c. 638; 1971, c. 1105; 1973, c. 507, ss. 5, 11; 1977, c. 464, s. 7.1; 1989 (Reg. Sess., 1990), c. 962, s. 2; 1991 (Reg. Sess., 1992), c. 979, s. 1; 2009-266, s. 7.)

**Cross References.** — As to powers of the Department of Transportation, see G.S. 136-18. As to condemnation generally for roads, etc., see G.S. 136-103 et seq.

**Effect of Amendments.** — Session Laws 2009-266, s. 7, effective August 1, 2009, in subsection (a), in the first sentence, inserted "transportation infrastructure construction, including" near the middle, in the second sentence, inserted "transportation infrastructure, including" and substituted "infrastructure right-of-way" for "highway right-of-way" near the middle; in subsection (b), inserted "or other transportation projects" in the first sentence; in subsection (d), substituted "rights-of-way for transportation projects, including" for "rights-of-way or" and inserted "transportation projects, including" in the first sentence; in subsection (e), substituted "transportation project rights-of-way" for "highway rights-of-way" and "transportation project" for "highway project" in the first sentence; and, in subsection (g), substituted "transportation projects" for "highways" in the first sentence.

**Legal Periodicals.** — For comment on the operation of this section in connection with Chapter 40, see 28 N.C.L. Rev. 403 (1950).

For case law survey on eminent domain, see 41 N.C.L. Rev. 471 (1963); 44 N.C.L. Rev. 941, 1003 (1966); 48 N.C.L. Rev. 767 (1970).

For note on public use in North Carolina, see 44 N.C.L. Rev. 1142 (1966).

For article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

## CASE NOTES

I. General Consideration.
II. Purpose for Which Property Taken.
III. What Constitutes "Taking."
IV. Compensation and Damages.
V. Pleading and Practice.

### I. GENERAL CONSIDERATION.

***Editor's Note.*** — *Some of the cases cited below were decided under this section as it stood prior to the first 1959 amendment, when the power to condemn was exercised pursuant to the provisions of Chapter 40 (now Chapter 40A) rather than the provisions of Article 9 of this Chapter.*

**Rights Afforded by Former Version of this Section.** — In enacting this section, the legislature has implicitly waived the Department of Transportation's sovereign immunity to the extent of the rights afforded in the former version of this section. Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

**The Department possesses the sovereign power of eminent domain,** and by reason thereof can take private property for public use for highway purposes. The Commission (now Department) may do this either by bringing a special proceeding against the owner for the condemnation of the property under this section, or by actually seizing the property and appropriating it to public use. Moore v. Clark, 235 N.C. 364, 70 S.E.2d 182 (1952).

As a State agency, the State Highway Commission (now Department of Transportation) possesses the power of eminent domain for the purpose of acquiring property and property rights necessary to carry out its designated functions. North Carolina State Hwy. Comm'n v. Asheville School, Inc., 5 N.C. App. 684, 169 S.E.2d 193 (1969), aff'd, 276 N.C. 556, 173 S.E.2d 909 (1970).

The State Highway Commission (now Department of Transportation) as a State agency or instrumentality possesses the sovereign power of eminent domain, and by reason thereof can take private property for public use for highway purposes upon payment of just compensation. State Hwy. Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

**Power to Acquire Rights-of-Way.** — There is no question about the right of the State Highway Commission (now Department of Transportation) to procure by dedication, purchase, prescription or condemnation such rights-of-way as it may deem necessary for highway purposes. Browning v. North Carolina State Hwy. Comm'n, 263 N.C. 130, 139 S.E.2d 227 (1964).

The Commission (now Department) has authority by virtue of this section to acquire rights-of-way by purchase. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

North Carolina statutes and court decisions set forth the following methods by which the State Highway Commission (now Department of Transportation) can acquire right-of-way easements: (1) purchase or agreement; (2) donation; (3) dedication; (4) prescription; or (5) condemnation. Hughes v. North Carolina State Hwy. Comm'n, 2 N.C. App. 1, 162 S.E.2d 661 (1968), rev'd on other grounds, 275 N.C. 121, 165 S.E.2d 321 (1969).

**Extent of Right Acquired by Condemnation.** — Where it exercises the power of eminent domain vested in it by this section and in that way appropriates the land of another to public use as the right-of-way for a public highway, the State Highway Commission (now Department of Transportation) acquires once and for all the complete legal right to use the entire right-of-way for highway purposes as long as time shall last. North Carolina State Hwy. & Pub. Works Comm'n v. Black, 239 N.C. 198, 79 S.E.2d 778 (1954); Van Leuven v. Akers Motor Lines, 261 N.C. 539, 135 S.E.2d 640 (1964).

**Rights Acquired by Purchase.** — The purchase of a right-of-way by the State Highway Commission (now Department of Transportation), under the provisions of this section, vests in the Commission (now Department) the same rights as though it had acquired the land by condemnation. Sale v. State Hwy. & Pub. Works Comm'n, 238 N.C. 599, 78 S.E.2d 724 (1953), modified, 242 N.C. 612, 89 S.E.2d 290 (1985).

**Purchase from One Cotenant Does Not Affect Interest of Other Cotenant.** — The purchase of an easement from one cotenant does not carry with it an easement in the interest of the other cotenant. Browning v. North Carolina State Hwy. Comm'n, 263 N.C. 130, 139 S.E.2d 227 (1964).

**A lessee as tenant of an estate for years** takes and holds his term in the same manner as any other owner of realty holds his title, subject to the right of the sovereign to take the hold or any part of it for public use upon the payment to him of just compensation. Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).

**A right of access to a public highway is an easement appurtenant to the land.** The State Highway Commission (now Department of Transportation) stands in the position of a servient owner with the right to locate an access route under the general rule that where an easement is granted or reserved in general terms, which do not fix a specific location, then the owner of the servient estate has the right in the first instance to designate the specific location of such easement, subject to the limitation that this right be exercised in a reasonable manner with due regard to the rights of the owner of the easement. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

The right of direct access from the plaintiff's land to the highway, whether it existed prior to the agreement or was created by it, was an easement appurtenant to the plaintiff's land and was a private property right in the plaintiff, over and above the plaintiff's right, as a member of the public, to use this ramp as a means of getting to the lanes of the highway. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

**Which Cannot Be Damaged or Taken Without Compensation.** — The owner of land abutting a highway has a right beyond that which is enjoyed by the general public, a special right of easement in the public road for access purposes, and this is a property right which cannot be damaged or taken from him without due compensation. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

While the State Highway Commission (now Department of Transportation) has the power to eliminate a hazardous access point, it cannot do so without paying the landowner for his property right. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

**The fact that landowner's right of access arose out of an agreement and a deed** does not prevent its being a property right. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

**Department May Condemn Right of Access to Public Highway.** — The State Highway Commission (now Department of Transportation) has statutory authority to exercise the power of eminent domain to condemn or severely curtail an abutting landowner's right of access to a public highway adjacent to his property, for the construction or reconstruction, maintenance and repair, of a limited-access highway, upon the payment of just compensation. Williams v. North Carolina State Hwy. Comm'n, 252 N.C. 772, 114 S.E.2d 782 (1960).

A right of access is an easement, a property right, and as such is subject to condemnation. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

**No Authority to Appropriate Personal Property.** — The State Highway Commission (now Department of Transportation) has no authority to appropriate personal property for public use. Lyerly v. North Carolina State Hwy. Comm'n, 264 N.C. 649, 142 S.E.2d 658 (1965); Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).

This section does not authorize State Highway Commission (now Department of Transportation) to appropriate personal property for public use. Midgett v. North Carolina State Hwy. Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963), overruled on other grounds in Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

**Any injury to personal property is damnum absque injuria.** Lyerly v. North Carolina State Hwy. Comm'n, 264 N.C. 649, 142 S.E.2d 658 (1965).

**Removal of Personalty from Leasehold Estate.** — When a leasehold estate is taken under the power of eminent domain, the ownership of personalty kept on the premises taken, but not permanently affixed thereto, is not affected, and the owner is entitled to remove it at his own expense. Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).

**Acquisition of Topsoil.** — The State Highway Commission (now Department of Transportation) is authorized by this section to acquire by condemnation topsoil deemed necessary and suitable for road construction, "topsoil" being included in the generic term "earth," and the power to acquire topsoil is not limited to lands contiguous to the highway upon which it is to be used. State Hwy. & Pub. Works Comm'n v. Basket, 212 N.C. 221, 193 S.E. 16 (1937).

**Construing Right-of-Way Agreement.** — In construing a right-of-way agreement, all of the language contained therein is to be considered, and a landowner can rely upon language creating easement rights and property rights greater than those of the general public. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

**Liability of Contractor.** — A contractor who is employed by the State Highway Commission (now Department of Transportation) to do work incidental to the construction or maintenance of a public highway and who performs such work with proper care and skill cannot be held liable to an owner for damages resulting to property from the performance of the work. The injury to the property in such a case constitutes a taking of the property for public use for highway purposes, and the only remedy available to the owner is a special proceeding against the Commission (now Department) under this section to recover compensation for the property taken or damaged. But if the contractor employed by the Commission (now Department) performs his work in a negligent manner and thereby proximately injures the property of another, he is personally liable to the owner therefor. Moore v. Clark, 235 N.C. 364, 70 S.E.2d 182 (1952); Guilford Realty & Ins. Co. v. Blythe Bros. Co., 260 N.C. 69, 131 S.E.2d 900 (1963); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972).

**In a consolidated action brought by property owners as a result of the disposal of waste materials from a highway project,** where no party challenged the trial court's conclusion that the acts of the defendants in disposing of the waste materials from the project were not for a public purpose, neither the plaintiffs nor the other defendants could maintain an action against the Department of Transportation arising from those acts. Clark v. Asheville Contracting Co., 316 N.C. 475, 342 S.E.2d 832 (1986).

**Applied** in Calhoun v. State Hwy. & Pub. Works Comm'n, 208 N.C. 424, 181 S.E. 271 (1935); Laughter v. State Hwy. & Pub. Works Comm'n, 238 N.C. 512, 78 S.E.2d 252 (1953); Simmons v. State Hwy. & Pub. Works Comm'n, 238 N.C. 532, 78 S.E.2d 308 (1953); North Carolina State Hwy. & Pub. Works Comm'n v. Privett, 246 N.C. 501, 99 S.E.2d 61 (1957); Abdalla v. State Hwy. Comm'n, 261 N.C. 114, 134 S.E.2d 81 (1964); State Hwy. Comm'n v. Luck, 263 N.C. 125, 139 S.E.2d 8 (1964); North Carolina State Hwy. Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964); Northgate Shopping Center, Inc. v. State Hwy. Comm'n, 265 N.C. 209, 143 S.E.2d 244 (1965); State Hwy. Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967); North Carolina State Hwy. Comm'n v. Hettiger, 271 N.C. 152, 155 S.E.2d 469 (1967); Prestige Realty Co. v. State Hwy. Comm'n, 1 N.C. App. 82, 160 S.E.2d 83 (1968).

**Cited** in Town of Greenville v. State Hwy. Comm'n, 196 N.C. 226, 145 S.E. 31 (1928); Long v. City of Randleman, 199 N.C. 344, 154 S.E. 317 (1930); Switzerland Co. v. North Carolina State Hwy. & Pub. Works Comm'n, 216 N.C. 450, 5 S.E.2d 327 (1939); Bailey v. State Hwy. & Pub. Works Comm'n, 230 N.C. 116, 52 S.E.2d 276 (1949); North Carolina State Hwy. & Pub. Works v. Mullican, 243 N.C. 68, 89 S.E.2d 738 (1955); Zourzoukis v. State Hwy. Comm'n, 252 N.C. 149, 113 S.E.2d 269 (1960); Ferrell v. North Carolina State Hwy. Comm'n, 252 N.C. 830, 115 S.E.2d 34 (1960); State Hwy. Comm'n v. Kenan Oil Co., 260 N.C. 131, 131 S.E.2d 665 (1963); Kaperonis v. North Carolina State Hwy. Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963); Sherrill v. North Carolina State Hwy. Comm'n, 264 N.C. 643, 142 S.E.2d 653 (1965); Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977); Sanders v. State Pers. Comm'n, 183 N.C. App. 15, 644 S.E.2d 10, 2007 N.C. App. LEXIS 845 (2007).

### II. PURPOSE FOR WHICH PROPERTY TAKEN.

**The existence of a public use is a prerequisite** to the right of the State Highway Commission (now Department of Transportation) to exercise the power of eminent domain to condemn private property, and final determination as to whether the proposed condemnation and taking of defendants' land by condemnation is for a public use is for judicial determination. State Hwy. Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

It is elementary law that the State Highway Commission (now Department of Transportation) can condemn property only for a public purpose. North Carolina State Hwy. Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970).

**What constitutes a public use is a judicial question** to be decided by the court as a matter of law. North Carolina State Hwy. Comm'n v. Asheville School, Inc., 5 N.C. App. 684, 169 S.E.2d 193 (1969), aff'd, 276 N.C. 556, 173 S.E.2d 909 (1970).

Any highway condemnation proceeding may incite controversy as to whether the proposed road will serve a public or private purpose. This question, when the facts are determined, is one of law for the courts. North Carolina State Hwy. Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970).

**Land Cannot Be Taken Solely to Construct Road for Private Use.** — The State Highway Commission (now Department of Transportation) cannot take the land of one property owner for the sole purpose of constructing a road for the private use of another. North Carolina State Hwy. Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970).

**But May Be Taken to Provide Access to Property Otherwise Landlocked by Highway.** — Condemnation of land by the State Highway Commission (now Department of Transportation) to provide access to private property which otherwise would have been landlocked by the construction of a controlled access interstate highway was for a public purpose and was authorized by this section, and G.S. 136-89.49 and 136-89.52. North Carolina State Hwy. Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970).

A service road alleviating a landlocked condition caused by the construction of a freeway constituted a public use whether such road served one property owner or many. North Carolina State Hwy. Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970).

Condemnation of property by the State Highway Commission (now Department of Transportation) for the sole purpose of providing a private driveway into adjoining property which had been landlocked as the result of the construction of a controlled access freeway was a taking for a public purpose, where the driveway was constructed in connection with the freeway project and not as a separate and distinct project completely unrelated to any public undertaking, and since the landlocking of the property was a damage to the owners thereof, which if not repaired, would have entitled them to compensation. North Carolina State Hwy. Comm'n v. Asheville School, Inc., 5 N.C. App. 684, 169 S.E.2d 193 (1969), aff'd, 276 N.C. 556, 173 S.E.2d 909 (1970).

**Right to Compensation Where Evidence is Insufficient to Show Taking Was for Private Purpose.** — Where there was no evidence upon the record showing that the taking over of a road as part of the county system was for a private purpose sufficient to raise an issue of fact, plaintiff is remitted to his rights under this section for the recovery of just compensation. Reed v. State Hwy. & Pub. Works Comm'n, 209 N.C. 648, 184 S.E. 513 (1936).

**Use of Land in Repairing Damage Caused by Highway Project.** — The State Highway Commission (now Department of Transportation) has the responsibility of repairing, whenever possible, damage caused by a highway project, and it is not precluded by the law or Constitution from making reasonable use of land acquired for the project in doing so. North Carolina State Hwy. Comm'n v. Asheville School, Inc., 5 N.C. App. 684, 169 S.E.2d 193 (1969), aff'd, 276 N.C. 556, 173 S.E.2d 909 (1970).

## III. WHAT CONSTITUTES "TAKING."

**"Taking" Defined.** — See Browning v. North Carolina State Hwy. Comm'n, 263 N.C. 130, 139 S.E.2d 227 (1964).

**Merely Laying Out Right-of-Way Is Not "Taking".** — The mere laying out of a right-of-way is not in contemplation of law a full appropriation of property. Complete appropriation occurs when the property is actually taken for the specified purpose after due notice to the owner; and the owner's right to compensation arises only from the actual taking or occupation of the property by the State Highway Commission (now Department of Transportation). Browning v. North Carolina State Hwy. Comm'n, 263 N.C. 130, 139 S.E.2d 227 (1964).

**Nor Is Paving Existing Highway "Taking" or Notice Thereof.** — The completion of a project is, in ordinary cases, a clear taking of the owner's property and notice to him of the taking, but this is not true where the project consists of the mere paving of an existing public highway. Such paving, where the rights of the public are unquestioned, would be no assertion of rights over adjacent land or notice to the owners that such rights were being asserted. Browning v. North Carolina State Hwy. Comm'n, 263 N.C. 130, 139 S.E.2d 227 (1964).

**Interference with Natural Flow of Water.** — The right to have water flow in the direction provided by nature is a property right, and if such right of a landowner is materially interfered with so that his land is flooded by the manner in which a highway is constructed, it is a nuisance and a taking of property for public use for which compensation must be paid. Midgett v. North Carolina State Hwy. Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963), overruled on other grounds in Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

**Lowering of Canal Bridge.** — Petitioner constructed a canal across a county highway and thereafter maintained the bridge constructed over the canal. The State Highway Commission (now Department of Transportation), upon taking over the highway, constructed a new bridge and later constructed a second new bridge which was some two and one-half inches lower than the first. Petitioner instituted a proceeding under this section to recover compensation upon his contention that the lowering of the bridge interfered with the use of the canal in floating his barge under the bridge. It was held that the use of the canal by petitioner was permissive and subject to the easement for highway purposes, and therefore petitioner was not entitled to recover compensation. Dodge v. State Hwy. & Pub. Works Comm'n, 221 N.C. 4, 18 S.E.2d 706 (1942).

**Negligence Causing Cave-In.** — Where plaintiffs' building was damaged by a cave-in resulting from alleged negligence in excavation work incident to the construction of a highway overpass, plaintiffs were not relegated to a claim for damages against the State Highway Commission (now Department of Transportation) as for a taking of their property under this section, and the demurrer of the contractor for the Commission (now Department) in plaintiff's action in tort was properly overruled. Broadhurst v. Blythe Bros. Co., 220 N.C. 464, 17 S.E.2d 646 (1941).

**Denial of Access Constitutes Appropriation of Private Property.** — Where a right-of-way agreement gave plaintiffs a right of access at a particular spot to the highway to be constructed on the right-of-way, the State Highway Commission's (now Department of Transportation's) refusal to allow plaintiffs to enter upon the highway at the point of the easement constituted a taking or appropriation of private property for which an adequate statutory remedy in the nature of a special proceeding is provided, so that plaintiffs' complaint stating a civil action for breach of the agreement was demurrable. Williams v. North Carolina State Hwy. Comm'n, 252 N.C. 772, 114 S.E.2d 782 (1960).

### IV. COMPENSATION AND DAMAGES.

**Right to Compensation Does Not Rest upon Statute.** — The right to compensation for property taken under the power of eminent domain does not rest upon statute, but has always obtained in this jurisdiction. Lewis v. North Carolina State Hwy. & Pub. Works Comm'n, 228 N.C. 618, 46 S.E.2d 705 (1948).

**Property owner has a constitutional right to just compensation for the taking of his property** for a public purpose. Browning v. North Carolina State Hwy. Comm'n, 263 N.C. 130, 139 S.E.2d 227 (1964).

**Measure and Elements of Damages Generally.** — In proceedings to take land for a public highway, the measure of damages is the difference in the fair market value of the entire tract immediately before and immediately after the taking, the elements upon which the damages are predicated being the fair market value of the land taken and the injury to respondent's remaining land, less any general and special benefits accruing to respondent from the construction of the highway. State Hwy. & Pub. Works Comm'n, v. Hartley, 218 N.C. 438, 11 S.E.2d 314 (1940). See Dalton v. State Hwy. & Pub. Works Comm'n, 223 N.C. 406, 27 S.E.2d 1 (1943); Williams v. State Hwy. Comm'n, 252 N.C. 514, 114 S.E.2d 340 (1960).

The measure of damages for the taking of a part of a tract of land for highway purposes is the difference between the fair market value of respondent's land immediately before the taking and the fair market value of the portion left immediately after the taking, which difference embraces compensation for the part taken and compensation for injury to the remaining portion, less general and special benefits resulting to the landowner by the utilization of the property for a highway. Proctor v. State Hwy. & Pub. Works Comm'n, 230 N.C. 687, 55 S.E.2d 479 (1949).

For a statement of the rule of damages for property taken, see State Hwy. & Pub. Works Comm'n v. Black, 239 N.C. 198, 79 S.E.2d 778 (1954).

**Where only a part of a tract of land is appropriated** for highway purposes, the measure of damages in such proceeding is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left immediately after the taking. The items going to make up this difference embrace compensation for the part taken and compensation for injury to the remaining portion, which is to be offset under the terms of the controlling statute by any general and special benefits resulting to the landowner from the utilization of the property taken for a highway. Robinson v. State Hwy. Comm'n, 249 N.C. 120, 105 S.E.2d 287 (1958); Barnes v. North Carolina State Hwy. Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1959); Barnes v. North Carolina State Hwy. Comm'n, 257 N.C. 507, 126 S.E.2d 732 (1962).

**When the taking renders the remaining land unfit or less valuable for any use** to which it is adapted, that fact is a proper item to be considered in determining whether the taking has diminished the value of the land itself. Kirkman v. State Hwy. Comm'n, 257 N.C. 428, 126 S.E.2d 107 (1962); State Hwy. Comm'n v. Phillips, 267 N.C. 369, 148 S.E.2d 282 (1966).

**Remaining Land Left with Direct Access to Only One Lane of Divided Highway.** — In determining the injury, if any, to the remaining portion of the owner's land, he is not entitled to compensation for diminution in the value thereof caused by the fact after a divided highway is built he has direct access therefrom only to the lanes of the relocated highway reserved exclusively for southbound traffic and only southbound traffic has direct access thereto. Barnes v. North Carolina State Hwy. Comm'n, 257 N.C. 507, 126 S.E.2d 732 (1962).

**Diminution of Value by Cutting Off Access over Private Way or Neighborhood Road to Public Road.** — To completely cut off one's access over a private way or neighborhood road to the nearest public road, without providing other reasonable access to a public road, may diminish the value of the land involved to the same extent as if access was denied to a public highway abutting the premises. State Hwy. Comm'n v. Phillips, 267 N.C. 369, 148 S.E.2d 282 (1966).

Where a landowner's access to a public highway over a section of neighborhood public road is cut off by the construction of a limited access highway across a portion of his land, leaving no access from the property to a public highway, the deprivation of access affects the value of the property and the landowner is entitled to introduce evidence of such deprivation of access as an element of damages. State Hwy. Comm'n v. Phillips, 267 N.C. 369, 148 S.E.2d 282 (1966).

**Grant of Right of Access in Right-of-Way Agreement.** — The State Highway Commission (now Department of Transportation) not only can pay money as consideration for a right-of-way agreement, but can grant to the landowner a right of access at a particularly designated point. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

**Loss of profits or injury to a growing business** conducted on property or connected therewith are not elements of recoverable damages in an award for the taking under the power of eminent domain. Kirkman v. State Hwy. Comm'n, 257 N.C. 428, 126 S.E.2d 107 (1962); State Hwy. Comm'n v. Phillips, 267 N.C. 369, 148 S.E.2d 282 (1966).

The owner of a water mill which had a right of ingress and egress to his mill over the land of another and had constructed a bridge and maintained a ferry situated to command a large patronage can recover damages for the injury to his property by the building of a highway but not for profits from his mill, which is too speculative. Riverside Milling Co. v. State Hwy. Comm'n, 190 N.C. 692, 130 S.E. 724 (1925).

**Evidence of Market Value of Remaining Land.** — In a special proceeding to assess compensation for land of an educational institution taken for highway purposes, any evidence which aids the jury in fixing fair market value of the remaining land, and its diminution by the burden upon it, including everything which affects the market value of the land remaining, is competent. Gallimore v. State Hwy. & Pub. Works Comm'n, 241 N.C. 350, 85 S.E.2d 392 (1955); Barnes v. North Carolina State Hwy. Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1959); State Hwy. Comm'n v. Phillips, 267 N.C. 369, 148 S.E.2d 282 (1966).

**Price at Which Land Was Bought as Evidence of Market Value.** — It is accepted law that when land is taken in the exercise of eminent domain it is competent, as evidence of market value, to show the price at which it was bought if the sale was voluntary and not too remote in point of time. North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

**Price paid at voluntary sales of land similar to condemnee's** land at or about the time of taking is admissible as independent evidence of value of land taken. Barnes v. North Carolina State Hwy. Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1959); State Hwy. Comm'n v. Conrad, 263 N.C. 394, 139 S.E.2d 553 (1965).

**Rental Value.** — When rental property is condemned the owner may not recover for lost rents, but rental value of property is competent upon the question of the fair market value of the property at the time of the taking. Kirkman v. State Hwy. Comm'n, 257 N.C. 428, 126 S.E.2d 107 (1962).

**All Capabilities of Land Are to Be Considered.** — In estimating its value, all of the capabilities of the property, and all of the uses to which it may be applied or for which it is adapted, which affect its value in the market, are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner. Williams v. State Hwy. Comm'n, 252 N.C. 514, 114 S.E.2d 340 (1960).

**But Undeveloped Property May Not Be Valued on a Per-Lot Basis.** — It is proper to show that a particular tract of land is suitable and available for division into lots and is valuable for that purpose, but it is not proper to show the number and value of lots as separated parcels in an imaginary subdivision thereof. In other words, it is not proper for the jury in these cases to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact. Such undeveloped property may not be valued on per-lot basis. The cost factor is too speculative. Barnes v. North Carolina State Hwy. Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1959).

Under proper circumstances a map of a proposed subdivision of undeveloped land is admissible to illustrate and explain the testimony of witnesses as to the highest and best available use of the property and that it is capable of subdivision. But where such map is admitted in evidence, the inclusion of a price per lot noted thereon or by testimony of witnesses is incompetent and should be excluded. State Hwy. Comm'n v. Conrad, 263 N.C. 394, 139 S.E.2d 553 (1965).

The fair market value of undeveloped land immediately before condemnation is not a speculative value based on an imaginary subdivision and sales in lots to many purchasers. It is the fair market value of the land as a whole in its then state according to the purpose or purposes to which it is best adapted and in accordance to its best and highest capabilities. State Hwy. Comm'n v. Conrad, 263 N.C. 394, 139 S.E.2d 553 (1965).

**Compensation for Land Containing Mineral Deposits.** — See State Hwy. Comm'n v. Mode, 2 N.C. App. 464, 163 S.E.2d 429 (1968).

**Compensation for Land Containing Stone Deposits.** — See State Hwy. Comm'n v. Mode, 2 N.C. App. 464, 163 S.E.2d 429 (1968).

**Offsets Allowed.** — In an action to recover damages resulting from the relocation of a public road through the lands of plaintiff, both the special and general benefits accruing to plaintiff by reason of the construction of the highway should be allowed as offsets against any damages which plaintiff might have sustained, and an instruction that limits offsets to special advantages that accrued to plaintiff is erroneous. Bailey v. State Hwy. & Pub. Works Comm'n, 214 N.C. 278, 199 S.E. 25 (1938); John R. Taylor Co. v. North Carolina State Hwy. & Pub. Works Comm'n, 250 N.C. 533, 109 S.E.2d 243 (1959).

**General benefits** are those which arise from the fulfillment of the public object which justified the taking. State Hwy. Comm'n v. Mode, 2 N.C. App. 464, 163 S.E.2d 429 (1968).

**Special benefits** are those which arise from the peculiar relation of the land in question to the public improvement. State Hwy. Comm'n v. Mode, 2 N.C. App. 464, 163 S.E.2d 429 (1968).

**Benefits to Independent Tract May Not Be Offset.** — When the State takes a part or all of a tract of land for highway purposes, it is not entitled to offset against damages the benefits to another separate and independent parcel or parcels belonging to the landowner whose land was taken. Barnes v. North Carolina State Hwy. Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1959).

**Although an adjacent tract was separated from the taken property** by an easement and zoned differently, evidence of benefit to that tract was competent to offset damage to property taken. Barnes v. North Carolina State Hwy. Comm'n, 250 N.C. 378, 109 S.E.2d 219 (1959).

**Compensatory damages for injury to personal property** are the difference between its fair market value immediately before and immediately after the injury. If the property has no market value, the measure of damages may be gauged by the cost of repairs. Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).

**This section, when read consistently with §§ 40A-63 and 40A-65, as well as with the Fifth Amendment to the U.S. Const.,** dictates that the State not profit from overreaching seizures by eminent domain; therefore, Department of Transportation (DOT) was required to reconvey property acquired by eminent domain but unused by the DOT to the assigns of the original owner at the original purchase price, plus interest at the legal rate compounded annually. Ferrell v. DOT, 104 N.C. App. 42, 407 S.E.2d 601 (1991), aff'd, 334 N.C. 650, 435 S.E.2d 309 (1993).

**Date of Taking.** — Petitioner, electing to try his case on the theory that the date of taking was a particular date, will not be allowed to appeal the judgment awarded on the grounds that the "taking" has actually occurred on a later date when the value of the property has increased. John R. Taylor Co. v. North Carolina State Hwy. & Pub. Works Comm'n, 250 N.C. 533, 109 S.E.2d 243 (1959).

**Application of Amendment.** — At the time of the relocation of a road and when suit was instituted, the rule for the admeasurement of damages was as prescribed by this section prior to the 1923 amendment. Lanier v. Town of Greenville, 174 N.C. 311, 93 S.E. 850 (1917). But before trial, the legislature amended the law by adding: "And in all instances the general and special benefits shall be assessed as offsets against damages," etc. Hence, the law as amended should have been followed in determining the amount plaintiff was entitled to recover. Wade v. State Hwy. Comm'n, 188 N.C. 210, 124 S.E. 193 (1924).

**Interest.** — In a proceeding to recover just compensation for the taking of private property for highway purposes, petitioners are entitled, as a matter of strict legal right, to have the jury award them, in addition to the sum the jury finds to be the fair market value of the property on taking date, interest on such sum at the rate of six percent from the date petitioners were physically dispossessed to the date of verdict, as an element of just compensation guaranteed by N.C. Const., Art. I, § 19, and U.S. Const., Amend. XIV. De Bruhl v. State Hwy. & Pub. Works Comm'n, 247 N.C. 671, 102 S.E.2d 229 (1958).

**Instruction Held Not Prejudicial.** — An instruction to the effect that the market value of property taken by eminent domain should be measured by what the property would bring in voluntary sale by one who desires, but is not obliged, to sell and is bought by one who is under no necessity of buying, will not be held prejudicial for failure to charge that the buyer must be one desiring to buy, when it appears from the entire charge, construed contextually, that the jury could not have been misled but must have understood that the market value was to be determined by what the property would bring by a willing seller, not required to sell, to a wanting buyer, not required to buy. John R. Taylor Co. v. North Carolina State Hwy. & Pub. Works Comm'n, 250 N.C. 533, 109 S.E.2d 243 (1959).

**Instructions as to Damages Held Error.** — See Robinson v. State Hwy. Comm'n, 249 N.C. 120, 105 S.E.2d 287 (1958).

## V. PLEADING AND PRACTICE.

**Owner Is Entitled to Reasonable Notice and Opportunity to Be Heard on Damages.** — As both the federal and State Constitutions protect all persons from being deprived of their property for public use without the payment of just compensation and a reasonable notice and a reasonable opportunity to be heard, proceedings to condemn property must not violate these guaranties. Browning v. North Carolina State Hwy. Comm'n, 263 N.C. 130, 139 S.E.2d 227 (1964).

**But Notice That Property Is To Be Appropriated Is Unnecessary.** — It is not necessary to notify the owner that his property is to be appropriated provided he is notified and given opportunity to appear and be heard on the question of the compensation that may be due him. Browning v. North Carolina State Hwy. Comm'n, 263 N.C. 130, 139 S.E.2d 227 (1964).

The due process clause is not violated by failure to give the owner of property an opportunity to be heard as to the necessity and extent of appropriating his property to public use; but it is essential to due process that the mode of determining the compensation to be paid for the appropriation be such as to afford the owner an opportunity to be heard. Browning v. North Carolina State Hwy. Comm'n, 263 N.C. 130, 139 S.E.2d 227 (1964).

**Special Proceeding Prior to Taking Not Required.** — The State Highway Commission (now Department of Transportation) is not required to bring a special proceeding against the owner for the condemnation of private property prior to taking it, but may actually take the property and appropriate it to public use. When this is done the property owner is entitled to just compensation, but he must pursue the prescribed remedy. Williams v. North Carolina State Hwy. Comm'n, 252 N.C. 772, 114 S.E.2d 782 (1960).

**Statutory Procedure Must Be Followed.** — The General Assembly has expressly granted to the State Highway Commission (now Department of Transportation), under prescribed conditions, the power of eminent domain, and has set forth the procedure to be followed in the exercise of such power. This procedure must be followed, and the conditions prescribed therein must be met before the State Highway Commission (now Department of Transportation) has the right to exercise the power of eminent domain. State Hwy. Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968).

**Statutory Procedure Is Exclusive.** — The State Highway Commission (now Department of Transportation) is charged with the duty of exercising certain administrative and governmental functions, and statutory method of procedure for adjusting and litigating claims against it is exclusive and may alone be pursued. Latham v. State Hwy. Comm'n, 191 N.C. 141, 131 S.E. 385 (1926).

**Department Is Not Subject to Suit Except as Provided by Law.** — The State Highway and Public Works Commission (now Department of Transportation) is an agency of the State and as such is not subjected to suit save in a manner expressly provided by statute. Schloss v. State Hwy. & Pub. Works Comm'n, 230 N.C. 489, 53 S.E.2d 517 (1949); Moore v. Clark, 235 N.C. 364, 70 S.E.2d 182 (1952). See Cannon v. City of Wilmington, 242 N.C. 711, 89 S.E.2d 595 (1955), cert. denied, 352 U.S. 842, 77 S. Ct. 66, 1 L. Ed. 2d 58 (1956); Williams v. North Carolina State Hwy. Comm'n, 252 N.C. 772, 114 S.E.2d 782 (1960).

**The Commission (now Department) cannot be required to make recompense in any way in an ordinary civil action** for an injury to property, no matter what the source of the injury may be. Moore v. Clark, 235 N.C. 364, 70 S.E.2d 182 (1952).

**The owner of land cannot maintain an action in tort** against the State Highway Commission (now Department of Transportation), an unincorporated governmental agency, for damages caused to his land for its having been taken by the Commission (now Department) for highway purposes. McKinney v. North Carolina State Hwy. Comm'n, 192 N.C. 670, 135 S.E. 772 (1926).

**Right to Jury Trial on Ownership of Land Is Inapplicable to Eminent Domain.** — N.C. Const., Art. I, § 25, is a constitutional guaranty of jury trial when the issue determinative of the rights of the litigants is: "Who owns the land, plaintiff or defendant?" This issue does not arise when the State, or its agency exercises the power of eminent domain. The phrase "eminent domain" by definition admits condemnor did not own, but took or appropriated the property of another for a public purpose. Wescott v. State Hwy. Comm'n, 262 N.C. 522, 138 S.E.2d 133 (1964).

**But Where Department Claims It Is Owner, Issue Must Be Tried by Jury.** — When the State Highway Commission (now Department of Transportation) denies that the plaintiff, in a proceeding for compensation for the taking of and damage to his property, is entitled to compensation because it, not the plaintiff, was the owner of the property rights in controversy, the Commission (now Department) in effect converts what began as a condemnation proceeding into an action in ejectment or trespass to try title. On that issue the plaintiff is entitled to a jury trial. Wescott v. State Hwy. Comm'n, 262 N.C. 522, 138 S.E.2d 133 (1964).

**For cases involving former limitations on actions for damages,** see Browning v. North Carolina State Hwy. Comm'n, 263 N.C. 130, 139 S.E.2d 227 (1964); Lewis v. North Carolina State Hwy. & Pub. Works Comm'n, 228 N.C. 618, 46 S.E.2d 705 (1948); North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

## § 136-19.1: Repealed by Session Laws 1977, c. 338, s. 1.

## § 136-19.2: Repealed by Session Laws 1969, c. 733, s. 13.

## § 136-19.3. Acquisition of buildings.

Where the right-of-way of a proposed highway or other transportation project necessitates the taking of a portion of a building or structure, the

Department of Transportation may acquire, by condemnation or purchase, the entire building or structure, together with the right to enter upon the surrounding land for the purpose of removing said building or structure, upon a determination by the Department of Transportation based upon an affidavit of an independent real estate appraiser that the partial taking will substantially destroy the economic value or utility of the building or structure and (i) that an economy in the expenditure of public funds will be promoted thereby; or (ii) that it is not feasible to cut off a portion of the building without destroying the entire building; or (iii) that the convenience, safety or improvement of the transportation project will be promoted thereby; provided, nothing herein contained shall be deemed to give the Department of Transportation authority to condemn the underlying fee of the portion of any building or structure which lies outside the right-of-way of any existing or proposed transportation project, including a public road, street or highway. (1965, c. 660; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 2009-266, s. 8.)

**Effect of Amendments.** — Session Laws 2009-266, s. 8, effective August 1, 2009, inserted "or other transportation project" near the beginning, substituted "transportation project" for "highway" in clause (iii), and inserted "transportation project, including a" near the end.

## § 136-19.4. Registration of right-of-way plans.

(a) A copy of the cover sheet and plan and profile sheets of the final right-of-way plans for all Department of Transportation projects, on those projects for which plans are prepared, under which right-of-way or other interest in real property is acquired or access is controlled shall be certified by the Department of Transportation to the register of deeds of the county or counties within which the project is located. The Department shall certify said plan sheets to the register of deeds within two weeks from their formal approval by the Board of Transportation.

(b) The copy of the plans certified to the register of deeds shall consist of a Xerox, photographic, or other permanent copy, except for plans electronically transmitted pursuant to subsection (b1) of this section, and shall measure approximately 17 inches by 11 inches including no less than one and one-half inches binding space on the left-hand side.

(b1) With the approval of the county in which the right-of-way plans are to be filed, the Department may transmit the plans electronically.

(c) Notwithstanding any other provision in the law, upon receipt of said original certified copy of the right-of-way plans, the register of deeds shall record said right-of-way plans and place the same in a book maintained for that purpose, and the register of deeds shall maintain a cross-index to said right-of-way plans by number of road affected, if any, and by identification number. No probate before the clerk of the superior court shall be required.

(d) If after the approval of said final right-of-way plans the Board of Transportation shall by resolution alter or amend said right-of-way or control of access, the Department of Transportation, within two weeks from the adoption by the Board of Transportation of said alteration or amendment, shall certify to the register of deeds in the county or counties within which the project is located a copy of the amended plan and profile sheets approved by the Board of Transportation and the register of deeds shall remove the original plan sheets and record the amended plan sheets in lieu thereof.

(e) The register of deeds in each county shall collect a fee from the Department of Transportation for recording right-of-way plans and profile sheets in the amount set out in G.S. 161-10. (1967, c. 228, s. 1; 1969, c. 80, s. 13; 1973, c. 507, ss. 5, 12-15; 1975, c. 716, s. 7; 1977, c. 464, s. 7.1; 1999-422, s. 1; 2000-68, s. 1; 2001-390, s. 6.)

**Editor's Note.** — Session Laws 1969, c. 80, which added subsection (e) of this section, provided, in s. 14, that nothing in the act "shall prevent any register of deeds whose compensation is derived from fees from retaining those fees as heretofore provided by law except that the amount of such fees shall be determined as provided herein."

### CASE NOTES

**When Remedy for Denial of Access to Highway May Be Asserted.** — While the State has a right to cut adjacent landowners' access to highway off at any time, the State can only restrict such right of access when the highway is a controlled-access facility or is being converted to a controlled-access facility. It is at that point in time that the legislature has delegated a remedy to the deprived landowner of his abutter's right of access when it is denied and specified on a plat by the Department of Transportation. A non-controlled-access highway has no need for these types of remedies until the situation arises where it is necessary to effect measures for the safety of the public and in the public interest. Department of Transp. v. Craine, 89 N.C. App. 223, 365 S.E.2d 694, appeal dismissed, 322 N.C. 479, 370 S.E.2d 221 (1988), holding that evidence of right to deny access was improper in a condemnation proceeding by DOT to acquire a portion of defendants' property for a non-controlled-access highway project.

## § 136-19.5. Utility right-of-way agreements.

(a) Before the Department of Transportation acquires or proposes to acquire additional rights-of-way for the purpose of accommodating the installation of utilities as authorized by G.S. 136-18 and G.S. 136-19, there shall first be voluntary agreements with the appropriate utilities regarding the acquisition and use of the particular right-of-way and requiring the payment to the Department of Transportation for or recapture of all of its costs associated with that acquisition, including the use of funds allocated to such acquisition. Such agreements may take into account the fact that more than one utility can make use of the right-of-way. No such agreement shall constitute a sale of the right-of-way and all such rights-of-way shall remain under the control of the Department of Transportation.

(b) A prior agreement between the Department of Transportation and the affected utilities may be entered into but is not required when the acquisition of right-of-way is for the purpose of relocation of utilities due to construction, reconstruction, or rehabilitation of a State transportation project. The Department of Transportation shall notify the affected utility whose facilities are being relocated and the affected utility may choose not to participate in the proposed plan for right-of-way acquisition. The decision not to participate in the proposed plan of right-of-way acquisition shall not affect any other rights the utility may have as a result of the relocation of its lines or pipelines.

(c) Whenever the Department of Transportation requires the relocation of utilities located in a right-of-way for which the utility owner contributed to the cost of acquisition, the Department of Transportation shall reimburse the utility owner for the cost of moving those utilities.

(d) Any additional right-of-way obtained pursuant to this section which is part of a railroad right-of-way shall be returned to the railroad or its successor in interest when the Department of Transportation and the affected utilities agree that the additional right-of-way is no longer useful for utility purposes and the Department of Transportation determines that it is no longer useful for transportation purposes. (1989 (Reg. Sess., 1990), c. 962, s. 3; 2009-266, s. 9.)

**Effect of Amendments.** — Session Laws 2009-266, s. 9, effective August 1, 2009, substituted "transportation" for "highway" in the first sentence of subsection (b), and near the end of subsection (d).

## § 136-20. Elimination or safeguarding of grade crossings and inadequate underpasses or overpasses.

(a) Whenever any road or street forming a link in or a part of the State highway system, whether under construction or heretofore or hereafter constructed, shall cross or intersect any railroad at the same level or grade, or by an underpass or overpass, and in the opinion of the Secretary of Transportation such crossing is dangerous to the traveling public, or unreasonably interferes with or impedes traffic on said State highway, the Department of Transportation shall issue notice requiring the person or company operating such railroad to appear before the Secretary of Transportation, at his office in Raleigh, upon a day named, which shall not be less than 10 days or more than 20 days from the date of said notice, and show cause, if any it has, why such railroad company shall not be required to alter such crossing in such way as to remove such dangerous condition and to make such changes and improvements thereat as will safeguard and secure the safety and convenience of the traveling public thereafter. Such notice shall be served on such railroad company as is now provided by law for the service of summons on domestic corporations, and officers serving such notice shall receive the same fees as now provided by law for the service of such summons.

(b) Upon the day named, the Secretary of Transportation shall hear said matter and shall determine whether such crossing is dangerous to public safety, or unreasonably interferes with traffic thereon. If he shall determine that said crossing is, or upon the completion of such highway will be, dangerous to public safety and its elimination or safeguarding is necessary for the proper protection of the traffic on said State highway, the Secretary of Transportation shall thereupon order the construction of an adequate underpass or overpass at said crossing or he may in his discretion order said railroad company to install and maintain gates, alarm signals or other approved safety devices if and when in the opinion of said Secretary of Transportation upon the hearing as aforesaid the public safety and convenience will be secured thereby. And said order shall specify that the cost of construction of such underpass or overpass or the installation of such safety device shall be allocated between the railroad company and the Department of Transportation in the same ratio as the net benefits received by such railroad company from the project bear to the net benefits accruing to the public using the highway, and in no case shall the net benefit to any railroad company or companies be deemed to be more than ten percent (10%) of the total benefits resulting from the project. The Secretary of Transportation shall be responsible for determining the proportion of the benefits derived by the railroad company from the project, and shall fix standards for the determining of said benefits which shall be consistent with the standards adopted for similar purposes by the United States Bureau of Public Roads under the Federal-Aid Highway Act of 1944.

(c) Upon the filing and issuance of the order as hereinbefore provided for requiring the construction of any underpass or overpass or the installation and maintenance of gates, alarm signals or other safety devices at any crossing upon the State highway system, it shall be the duty of the railroad company operating the railroad with which said public road or street intersects or crosses to construct such underpass or overpass or to install and maintain such safety device as may be required in said order. The work may be done and material furnished either by the railroad company or the Department of Transportation, as may be agreed upon, and the cost thereof shall be allocated and borne as set out in subsection (b) hereof. If the work is done and material furnished by the railroad company, an itemized statement of the total amount expended therefor shall, at the completion of the work, be furnished the Department of Transportation, and the Department of Transportation shall pay such amount to the railroad company as may be shown on such statement after deducting the amount for which the railroad company is responsible; and if the work is done by the Department of Transportation, an itemized statement of the total amount expended shall be furnished to the railroad company, and the railroad company shall pay to the Department of Transportation such part thereof as the railroad company may be responsible for as herein provided; such payment by the railroad company shall be under such rules and regulations and by such methods as the Department of Transportation may provide.

(d) Within 60 days after the issuance of the order for construction of an underpass or overpass or the installation of other safety devices as herein provided for, the railroad company against which such order is issued shall submit to the Department of Transportation plans for such construction or installation, and within 10 days thereafter said Department of Transportation, through its chairman of the Department of Transportation, shall notify such railroad company of its approval of said plan or of such changes and amendments thereto as to it shall seem advisable. If such plans are not submitted to the Department of Transportation by said railroad company within 60 days as aforesaid, the chairman of the Department of Transportation shall have plans prepared and submit them to the railroad company. The railroad company shall within 10 days notify the chairman of the Department of Transportation of its approval of the said plans or shall have the right within such 10 days to suggest such changes and amendments in the plans so submitted by the chairman of the Department of Transportation as to it shall seem advisable. The plans so prepared and finally approved by the chairman of the Department of Transportation shall have the same force and effect, and said railroad company shall be charged with like liability, and said underpass or overpass shall be constructed or such safety device installed in accordance therewith, as if said plans had been originally prepared and submitted by said railroad company. If said railroad company shall fail or neglect to begin or complete the construction of said underpass or overpass, or the installation of such safety device, as required by the order of the Secretary of Transportation, said Secretary of Transportation is authorized and directed to prepare the necessary plans therefor, which plans shall have the same force and effect, and shall fix said railroad company with like liability, as if said plans had been originally prepared and submitted by said railroad company, and the Department of Transportation shall proceed to construct said underpass or overpass or install such safety device in accordance therewith. An accurate account of the cost of said construction or installation shall be kept by the Department of Transportation and upon the completion of such work a statement of that portion thereof chargeable to such railroad company as set out in the order of the Department of Transportation shall be rendered said railroad company. Upon the failure or refusal of said company to pay the bill so rendered, the Department of Transportation shall recover the amount thereof by suit therefor against said company in the Superior Court of Wake County: Provided, that the payment by such railroad company of said proportionate part may be made under such rules and regulations and by such methods as the Department of Transportation may provide. If the Department of Transportation shall undertake to do the work, it shall not obstruct or impair the operation of the railroad and shall keep the roadbed and track safe for the operation of trains at every stage of work. If said railroad company shall construct such underpass or overpass or shall install such safety devices in accordance with the order of the Secretary of Transportation, the proportionate share of the cost thereof as set out in subsection (b) hereof shall upon the completion of said work be paid to the railroad company by the Department of Transportation. The Department of Transportation may inspect and check the expenditures for such construction or installation so made by the railroad company and an accurate account of the cost thereof shall upon the completion of said work be submitted to the Department of Transportation by the railroad company. If the Department of Transportation shall neglect or refuse to pay that portion of the cost of said construction or installation chargeable to it, the railroad company shall recover the amount thereof by suit therefor against the Department of Transportation in the Superior Court of Wake County.

(e) If any railroad company so ordered by the Secretary of Transportation to construct an underpass or overpass or to install safety devices at grade crossings as hereinbefore provided for shall fail or refuse to comply with the order of the Secretary of Transportation requiring such construction or installation, said railroad company shall be guilty of a Class 3 misdemeanor and shall only be fined not less than fifty dollars ($50.00) nor more than one hundred dollars ($100.00) in the discretion of the court for each day such failure or refusal shall continue, each said day to constitute a separate offense.

(f) The jurisdiction over and control of said grade crossings and safety devices upon the State highway system herein given the Department of Transportation shall be exclusive.

(g) From any order or decision so made by the Secretary of Transportation the railroad company may appeal to the superior court of the county wherein is located the crossing affected by said order. Such appeal shall not defer or delay the construction of such underpass or overpass or the installation of such safety device as required by the order of the Secretary of Transportation, but the railroad company shall proceed to comply with such order in accordance with his terms. The action of the railroad company in complying with and carrying out such order pending said appeal shall not prejudice or affect the right or remedies of such railroad company on such appeal. Upon such appeal the court shall determine only whether the order of the Secretary of Transportation for such construction or installation is unreasonable and unnecessary for the protection of the traveling public and the apportionment of the cost to the extent hereinafter provided in this subsection, and if upon the hearing of said appeal it shall be determined that said order was unnecessary for the protection of the traveling public, the Department of Transportation shall bear the total cost of the construction of such underpass or overpass or the installation of such safety device. In the event the decision on appeal should be that the construction or installation was necessary but the cost or apportionment thereof unreasonable, then the railroad company shall bear its proportion as provided in this section of such cost as may be determined on appeal to have been reasonable to meet the necessity of the case. Upon said appeal from an order of the Secretary of Transportation, the burden of proof shall be upon the railroad company, and if it shall not be found and determined upon said appeal that said order was unreasonable or unnecessary for the protection of the traveling public at said crossing, then such railroad company shall bear its proportion of the cost of such construction or installation in accordance with this section.

(h) The Department of Transportation shall pay the cost of maintenance of all overpasses and the railroad company shall pay the cost of maintenance of all underpasses constructed in accordance with this section. The cost of maintenance of safety devices at all intersections of any railroad company and any street or road forming a link in or a part of the State highway system which have been constructed prior to July 1, 1959, or which shall be constructed thereafter shall be borne fifty percent (50%) by the railroad company and fifty percent (50%) by the Department of Transportation. The maintenance of said overpasses and underpasses shall be performed by the railroad company or the Department of Transportation as may be agreed upon and reimbursement for the cost thereof, in accordance with this section, shall be made annually. The maintenance of such safety devices shall be performed by the railroad company and reimbursement for the cost thereof, in accordance with this section, shall be made annually by the Department of Transportation. (1921, c. 2, s. 19; 1923, c. 160, s. 5; C.S., s. 3846(y); 1925, c. 277; 1929, c. 74; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1959, c. 1216; 1973, c. 507, s. 5; 1977, c. 464, ss. 7.1, 11, 15; 1993, c. 539, s. 979; 1994, Ex. Sess., c. 14, s. 60; c. 24, s. 14(c).)

**Legal Periodicals.** — For note on railroads' liability at dangerous highway crossings, see 41 N.C.L. Rev. 296 (1963).

## CASE NOTES

**Section Applies Only to Specific Factual Situations.** — Although this section and G.S. 62-237 may indicate a legislative trend in the field of allocating costs of grade crossing improvements, these statutes fall short of establishing a state policy applicable to factual situations other than those to which they relate in express and specific terms. Southern Ry. v. City of Winston-Salem, 275 N.C. 465, 168 S.E.2d 396 (1969).

**Section Not Binding on Municipality in All Cases Where Railroads Cross City Streets.** — The explicit language chosen by the legislature clearly negatives any intention that this section should be construed as the adoption of a statewide policy binding upon municipalities in administering their city streets which were not parts or links in the State highway system. Had the legislature intended this section to be binding upon municipalities in all cases where railroads crossed its city street, surely the legislature would have employed language which expressed, rather than language which would negative, that intent. Southern Ry. v. City of Winston-Salem, 4 N.C. App. 11, 165 S.E.2d 751, aff'd, 275 N.C. 465, 168 S.E.2d 396 (1969).

This section does not adopt a statewide policy with respect to the allocation of costs of safety devices at railroad crossings which is binding upon municipalities in administering city streets which are not parts of or links in the State highway system. Southern Ry. v. City of Winston-Salem, 4 N.C. App. 11, 165 S.E.2d 751, aff'd, 275 N.C. 465, 168 S.E.2d 396 (1969).

This section does not apply where the streets involved, at the location of the crossings, are not links in or parts of the State highway system. Southern Ry. v. City of Winston-Salem, 275 N.C. 465, 168 S.E.2d 396 (1969).

**Railroad Crossings To Which Section Applies.** — This section by its express terms applies to railroad crossings of "any road or street forming a link in or a part of the State highway system." Southern Ry. v. City of Winston-Salem, 4 N.C. App. 11, 165 S.E.2d 751, aff'd, 275 N.C. 465, 168 S.E.2d 396 (1969).

The language of this section expressly and clearly limits its applications to railroad crossings of roads or streets which are parts of the State highway system. Southern Ry. v. City of Winston-Salem, 4 N.C. App. 11, 165 S.E.2d 751, aff'd, 275 N.C. 465, 168 S.E.2d 396 (1969).

**Elimination of Grade Crossings.** — This section confers upon the State Highway Commission (now Department of Transportation) the power to eliminate grade crossings. Mosteller v. Southern Ry., 220 N.C. 275, 17 S.E.2d 133 (1941).

**Determining Which Roads Become Part of Highway System.** — Under G.S. 136-54, 136-59 and 136-66.2 it is for the State Highway Commission (now Department of Transportation) rather than for the courts to determine which particular roads and streets shall become a part or link in the State highway system. Southern Ry. v. City of Winston-Salem, 4 N.C. App. 11, 165 S.E.2d 751, aff'd, 275 N.C. 465, 168 S.E.2d 396 (1969).

**Section Applies Only to Construction of Overpasses and Underpasses or Safety Devices.** — This section applies only to the construction of an underpass or overpass or the installation and maintenance of gates, alarm signals or other safety devices. State Hwy. Comm'n v. Clinchfield R.R., 260 N.C. 274, 132 S.E.2d 595 (1963).

This section applies only to a factual situation for which provision is made, namely, the construction of an underpass or overpass or the installation and maintenance of gates, alarm signals or other safety devices. Cecil v. High Point, T. & D.R.R., 269 N.C. 541, 153 S.E.2d 102 (1967).

**And Not to Widening of Crossing.** — A proceeding under this section to require railroad to widen solely at its own expense a crossing subsequent to the widening of the intersecting highway, will be dismissed. State Hwy. Comm'n v. Clinchfield R.R., 260 N.C. 274, 132 S.E.2d 595 (1963).

**A municipality is not entitled to a mandatory injunction to compel a railroad company to widen and improve an under-**

**pass** in the interest of public safety when such underpass, although within the municipality, constitutes a part of a State highway, since the exclusive control over the underpass in such instance is vested in the State Highway Commission (now Department of Transportation) under subsection (f) of this section. Town of Williamston v. Atlantic C.L.R.R., 236 N.C. 271, 72 S.E.2d 609 (1952).

**Erection of Signaling Devices.** — By the enactment of this section the legislature has taken from the railroads authority to erect gates or gongs or other like signaling devices at railroad crossings at will and has vested exclusive discretionary authority in the State Highway Commission (now Department of Transportation) to determine when and under what conditions such signaling devices are to be erected and maintained by railroad companies. Southern Ry. v. Akers Motor Lines, 242 N.C. 676, 89 S.E.2d 392 (1955), commented on in 41 N.C.L. Rev. 296 (1963); Cecil v. High Point, T. & D.R.R., 269 N.C. 541, 153 S.E.2d 102 (1967).

**Section Does Not Relieve Railroad of Duty to Give Notice and Warning of Existence of Grade Crossing.** — This section, giving the State Highway Commission (now Department of Transportation) exclusive jurisdiction to require gates, alarm signals or other approved safety devices to be installed at railroad crossings does not include signs and notices of the existence of a crossing, and does not relieve a railroad company of the duty to give users of the highway adequate notice and warning of the existence of a grade crossing, even though it be one at which the State Highway Commission (now Department of Transportation) has not required the erection of gates, gongs or signaling devices. Cecil v. High Point, T. & D.R.R., 269 N.C. 541, 153 S.E.2d 102 (1967).

This section, which empowers the State Highway Commission (now Department of Transportation), under certain circumstances, to require a railroad company to install gates, alarm signals or other safety devices at a crossing, does not relieve the railroad from its common-law duty to give users of a highway adequate warning of the existence of a grade crossing at which the Commission (now Department) has not required such devices to be installed. Cox v. Gallamore, 267 N.C. 537, 148 S.E.2d 616 (1966); Cecil v. High Point, T. & D.R.R., 269 N.C. 541, 153 S.E.2d 102 (1967); Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

**Or of Duty to Install Gates and Signals.** — This section does not entrust to the State Highway Commission (now Department of Transportation), and relieve a railroad of, the duty to install gates and signals at a crossing where vision is obstructed. Hunter v. Seaboard Coast Line R.R., 443 F.2d 1319 (4th Cir. 1971).

**Cited** in Rockingham County v. Norfolk & W. Ry., 197 N.C. 116, 147 S.E. 832 (1929); Austin v. Shaw, 235 N.C. 722, 71 S.E.2d 25 (1952); City of Winston-Salem v. Southern Ry., 248 N.C. 637, 105 S.E.2d 37 (1958); Cecil v. High Point, T. & D.R.R., 266 N.C. 728, 147 S.E.2d 223 (1966); Atlantic C.L.R.R. v. State Hwy. Comm'n, 268 N.C. 92, 150 S.E.2d 70 (1966); City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969).

## § 136-20.1. To require installation and maintenance of block system and safety devices; automatic signals at railroad intersections.

(a) The Department of Transportation is empowered and directed to require any railroad company to install and put in operation and maintain upon the whole or any part of its road a block system of telegraphy or any other reasonable safety device, but no railroad company shall be required to install a block system upon any part of its road unless at least eight trains each way per day are operated on that part.

(b) The Department of Transportation is empowered and directed to require, when public safety demands, where two or more railroads cross each other at a common grade, or any railroad crosses any stream or harbor by means of a bridge, to install and maintain such a system of interlocking or automatic signals as will render it safe for engines and trains to pass over such crossings or bridge without stopping, and to apportion the cost of installation and maintenance between said railroads as may be just and proper. (1907, c. 469, s. 1b; 1911, c. 197, s. 2; Ex. Sess. 1913, c. 63, s. 1; C.S., ss. 1047, 1049; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1995 (Reg. Sess., 1996), c. 673, s. 5.)

**Editor's Note.** — This section was formerly numbered 62-236. It was recodified as G.S. 136-20.1 by Session Laws 1995 (Reg. Sess., 1996), c. 673, s. 5.

### CASE NOTES

**Lack of a "block system," when required, is negligence per se.** Gerringer v. North Carolina R.R., 146 N.C. 32, 59 S.E. 152 (1907). See also Stewart v. Railroad, 137 N.C. 687, 50 S.E. 312 (1905); Stewart v. Railroad, 141 N.C. 253, 53 S.E. 877 (1906).

## § 136-21. Drainage of highway; application to court; summons; commissioners.

Whenever in the establishment, construction, improvement or maintenance of any public highway it shall be necessary to drain said highway, and to accomplish such purpose it becomes necessary to excavate a canal or canals for carrying the surplus water to some appropriate outlet, either along the right-of-way of said highway or across the lands of other landowners, and by the construction, enlargement or improvement of such canal or canals, lands other than said highway will be drained and benefited, then, and in such event, the Department of Transportation, if said highway be a part of the State highway system, or the county commissioners, if said road is not under State supervision, may, by petition, apply to the superior court of the county in which, in whole or in part, said highway lies or said canal is to be constructed, setting forth the necessity for the construction, improvement or maintenance of said canal, the lands which will be drained thereby, with such particularity as to enable same to be identified, the names of the owners of said land and the particular circumstances of the case; whereupon a summons shall be issued for and served upon each of the proprietors, requiring them to appear before the court at a time to be named in the summons, which shall not be less than 10 days from the service thereof, and upon such day the petition shall be heard, and the court shall appoint three disinterested persons, one of whom shall be a competent civil and drainage engineer recommended by the Department of Environment and Natural Resources, and the other two of whom shall be resident freeholders of the county or counties in which the road and lands are, in whole or in part, located, as commissioners, who shall, before entering upon the discharge of their duties, be sworn to do justice between the parties. (1925, c. 85, s. 3; c. 122, s. 44; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5; c. 1262, s. 86; 1977, c. 464, s. 7.1; c. 771, s. 4; 1989, c. 727, s. 218(88); 1997-443, s. 11A.119(a).)

## § 136-22. View by commissioners; report; judgment.

The commissioners, or a majority of them, one of whom must be the engineer aforesaid, shall, on a day of which each party is to be notified at least five days in advance, meet on the premises, and view the highway, or proposed highway, and also the lands which may be drained by the proposed canal, and shall determine and report what lands will be drained and benefited by the construction, enlargement or improvement of such canal, and whether said drainage ought to be done exclusively by said highway authorities, and if they are of opinion that the same ought not to be drained exclusively at their expense, then they shall decide and determine the route of the canal, the dimensions and character thereof, and the manner in which the same shall be cut or thrown up, considering all the circumstances of the case, the extent, area and identity of lands which shall be permitted to drain therein, and providing as far as possible for the effectual drainage of said highway, and the protection and benefit of the lands of all the parties; and they shall apportion the cost of the construction, repair and maintenance of said canal among said highway authorities and said landowners, and report the same to the court, which when confirmed by the clerk shall stand as a judgment of the court against each of the parties, his or its executors, administrators, heirs, assigns or successors. (1925, c. 85, s. 4.)

## § 136-23. Appeal.

Upon the entry of the judgment or decree aforesaid the parties to said action, or any of them, shall have the right to appeal to the superior court in term time under the same rules and regulations as apply to other special proceedings. (1925, c. 85, s. 5.)

## § 136-24. Rights of parties.

The parties to such special proceeding shall have all the rights which are secured to similar parties by Article 1 of Chapter 146 of this Code and shall be regulated by the provisions thereof and amendments thereto, insofar as the same are not inconsistent herewith. (1925, c. 85, s. 6.)

## § 136-25. Repair of road detour.

It shall be mandatory upon the Department of Transportation, its officers and employees, or any contractor or subcontractor employed by the said Department of Transportation, to select, lay out, maintain and keep in as good repair as possible suitable detours by the most practical route while said highways or roads are being improved or constructed, and it shall be mandatory upon the said Department of Transportation and its employees or contractors to place or cause to be placed explicit directions to the traveling public during repair of said highway or road under the process of construction. All expense of laying out and maintaining said detours shall be paid out of the State Highway Fund. (1921, c. 2, s. 11; C.S., s. 3846(s); 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

### CASE NOTES

**Section Lays Duty on Both Department and Contractor.** — This section makes it the duty of both the State Highway Commission (now Department of Transportation) and the contractors, when the public highways of the State are being improved and constructed, to select, lay out, maintain and keep in as good repair as possible suitable detours by the most practical route. It is the further duty of both to place or cause to be placed explicit directions to the traveling public. Reynolds v. J.C. Critcher, Inc., 256 N.C. 309, 123 S.E.2d 738 (1962).

**Contractor Not Responsible for Defect in Road Not Under His Supervision.** — A highway contractor may not be held responsible for damages resulting from a defect or obstruction in a road not under his supervision. Reynolds v. J.C. Critcher, Inc., 256 N.C. 309, 123 S.E.2d 738 (1962).

**Driver's Right to Assume Compliance with Section.** — Where a contractor's flagman motioned a driver to proceed, the driver had the right to assume, nothing else appearing, that the contractor had complied with the provisions of this section. Dowless v. C.C. Mangum, Inc., 12 N.C. App. 258, 182 S.E.2d 828 (1971).

**Defect in State Highway onto Which Traffic Diverted by Contractor.** — A contractor working upon a highway, who has a right to and does divert traffic onto another State highway being maintained by the State Highway Commission (now Department of Transportation), is not liable for injuries received in accidents due to defects in said State highway. Reynolds v. J.C. Critcher, Inc., 256 N.C. 309, 123 S.E.2d 738 (1962).

**Selection of Detour Routes Not a Discretionary Governmental Function Immune from Suit.** — North Carolina's Tort Claims Act, G.S. 143-291 et seq., does not create an exception for negligent performance of duties involving discretion; thus, the selection of suitable highway detour routes by department of transportation employees was not a discretionary governmental function immune from suit. Zimmer v. North Carolina Dep't of Transp., 87 N.C. App. 132, 360 S.E.2d 115 (1987).

**Applied** in Davis v. J.M.X., Inc., 137 N.C. App. 267, 528 S.E.2d 56, 2000 N.C. App. LEXIS 309 (2000).

## § 136-26. Closing of State transportation infrastructure during construction; injury to barriers, warning signs, etc.

If it shall appear necessary to the Department of Transportation, its officers, or appropriate employees, to close any transportation infrastructure coming under its jurisdiction so as to permit proper completion of work which is being performed, the Department of Transportation, its officers or employees, may close, or cause to be closed, the whole or any portion of transportation infrastructure deemed necessary to be excluded from public travel. While any transportation infrastructure, or portion thereof, is so closed, or while any transportation infrastructure, or portion thereof, is in process of construction or maintenance, the Department of Transportation, its officers or appropriate employees, or its contractor, under authority from the Department of Transportation, may erect, or cause to be erected, suitable barriers or obstruction thereon; may post, or cause to be posted, conspicuous notices to the effect that the transportation infrastructure, or portion thereof, is closed; and may place warning signs, lights and lanterns on transportation infrastructure, or portions thereof. When infrastructure is closed to the public or in process of construction or maintenance, as provided herein, any person who willfully drives into new construction work, breaks down, removes, injures or destroys any such barrier or barriers or obstructions on the road closed or being constructed, or tears down, removes or destroys any such notices, or extinguishes, removes, injures or destroys any such warning lights or lanterns so erected, posted or placed, shall be guilty of a Class 1 misdemeanor. (1921, c. 2, s. 12; C.S., s. 3846(t); 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1993, c. 539, s. 980; 2009-266, s. 10.)

**Effect of Amendments.** — Session Laws 2009-266, s. 10, effective August 1, 2009, substituted "transportation infrastructure" for "highways" in the section catchline, and substituted "transportation infrastructure" for "road or highway" and "such road or highway" throughout the section; in the first sentence, deleted "of" preceding "proper", substituted "infrastructure" for "such road or highway" in the last sentence, and made stylistic changes throughout the section.

### CASE NOTES

**Powers of Department in Carrying Out Grading Work.** — This section, together with the general powers of the State Highway Commission (now Department of Transportation), authorized the State Highway Commission (now Department of Transportation) directly or by implication, in the prosecution of the grading work, to direct and permit soil to be conveyed across a highway, the dirt ramp to be placed on the highway for its protection from injury by heavy equipment, the placing of warning signs along the highway, the stationing of flagmen at the ramp to stop traffic along the highway and close that portion of the road when in use by earthmovers, and its grade inspector to give supervision and instruction to the contractor and its employees in carrying out the grading work. C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

**Purpose of Closing Highways.** — The closing or temporary closing of highways or portions thereof during construction and repair operations is designed to avoid interruptions and delays in the prosecution of the work. C.C. Mangum, Inc. v. Gasperson, 262 N.C. 32, 136 S.E.2d 234 (1964).

The exercise of authority to close a highway, which relates to a highway "in process of construction or maintenance," is for the public benefit. C.C. Mangum, Inc. v. Gasperson, 262 N.C. 32, 136 S.E.2d 234 (1964).

**Public Travel May Be Temporarily Suspended.** — Public travel on a street or other highway may be temporarily suspended for a necessary or proper purpose, as for example to permit repairs or reconstruction. C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

This section authorizes the State Highway Commission (now Department of Transportation) through "its officers or appropriate employees, or its contractor," to close a highway to public travel while a ramp is in use by its contractor's equipment. C.C. Mangum, Inc. v.

Gasperson, 262 N.C. 32, 136 S.E.2d 234 (1964).

**Liability of Contractor for Injury.** — A contractor constructing a highway was not relieved, by an order of the State Highway Commission (now Department of Transportation) closing the road to travel, of liability for injuries in an automobile collision with an unlighted disabled truck left by defendant on the side of the highway, where on the part of the road where the accident happened barriers had been removed and to defendant's knowledge many people habitually traversed it. Thompson Caldwell Constr. Co. v. Young, 294 F. 145 (4th Cir. 1923).

**Contractor Has Duty to Exercise Ordinary Care.** — When a contractor undertakes to perform work under contract with the State Highway Commission (now Department of Transportation), the positive legal duty devolves on him to exercise ordinary care for the safety of the general public traveling over the road on which he is working. C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

The contractor doing the work is there for a lawful purpose and is not obliged to stop the work every time a traveler drives along. But while the traveler assumes certain risks, he is still a traveler on a public way, and the contractor still owes him due care, and is liable for injuries suffered by him as a result of negligence in the performance of the work. C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

**In Providing and Maintaining Warnings and Safeguards.** — Contractors must exercise ordinary care in providing and maintaining reasonable warnings and safeguards against conditions existent at the time and place. C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

**Requirements as to Signs and Flagmen Do Not Give Contractor Special Privileges.** — Where a contractor for the improvement of an airport is granted permission by the State Highway Commission (now Department of Transportation) to construct a dirt ramp over the highway to protect it from heavy equipment, the Commission's (now Department's) requirements with reference to signs and flagmen are primarily for the protection of the users of the highway and do not confer on the contractor special privileges in respect to right-of-way. C.C. Mangum, Inc. v. Gasperson, 262 N.C. 32, 136 S.E.2d 234 (1964).

**Department Cannot Impose Different Standard of Care.** — The State Highway Commission (now Department of Transportation) cannot by contract or by supervisory instructions prescribe for contractors a different standard of care from that imposed by the common law in a given situation, as it affects third parties. But in its use of and authority over a highway, for purposes of construction, repair or maintenance, it may create circumstances which bring into play rules of conduct which would not apply if such purposes were not involved. C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

**Sufficiency of Warning.** — Actual notice of every special obstruction or defect in a highway is not required to be given to a traveler, nor need the way be so barricaded as to preclude all possibility of injury, but it is sufficient if a plain warning of danger is given, and the traveler has notice or knowledge of facts sufficient to put him on inquiry. The test of the sufficiency of the warning is whether the means employed, whatever they may be, are reasonably sufficient for the purpose. C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

**Red Light or Red Flag.** — A red light is recognized by common usage as a method of giving warning of danger during hours of darkness, and a driver seeing a red light ahead in the highway is required in the exercise of due care to heed its warning. The same is equally true of a red flag in daylight hours when properly displayed. C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

**Care Required of Traveler.** — When extraordinary conditions exist on a highway by reason of construction or repair operations, the motorist is required by law to take notice of them. The traveler's care must be commensurate with the obvious danger. C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

One who operates an automobile on a public highway which is under construction or repair, or in use for such purposes, cannot assume that there are no obstructions, defects or dangers ahead. In such instances it is the duty of the motorist, in the exercise of due care, to keep his vehicle under such control that it can be stopped within the distance within which a proper barrier or obstruction, or an obvious danger can be seen. C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

Where travel on the highway was closed temporarily by means of warning signs and flagmen's signals it was the duty of the motorist to stop and yield the right-of-way to the contractor's earth movers. C.C. Mangum, Inc. v. Gasperson, 262 N.C. 32, 136 S.E.2d 234 (1964).

**Applied** in Luther v. Asheville Contracting Co., 268 N.C. 636, 151 S.E.2d 649 (1966).

**Cited** in Payne v. Lowe, 2 N.C. App. 369, 163 S.E.2d 74 (1968).

## § 136-27. Connection of highways with improved streets; pipelines and conduits; cost.

When any portion of the State highway system shall run through any city or town and it shall be found necessary to connect the State highway system with improved streets of such city or town as may be designated as part of such system, the Department of Transportation shall build such connecting links, the same to be uniform in dimensions and materials with such State highways: Provided, however, that whenever any city or town may desire to widen its streets which may be traversed by the State highway, the Department of Transportation may make such arrangements with said city or town in connection with the construction of said road as, in its discretion, may seem wise and just under all the facts and circumstances in connection therewith: Provided further, that such city or town shall save the Department of Transportation harmless from any claims for damage arising from the construction of said road through such city or town and including claims for rights-of-way, change of grade line, and interference with public-service structures. And the Department of Transportation may require such city or town to cause to be laid all water, sewer, gas or other pipelines or conduits, together with all necessary house or lot connections or services, to the curb line of such road or street to be constructed: Provided further, that whenever by agreement with the road governing body of any city or town any street designated as a part of the State highway system shall be surfaced by order of the Department of Transportation at the expense, in whole or in part, of a city or town it shall be lawful for the governing body of such city or town to declare an assessment district as to the street to be improved, without petition by the owners of property abutting thereon, and the costs thereof, exclusive of so much of the cost as is incurred at street intersections and the share of railroads or street railways whose tracks are laid in said street, which shall be assessed under their franchise, shall be specially assessed upon the lots or parcels of land abutting directly on the improvements, according to the extent of their respective frontage thereon by an equal rate per foot of such frontage. (1921, c. 2, s. 16; 1923, c. 160, s. 4; C.S., s. 3846(ff); 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

**Local Modification.** — Durham: 1925, c. 312; town of Siler City: 1935 Pr., c. 143.

### CASE NOTES

**City Has Power to Condemn Land.** — Under authority of this section a city has the power and authority to condemn land which is wholly within its limits for a street, and the fact that the State Highway Commission (now Department of Transportation) has aided in the construction of the street within the city limits and relieved the city, is for the benefit of the city and in no way abridges the city's power and authority to condemn the land. City of Raleigh v. Hatcher, 220 N.C. 613, 18 S.E.2d 207 (1942).

**Construction of Section with Local Act.** — Chapter 56, Article 9 of the Acts of 1921, providing for local improvements of the streets of a city or incorporated town by a method of assessing the owners of abutting land, and this section, would be construed together in pari materia. Shute v. City of Monroe, 187 N.C. 676, 123 S.E. 71 (1924).

**Street and Highway of Same Width.** — This section applies only where the width of the street and the regular highway are the same. Sechriest v. City of Thomasville, 202 N.C. 108, 162 S.E. 212 (1932).

**Exercise of Power by City.** — Where the State Highway Commission (now Department of Transportation) orders a connecting link to be hard surfaced, and the municipality voluntarily agrees to make the improvement, it is not required that a petition of the abutting owners of land thereon be made. This section gives the governing body of the municipality power to make it an assessment district. Shute v. City of Monroe, 187 N.C. 676, 123 S.E. 71 (1924).

**Power of City to Voluntarily Improve.** — Where a city or incorporated town having three thousand inhabitants, or more, has a considerable portion of its streets hard surfaced, the municipality may voluntarily assess and undertake the improvement of a street being a connecting link in the highway system. Shute v. City of Monroe, 187 N.C. 676, 123 S.E. 71 (1924).

**Invalid Assessment May Be Subsequently Validated.** — Where an incorporated town, under authority of this section, levies an assessment against abutting property owners for street improvements in paving a strip on either side of a State highway running through the town, but such levies are made without a petition of the abutting owners, the assessments are invalid but not void, and the legislature has the power to validate the assessments by subsequent legislative act. Crutchfield v. City of Thomasville, 205 N.C. 709, 172 S.E. 366 (1934).

**Cited** in Long v. City of Randleman, 199 N.C. 344, 154 S.E. 317 (1930).

## § 136-27.1. Relocation of water and sewer lines of municipalities and nonprofit water or sewer corporations or associations.

The Department of Transportation shall pay the nonbetterment cost for the relocation of water and sewer lines, located within the existing State transportation project right-of-way, that are necessary to be relocated for a State transportation improvement project and that are owned by: (i) a municipality with a population of 5,500 or less according to the latest decennial census; (ii) a nonprofit water or sewer association or corporation; (iii) any water or sewer system organized pursuant to Chapter 162A of the General Statutes; (iv) a rural water system operated by a County as an enterprise system; (v) any sanitary district organized pursuant to Part 2 of Article 2 of Chapter 130A of the General Statutes; or (vi) constructed by a water or sewer system organized pursuant to Chapter 162A of the General Statutes and then sold or transferred to a municipality with a population of greater than 5,500 according to the latest decennial census. (1983 (Reg. Sess., 1984), c. 1090; 1985, c. 479, s. 186(a); 1985 (Reg. Sess., 1986), c. 1018, s. 11; 1993 (Reg. Sess., 1994), c. 736, s. 1; 1995, c. 33, s. 1; c. 266, s. 1.1; 2009-266, s. 11.)

**Effect of Amendments.** — Session Laws 2009-266, s. 11, effective August 1, 2009, substituted "transportation project" and "transportation" for "highway" near the beginning of the section.

### CASE NOTES

**Waiver of Sovereign Immunity.** — This section logically implies waiver of sovereign immunity as to those costs the Department of Transportation is obligated to pay. Bell Arthur Water Corp. v. DOT, 101 N.C. App. 305, 399 S.E.2d 353 (1991), discretionary review denied, 328 N.C. 569, 403 S.E.2d 507 (1991).

**There is no requirement under this section that the project be "let to contract."** Bell Arthur Water Corp. v. DOT, 101 N.C. App. 305, 399 S.E.2d 353 (1991), discretionary review denied, 328 N.C. 569, 403 S.E.2d 507 (1991).

**Determination of Whether Work Was Improvement.** — Material issue of fact existed as to whether work was an "improvement," where the only description in the record of the work performed was that it was work performed to replace a "blown out" storm drain pipe. Bell Arthur Water Corp. v. DOT, 101 N.C. App. 305, 399 S.E.2d 353 (1991), discretionary review denied, 328 N.C. 569, 403 S.E.2d 507 (1991).

### OPINIONS OF ATTORNEY GENERAL

**Qualification for Exemption.** — On the date the Department of Transportation lets a contract for a highway improvement project, a water or sewer system organized pursuant to Chapter 162A must be in existence to qualify for an exemption from the requirement that water and sewer lines on state highway right of way be relocated at local expense. See opinion of Attorney General to Mr. William S. Richardson, — N.C.A.G. — (June 21, 1994).

**The existence of a right of way encroachment agreement** did not affect the application of the exemption as the specific exemption contained in this section supersedes any conflicting provision of the agreement and would not be enforceable. See opinion of Attorney General to Mr. William S. Richardson, — N.C.A.G. — (June 21, 1994).

## § 136-27.2. Relocation of county-owned natural gas lines located on Department of Transportation right-of-way.

The Department of Transportation shall pay the nonbetterment cost for the relocation of county-owned natural gas lines, located within the existing State transportation project right-of-way, that the Department needs to relocate due to a State transportation improvement project. (2002-126, s. 26.18(a); 2009-266, s. 12.)

**Editor's Note.** — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 26.18(b), provides: "The Department of Transportation is directed to use monies appropriated to the Department to relocate county-owned natural gas lines located on Department of Transportation right-of-way."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

**Effect of Amendments.** — Session Laws 2009-266, s. 12, effective August 1, 2009, substituted "transportation project" for "highway" near the middle, and "transportation" for "highway" near the end.

## § 136-28: Repealed by Session Laws 1971, c. 972, s. 6.

## § 136-28.1. Letting of contracts to bidders after advertisement; exceptions.

(a) All contracts over one million two hundred thousand dollars ($1,200,000) that the Department of Transportation may let for construction, maintenance, operations, or repair necessary to carry out the provisions of this Chapter shall be let to a responsible bidder after public advertising under rules and regulations to be made and published by the Department of Transportation. The right to reject any and all bids shall be reserved to the Board of Transportation. Contracts for construction or repair for federal aid projects entered into pursuant to this section shall not contain the standardized contract clauses prescribed by 23 U.S.C. § 112(e) and 23 C.F.R. § 635.109 for differing site conditions, suspensions of work ordered by the engineer or significant changes in the character of the work. For those federal aid projects, the Department of Transportation shall use only the contract provisions for differing site conditions, suspensions of work ordered by the engineer, or significant changes in the character of the work developed by the North Carolina Department of Transportation and approved by the Board of Transportation.

(b) For contracts let to carry out the provisions of this Chapter in which the amount of work to be let to contract for transportation infrastructure construction or repair is one million two hundred thousand dollars ($1,200,000) or less, and for transportation infrastructure maintenance, excluding resurfacing, that is one million two hundred thousand dollars ($1,200,000) per year or less, at least three informal bids shall be solicited. The term "informal bids" is defined as bids in writing, received pursuant to a written request, without public advertising. All such contracts shall be awarded to the lowest responsible bidder. The Secretary of Transportation shall keep a record of all bids submitted, which record shall be subject to public inspection at any time after the bids are opened.

(c) The construction, maintenance, and repair of ferryboats and all other marine floating equipment and the construction and repair of all types of docks by the Department of Transportation shall be deemed highway construction, maintenance, or repair for the purpose of G.S. 136-28.1 and Chapter 44A and Chapter 143C of the General Statutes, the State Budget Act. In cases of a written determination by the Secretary of Transportation that the requirement for compatibility does not make public advertising feasible for the repair of ferryboats, the public advertising as well as the soliciting of informal bids may be waived.

(d) The construction, maintenance, and repair of the highway rest area buildings and facilities, weight stations and the Department of Transportation's participation in the construction of welcome center buildings shall be deemed highway construction, maintenance, or repair for the purpose of G.S. 136-28.1 and 136-28.3 and Chapter 143C of the General Statutes, the State Budget Act.

(e) The Department of Transportation may enter into contracts for construction, maintenance, or repair without complying with the bidding requirements of this section upon a determination of the Secretary of Transportation or the Secretary's designee that an emergency exists and that it is not feasible or not in the public interest for the Department of Transportation to comply with the bidding requirements.

(f) Notwithstanding any other provision of law, the Department of Transportation may solicit proposals under rules and regulations adopted by the Department of Transportation for all contracts for professional engineering services and other kinds of professional or specialized services necessary in connection with the planning, design, maintenance, repair, and construction of transportation infrastructure. In order to promote engineering and design quality and ensure maximum competition by professional firms of all sizes, the Department may establish fiscal guidelines and limitations necessary to promote cost-efficiencies in overhead, salary, and expense reimbursement rates. The right to reject any and all proposals is reserved to the Board of Transportation.

(g) The Department of Transportation may enter into contracts for research and development with educational institutions and nonprofit organizations without soliciting bids or proposals.

(h) The Department of Transportation may enter into contracts for applied research and experimental work without soliciting bids or proposals; provided, however, that if the research or work is for the purpose of testing equipment, materials, or supplies, the provisions of Article 3 of Chapter 143 of the General Statutes shall apply. The Department of Transportation is encouraged to solicit proposals when contracts are entered into with private firms when it is in the public interest to do so.

(i) The Department of Transportation may negotiate and enter into contracts with public utility companies for the lease, purchase, installation, and maintenance of generators for electricity for its ferry repair facilities.

(j) Repealed by Session Laws 2002-151, s. 1, effective October 9, 2002.

(k) The Department of Transportation may accept bids under this section by electronic means and may issue rules governing the acceptance of these bids. For purposes of this subsection "electronic means" is defined as means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(*l*) The Department of Transportation may enter into as many as two pilot contracts for public private participation in providing litter removal from State right-of-way. Selection of firms to perform this work shall be made using a best value procurement process and shall be without regard to other provisions of law regarding the Adopt-A-Highway Program administered by the Department. Acknowledgement of sponsors may be indicated by appropriate signs that shall be owned by the Department of Transportation. The size, style, specifications, and content of the signs shall be determined in the sole discretion of the Department of Transportation. The Department of Transportation may issue rules and policies necessary to implement this section.

(m) The Department of Transportation may enter into as many as two pilot contracts for public-private participation in providing real-time traveler information at State-owned rest areas. Selection of firms to perform this work shall be made using a best value procurement process. Recognition of sponsors in the program may be indicated by appropriate acknowledgment for any services provided. The size, style, specifications, and content of the acknowledgment shall be determined in the sole discretion of the Department. Revenues generated pursuant to a contract initiated under this subsection shall be shared with Department of Transportation at a predetermined percentage or rate, and shall be earmarked by the Department to maintain the State owned rest areas from which the revenues are generated. The Department of Transportation may issue guidelines, rules, and policies necessary to administer a pilot program initiated under this subsection. (1971, c. 972, s. 1; 1973, c. 507, ss. 5, 16; c. 1194, ss. 4, 5; 1977, c. 464, ss. 7.1, 16; 1979, c. 174; 1981, c. 200, ss. 1, 2; c. 859, s. 68; 1985, c. 122, s. 2; 1985 (Reg. Sess., 1986), c. 955, s. 46; c. 1018, s. 2; 1987, c. 400; 1989, c. 78; c. 749, ss. 2, 3; 1995, c. 167, s. 1; 1997-196, s. 1; 1999-25, ss. 2, 3; 2001-424, ss. 27.9(a), 27.9(b); 2002-151, s. 1; 2006-68, s. 1; 2006-203, s. 75; 2007-439, ss. 3, 4; 2009-266, s. 1; 2009-475, s. 12.)

**Cross References.** — As to Highway Fund and Highway Trust Fund Small Project Bidding, see G.S. 136-28.10. As to provisions similiar to those in former subsection (j) pertaining to design-build construction of transportation projects, see G.S. 136-28.11.

**Editor's Note.** — Session Laws 1998-212, s. 27 was codified as subsection (j) of this section at the direction of the Revisor of Statutes.

Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998.'"

Session Laws 1998-212, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Section 136-28.3, referred to in subsection (d) of this section, has been repealed. For present provisions as to performance bonds, see G.S. 44A-25 et seq.

Session Laws 1993, c. 561, s. 65(b) provides: "(b) The letting of contracts under this section is not subject to any of the provisions of G.S. 135-28.1 relating to the letting of contracts. The Department may waive the bonding requirements of Chapter 44A of the General Statutes and the licensing requirements of Chapter 87 for contracts awarded under this section."

Session Laws 1993, c. 561, s. 65(a) and (c), provide:

"(a) Notwithstanding the provisions of G.S. 136-28.4(b), for Highway Fund or Highway Trust Fund projects of three hundred thousand dollars ($300,000) or less, the Board of Transportation may, after soliciting at least three informal bids in writing from Small Business Enterprises, award contracts to the lowest responsible bidder. The Department of Transportation may identify projects likely to attract increased participation by Small Business Enterprises, and restrict the solicitation and award to those bidders. The Board of Transportation may delegate full authority to award contracts, adopt necessary rules, and administer the provisions of this section to the Secretary of Transportation.

"(c) The Secretary of Transportation shall report quarterly to the Joint Legislative Transportation Oversight Committee on the implementation of this section."

Session Laws 1997-443, s. 32.11, provides that the Department of Transportation may enter into a design-build-warrant contract to develop, with Federal Highway Administration participation, a Congestion Avoidance and Reduction for Autos and Trucks (CARAT) system of traffic management in the Charlotte-Mecklenburg urban areas. Notwithstanding any other provision of law, contractors, their employees, and Department of Transportation employees involved in this project only do not have to be licensed by occupational licensing boards, and for the purpose of entering into contracts, the Department of Transportation is exempted from the provisions of G.S. 136-28.1, 143-52, 143-53, 143-58, 143-128, and 143-129; these exemptions are limited and available only to the extent necessary to comply with federal rules, regulations, and policies for completion of this project. The Department shall report quarterly to the Joint Legislative Transportation Oversight Committee on the project.

For prior similar provisions, see Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 94, Session Laws 1993, c. 321, s. 162, and Session Laws 1995, c. 324, s. 18.14.

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2009-475, s. 15, provides: "The General Assembly finds that it is in the public interest of the State of North Carolina to ensure expeditious awards of ARRA funds to maximize the economic recovery impact of the ARRA. It is the policy of the State to provide fair regulation, oversight, and transparency for the use of ARRA funds and to quickly and efficiently complete the awards of grants and contracts under the ARRA. It is also the policy of this State that, due to the historic level of federal and State oversight of ARRA grant and contract awards, restraint should be exercised in the granting of legal and injunctive relief that might forestall awards to programs and contractors."

**Effect of Amendments.** — Session Laws 2006-203, s. 75, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "Chapter 143C of the General Statutes, the State Budget Act" for "Article 1 of Chapter 143, 'The Executive Budget Act'" in subsections (c) and (d).

Session Laws 2009-266, s. 1, effective August 1, 2009, in subsection (a), inserted "maintenance" in the first sentence; in subsection (b), in the first sentence, substituted "For contracts let to carry out the provisions of this Chapter" for "In those cases" at the beginning, substituted "for construction" for "highway construction, maintenance" and inserted "and for maintenance, excluding resurfacing, that is one million two hundred thousand dollars ($1,200,000) per year or less," near the middle; in subsection (e), substituted "the Secretary's designee" for "the State Highway Administrator" near the middle; and, in subsection (f), in the first sentence, substituted "the planning, design, maintenance, repair, and construction of transportation infrastructure" for "highway construction, maintenance, or repair" at the end.

Session Laws 2009-475, s. 12, effective February 17, 2009, in subsection (a), inserted "operations" near the middle of the first sentence; and in the first sentence of subsection (b), inserted "transportation infrastructure" twice.

## CASE NOTES

**A statutory requirement for competitive bids constitutes a jurisdictional prerequisite** to the exercise of the power of a public corporation to enter into a contract. Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965); Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 4 N.C. App. 126, 166 S.E.2d 705 (1969).

**Persons dealing with a public agency are presumed to know the law** with respect to the requirement of competitive bidding and act at their peril. Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

Persons dealing with a public agency are presumed to know the law with respect to the requirement of competitive bidding and act at their peril. This includes knowledge that the officials and agents of the public agency may not waive the sovereign right of immunity or act in violation of statutory requirements. Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 4 N.C. App. 126, 166 S.E.2d 705 (1969).

**Implied Power to Take Action.** — Where a course of action is reasonably necessary for the effective prosecution of the State Highway Commission's (now Department of Transportation's) obligation to supervise the construction, repair and maintenance of public highways, the power to take such action must be implied from the general authority given and the duty imposed. Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 4 N.C. App. 126, 166 S.E.2d 705 (1969).

**Performance of Extra Remedial Work on**

**Highways under Existing Contract.** — See Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 4 N.C. App. 126, 166 S.E.2d 705 (1969).

**Invalidity of Subsequent Agreements to Pay Additional Compensation.** — In general, but subject to certain limitations and exceptions, statutes requiring the letting of public contracts to the lowest bidder are regarded as rendering invalid and unenforceable subsequent agreements to pay one to whom a public contract has been duly awarded additional compensation for extras or additional labor and materials not included in the original contract, at least where the additional compensation exceeds the amount for which public contracts may be made without competitive bidding. Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 4 N.C. App. 126, 166 S.E.2d 705 (1969).

**Lack of Contract.** — When the North Carolina Department of Transportation (NCDOT) entered into an agreement with a developer to jointly fund a roadway to be built to state specifications by a contractor selected by the developer, which NCDOT approved, due to the involvement of public funds in the project, and the developer did not pay the contractor, the contractor could not sue NCDOT under G.S. 136-29 because NCDOT was neither a joint venturer nor a partner with the developer, and the contractor had not completed a contract with NCDOT under the provisions of G.S. 136-28.1. Rifenburg Constr., Inc. v. Brier Creek Assocs., L.P., 160 N.C. App. 626, 586 S.E.2d 812, 2003 N.C. App. LEXIS 1926 (2003), aff'd sub nom. Rifenburg Constr., Inc. v. Brier Creek Assocs.L.P., 358 N.C. 218, 593 S.E.2d 585 (2004).

**Sovereign Immunity**. — When the North Carolina Department of Transportation (NCDOT) entered into an agreement with a developer to jointly fund a roadway to be built to state specifications by a contractor selected by the developer, which NCDOT approved, due to the involvement of public funds in the project, the contract was not let pursuant to G.S. 136-28.1, but, rather, was entered into pursuant to G.S. 136-28.6, so when the developer did not pay the contractor, NCDOT was not liable to the contractor because it did not contract with the contractor and, therefore, did not waive its sovereign immunity as to the contractor. Rifenburg Constr., Inc. v. Brier Creek Assocs., L.P., 160 N.C. App. 626, 586 S.E.2d 812, 2003 N.C. App. LEXIS 1926 (2003), aff'd sub nom. Rifenburg Constr., Inc. v. Brier Creek Assocs.L.P., 358 N.C. 218, 593 S.E.2d 585 (2004).

**Cited** in Allan Miles Cos. v. North Carolina Dep't of Transp., 68 N.C. App. 136, 314 S.E.2d 576 (1984); Welch Contr., Inc. v. N.C. DOT, 175 N.C. App. 45, 622 S.E.2d 691, 2005 N.C. App. LEXIS 2725 (2005).

### OPINIONS OF ATTORNEY GENERAL

**Contracts for Mowing Grass.** — Grass mowing is not a professional or specialized service within the meaning of this section. The professional or specialized services referenced in G.S. 136-28.1(f) must be "... necessary in connection with highway construction or repair...". Mowing grass on the right of way along public highways is a maintenance function rather than a form of highway construction or repair. See opinion of Attorney General to D.W. Bailey, P.E., Chief Engineer-Operations, Department of Transportation, 60 N.C.A.G. 97 (1992).

Contracts awarded for grass mowing services along public highways are governed by G.S. 143-49(3). See opinion of Attorney General to D.W. Bailey, P.E., Chief Engineer-Operations, Department of Transportation, 60 N.C.A.G. 97 (1992).

## § 136-28.2. Relocated transportation infrastructure; contracts let by others.

The Department of Transportation is authorized to permit power companies and governmental agencies, including agencies of the federal government, when it is necessary to relocate transportation infrastructure by reason of the construction of a dam, to let contracts for the construction of the relocated transportation infrastructure. The construction shall be in accordance with the Department of Transportation standards and specifications. The Department of Transportation is further authorized to reimburse the power company or governmental agency for betterments arising out of the construction of the relocated transportation infrastructure, provided the bidding and the award is in accordance with the Department of Transportation's regulations and the

Department of Transportation approves the award of the contract. (1971, c. 972, s. 2; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 2009-266, s. 13.)

**Effect of Amendments.** — Session Laws 2009-266, s. 13, effective August 1, 2009, substituted "transportation infrastructure" for "highways" in the section catchline; and substituted "transportation infrastructure" for "highway" in the first and last sentences, and substituted "transportation infrastructure" for "a public highway" in the first sentence.

**§ 136-28.3:** Repealed by Session Laws 1973, c. 1194, s. 6.

**Editor's Note.** — As to payment and performance bonds, see now G.S. 44A-25 et seq.

## § 136-28.4. (Expires August 31, 2010) State policy concerning participation by disadvantaged minority-owned and women-owned businesses in highway contracts.

(a) It is the policy of this State, based on a compelling governmental interest, to encourage and promote participation by disadvantaged minority-owned and women-owned businesses in contracts let by the Department pursuant to this Chapter for the planning, design, preconstruction, construction, alteration, or maintenance of State highways, roads, streets, or bridges and in the procurement of materials for these projects. All State agencies, institutions, and political subdivisions shall cooperate with the Department of Transportation and among themselves in all efforts to conduct outreach and to encourage and promote the use of disadvantaged minority-owned and women-owned businesses in these contracts.

(b) At least every five years, the Department shall conduct a study on the availability and utilization of disadvantaged minority-owned and women-owned business enterprises and examine relevant evidence of the effects of race-based or gender-based discrimination upon the utilization of such business enterprises in contracts for planning, design, preconstruction, construction, alteration, or maintenance of State highways, roads, streets, or bridges and in the procurement of materials for these projects. Should the study show a strong basis in evidence of ongoing effects of past or present discrimination that prevents or limits disadvantaged minority-owned and women-owned businesses from participating in the above contracts at a level which would have existed absent such discrimination, such evidence shall constitute a basis for the State's continued compelling governmental interest in remedying such race and gender discrimination in highway contracting. Under such circumstances, the Department shall, in conformity with State and federal law, adopt by rule and contract provisions a specific program to remedy such discrimination. This specific program shall, to the extent reasonably practicable, address each barrier identified in such study that adversely affects contract participation by disadvantaged minority-owned and women-owned businesses.

(b1) Based upon the findings of the Department's Second Generation Disparity Study completed in 2004, hereinafter referred to as "Study", the program design shall, to the extent reasonably practicable, incorporate narrowly tailored remedies identified in the Study, and the Department shall implement a comprehensive antidiscrimination enforcement policy. As appropriate, the program design shall be modified by rules adopted by the Department that are consistent with findings made in the Study and in subsequent studies conducted in accordance with subsection (b) of this section. As part of this program, the Department shall review its budget and establish annual aspirational goals, not mandatory goals, in percentages, for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses. These annual aspirational goals for disadvantaged minority-owned and women-owned businesses shall be established consistent with methodology specified in the Study, and they shall not be applied rigidly on specific contracts or projects. Instead, the Department shall establish contract-specific goals or project-specific goals for the participation of such firms in a manner consistent with availability of disadvantaged minority-owned and women-owned businesses, as appropriately defined by its most recent Study, for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization. Nothing in this section shall authorize the use of quotas. Any program implemented as a result of the Study conducted in accordance with this section shall be narrowly tailored to eliminate the effects of historical and continuing discrimination and its impacts on such disadvantaged minority-owned and women-owned businesses without any undue burden on other contractors. The Department shall give equal opportunity for contracts it lets without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition, as defined in G.S. 168A-3, to all contractors and businesses otherwise qualified.

(c) The following definitions apply in this section:

(1) "Disadvantaged business" has the same meaning as "disadvantaged business enterprise" in 49 C.F.R. § 26.5 or any subsequently promulgated replacement regulation.

(2) "Minority" includes only those racial or ethnicity classifications identified by a study conducted in accordance with this section that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department.

(d) The Department shall report semiannually to the Joint Legislative Transportation Oversight Committee on the utilization of disadvantaged minority-owned businesses and women-owned businesses and any program adopted to promote contracting opportunities for those businesses. Following each study of availability and utilization, the Department shall report to the Joint Legislative Transportation Oversight Committee on the results of the study for the purpose of determining whether the provisions of this section should continue in force and effect.

(e) This section expires August 31, 2010. (1983, c. 692, s. 3; 1989, c. 692, s. 1.5; 1989 (Reg. Sess., 1990), c. 1066, s. 143(a); 2006-261, s. 4; 2009-266, s. 3.)

**Cross References.** — As to Highway Fund and Highway Trust Fund Small Project Bidding, see G.S. 136-28.10.

**Editor's Note.** — Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 143(b) provided that the Department of Transportation should compile and keep a current list of all disadvantaged, minority, and women businesses in the State that could participate in contracts bought by the Department, and should adopt a plan for actively seeking participation by disadvantaged, minority, and women businesses pursuant to the State policy set forth in this section. The Department was required to report to the Joint Legislative Highway Oversight Committee on the details of this plan and keep the Committee informed of its progress in meeting the goals established in this section.

Session Laws 1993, c. 321, s. 169.2(g) provides: "Any law that contains 'Joint Legislative Highway Oversight Committee' shall be deemed to refer to the 'Joint Legislative Transportation Oversight Committee.' "

Session Laws 1993, c. 321, s. 321 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

**Effect of Amendments.** — Session Laws 2009-266, s. 3, effective August 1, 2009, substituted "August 31, 2010" for "August 31, 2009" in subsection (e).

### CASE NOTES

**Defendant was in compliance** with the Department of Transportation requirements entitled Program for Participation by Disadvantaged Business Enterprises in the North Carolina Department of Transportation's Federally Assisted Programs (1990). Clark Trucking of Hope Mills, Inc. v. Lee Paving Co., 109 N.C. App. 71, 426 S.E.2d 288, cert. denied, 333 N.C. 789, 431 S.E.2d 21 (1993).

**Cited** in Dickerson Carolina, Inc. v. Harrelson, 114 N.C. App. 693, 443 S.E.2d 127 (1994).

### OPINIONS OF ATTORNEY GENERAL

**Minority Participation Provisions.** — The minority participation provisions in this section, G.S. 143-128, 160A-17.1, Session Laws 1989, c. 8, s. 3(b) (Senate Bill 38) appear to be facially constitutional under the principles established by the United States Supreme Court in City of Richmond v. J.A. Croson Company, — U.S. —, 109 S. Ct. 706 (1989), because none of the provisions in question mandate a racial preference which would result in a deprivation of personal rights guaranteed to all persons by the Equal Protection Clause of the Fourteenth Amendment. See opinion of the Attorney General to Rep. Thomas C. Hardaway, Co-Chairman, Sen. Ralph Hunt, Co-Chairman, Legislative Research Commission Committee on Minority Business Contracts and Small Business Assistance, 60 N.C.A.G. 1 (1990).

## § 136-28.5. Construction diaries; bid analysis and management system.

(a) Diaries kept in connection with construction or repair contracts entered into pursuant to G.S. 136-28.1 shall not be considered public records for the purposes of Chapter 132 of the General Statutes until the final estimate has been paid.

(b) Analyses generated by the Department of Transportation's Bid Analysis and Management System, including work papers, documents and the output of automated systems associated with the analyses of bids made by the Bid Analysis and Management System, are confidential and are not subject to the public records provisions of Chapter 132 of the General Statutes. (1987, c. 380, s. 1; 1991, c. 716, s. 1.)

## § 136-28.6. Participation by the Department of Transportation with private developers.

(a) The Department of Transportation may participate in private engineering and construction contracts for State transportation systems.

(b) In order to qualify for State participation, the project must be:

(1) The construction of a transportation project on the Transportation Improvement Plan adopted by the Department of Transportation; or

(2) The construction of a transportation project on a mutually adopted transportation plan that is designated a Department of Transportation responsibility.

(c) Only those projects in which the right-of-way is furnished without cost to the Department of Transportation are eligible.

(d) The Department's participation shall be limited to fifty percent (50%) of the amount of any engineering contract and/or any construction contract let for the project.

(e) Department of Transportation participation in the contracts shall be limited to cost associated with normal practices of the Department of Transportation.

(f) Plans for the project must meet Department of Transportation standards and shall be approved by the Department of Transportation.

(g) Projects shall be constructed in accordance with the plans and specifications approved by the Department of Transportation.

(h) The Secretary shall report in writing, on a quarterly basis, to the Joint Legislative Commission on Governmental Operations on all agreements entered into between a private developer and the Department of Transportation for participation in private engineering and construction contracts under this section.

(i) Counties and municipalities may participate financially in private engineering, land acquisition, and construction contracts for transportation projects which meet the requirements of subsection (b) of this section within their jurisdiction. (1987, c. 860, ss. 1, 2; 1989, c. 749, s. 1; 1991, c. 272, s. 1; 1993, c. 183, s. 1; 1995, c. 358, s. 5; c. 437, s. 3; c. 447, ss. 1, 2; 2002-170, s. 1; 2008-164, s. 2; 2009-266, s. 14.)

**Effect of Amendments.** — Session Laws 2008-164, s. 2, effective August 3, 2008, rewrote the section heading; in subsection (c), substituted "the right-of-way is furnished" for "the developer furnishes the right-of-way"; deleted "by the developer" preceding "for the project" in subsection (d); substituted "Department of Transportation participation" for "Participation" in subsection (e); and rewrote subsection (i).

Session Laws 2009-266, s. 14, effective August 1, 2009, substituted "transportation systems" for "highways" at the end of subsection (a); in subdivisions (b)(1) and (b)(2), substituted "transportation project" for "street or highway"; and in subsection (i), substituted "transportation projects" for "projects pertaining to streets or highways."

## CASE NOTES

**Sovereign Immunity**. — When the North Carolina Department of Transportation (NCDOT) entered into an agreement with a developer to jointly fund a roadway to be built to state specifications by a contractor selected by the developer, which NCDOT approved, due to the involvement of public funds in the project, and the developer did not pay the contractor, NCDOT was not liable to the contractor because it did not contract with the contractor and, therefore, did not waive its sovereign immunity as to the contractor. Rifenburg Constr., Inc. v. Brier Creek Assocs., L.P., 160 N.C. App. 626, 586 S.E.2d 812, 2003 N.C. App. LEXIS 1926 (2003), aff'd sub nom. Rifenburg Constr., Inc. v. Brier Creek Assocs.L.P., 358 N.C. 218, 593 S.E.2d 585 (2004).

**Joint Venture**. — When the North Carolina Department of Transportation (NCDOT) entered into an agreement with a developer to jointly fund a roadway to be built to state specifications by a contractor selected by the developer, which NCDOT approved, due to the involvement of public funds in the project, it did not enter into a joint venture with the developer because: (1) no language in G.S. 136-28.6 referred to a joint venture being created in any agreement contemplated by that statute; and (2) if a joint venture could be created, none was created under these facts because NCDOT had unilateral approval of the quality of the work performed by the developer and a joint venture required an equal right, between the joint venturers, to control the means employed to carry out the venture. Rifenburg Constr., Inc. v. Brier Creek Assocs., L.P., 160 N.C. App. 626, 586 S.E.2d 812, 2003 N.C. App. LEXIS 1926 (2003), aff'd sub nom. Rifenburg Constr., Inc. v. Brier Creek Assocs.L.P., 358 N.C. 218, 593 S.E.2d 585 (2004).

**Partnership**. — When the North Carolina Department of Transportation (NCDOT) entered into an agreement with a developer to jointly fund a roadway to be built to state specifications by a contractor selected by the developer, which NCDOT approved, due to the involvement of public funds in the project, it did not enter into a partnership with the developer because: (1) no language in G.S. 136-28.6 referred to a partnership being created in any agreement contemplated by that statute; and (2) if a partnership could be created, none was created under these facts because nothing indicated NCDOT and the developer entered into an agreement as co-owners of any business for profit or that they were otherwise a partnership under G.S. 59-36(b). Rifenburg Constr., Inc. v. Brier Creek Assocs., L.P., 160 N.C. App. 626, 586 S.E.2d 812, 2003 N.C. App. LEXIS 1926 (2003), aff'd sub nom. Rifenburg Constr., Inc. v. Brier Creek Assocs.L.P., 358 N.C. 218, 593 S.E.2d 585 (2004).

## § 136-28.6A. (Expires December 31, 2011) Partnerships with private developers.

(a) When in the best interest of the State, the Department may enter into a contract with a private developer to accomplish the engineering, design, or construction of improvements to the State highway system.

(b) The Department is authorized to establish policies and promulgate rules providing for its participation in contracts for projects performed on or abutting a state highway or on a facility planned to be added to the State highway system for purposes of completing incidental work on the State highway system.

(c) Any project funded or constructed under this section shall be subject to the following restrictions:

(1) The Department's participation shall be limited to the lesser of ten percent (10%) of the amount of the engineering contract and any construction contract let by the developer for the project or two hundred fifty thousand dollars ($250,000). However, under no circumstances shall participation in the contracts by the Department exceed costs associated with normal practices of the Department.

(2) Plans for the project must meet established standards and shall be approved by the Department.

(3) Projects shall be constructed in accordance with the plans and specifications approved by the Department.

(d) The Secretary shall report annually, not later than March 1, in writing to the Joint Legislative Commission on Governmental Operations and the Joint Legislative Transportation Oversight Committee on all agreements entered into between the Department and a private developer for participation in private engineering and construction contracts under this section. (2009-235, s. 1.)

**Editor's Note.** — Session Laws 2009-235, s. 2, made this section effective June 30, 2009, and expiring December 31, 2011.

Subsection (c) of this section was enacted with subdivisions (c)(1), (3), and (4), but without a subdivision (c)(2). Subdivisions (c)(3) and (4) were renumbered as subdivisions (c)(2) and (3) at the direction of the Revisor of Statutes.

## § 136-28.7. Contract requirements relating to construction materials.

(a) The Department of Transportation shall require that every contract for construction or repair necessary to carry out the provisions of this Chapter shall contain a provision requiring that all steel and iron permanently incorporated into the construction or repair project be produced in the United States.

(b) Subsection (a) shall not apply whenever the Department of Transportation determines in writing that this provision required by subsection (a) cannot be complied with because such products are not produced in the United States in sufficient quantities to meet the requirements of such contracts or cannot be complied with because the cost of such products produced in the United States unreasonably exceeds other such products.

(c) The Department of Transportation shall apply this section consistent with the requirements in 23 C.F.R. § 635.410(b)(4).

(d) The Department of Transportation shall not authorize, provide for, or make payments to any person pursuant to any contract containing the provision required by subsection (a) unless such person has fully complied with such provision. (1989, c. 692, s. 1.18; c. 770, ss. 74.12, 74.14, 74.15; 2002-151, s. 3.)

## § 136-28.8. Use of recycled materials in construction.

(a) It is the intent of the General Assembly that the Department of Transportation continue to expand its use of recycled materials in its construction and maintenance programs.

(b) The General Assembly declares it to be in the public interest to find alternative ways to use certain recycled materials that currently are part of the solid waste stream and that contribute to problems of declining space in landfills. The Department shall, consistent with economic feasibility and applicable engineering and environmental quality standards, use:

(1) Rubber from tires in road pavements, subbase materials, or other appropriate applications.

(2) Recycled materials for guard rail posts, right-of-way fence posts, and sign supports.

(3) Recycling technology, including, but not limited to, hot in-place recycling, in road and highway maintenance.

(c) As a part of its scheduled projects, the Department shall conduct additional research, which may include demonstration projects, on the use of recycled materials in construction and maintenance.

(d) The Department shall review and revise existing bid procedures and specifications to eliminate any procedures and specifications that explicitly discriminate against recycled materials in construction and maintenance, except where the procedures and specifications are necessary to protect the health, safety, and welfare of the people of this State.

(e) The Department shall review and revise its bid procedures and specifications on a continuing basis to encourage the use of recycled materials in construction and maintenance and shall, to the extent economically practicable, require the use of recycled materials.

(f) All agencies shall cooperate with the Department in carrying out the provisions of this section.

(g) On or before October 1 of each year, the Department shall report to the Division of Pollution Prevention and Environmental Assistance of the Department of Environment and Natural Resources as to the amounts and types of recycled materials that were specified or used in contracts that were entered into during the previous fiscal year. On or before December 1 of each year, the Division of Pollution Prevention and Environmental Assistance shall prepare a summary of this report and submit the summary to the Joint Legislative Commission on Governmental Operations and the Joint Legislative Transportation Oversight Committee. The summary of this report shall also be included in the report required by G.S. 130A-309.06(c).

(h) The Department, in consultation with the Department of Environment and Natural Resources, shall determine minimum content standards for recycled materials.

(i) This section is broadly applicable to all procurements by the Department if the quality of the product is consistent with the requirements of the bid specifications.

(j) The Department may adopt rules to implement this section. (1989, c. 784, s. 6; 1993, c. 256, s. 3; 1995 (Reg. Sess., 1996), c. 743, s. 9; 1997-443, s. 11A.119(a); 1999-237, s. 27.4; 2001-452, s. 3.6.)

**Editor's Note.** — Session Laws 1989, c. 784, s. 6 enacted this section as G.S. 136-285. The section has been recodified as G.S. 136-28.8 at the direction of the Revisor of Statutes.

## § 136-28.9. Retainage — construction contracts.

Notwithstanding the provisions of G.S. 147-69.1, 147-77, 147-80, 147-86.10, and 147-86.11, or any other provision of the law, the Department of Transportation is authorized to enter into trust agreements with banks and contractors for the deposit of retainage and for the payment to contractors of income on these deposits, in connection with transportation construction contracts, in trust accounts with banks in accordance with Department of Transportation regulations, including deposit insurance and collateral requirements. The Department of Transportation may contract with those banks without trust departments in addition to those with trust departments. Funds deposited in any trust account shall be invested only in bonds, securities, certificates of deposits, or other forms of investment authorized by G.S. 147-69.1 for the investment of State funds. The trust agreement may also provide for interest to be paid on uninvested cash balances. (1989 (Reg. Sess., 1990), c. 1074, s. 38; 2009-266, s. 15.)

**Effect of Amendments.** — Session Laws 2009-266, s. 15, effective August 1, 2009, substituted "transportation construction contracts" for "highway construction contracts" in the first sentence.

## § 136-28.10. Highway Fund and Highway Trust Fund Small Project Bidding.

(a) Notwithstanding the provisions of G.S. 136-28.4(b), for Highway Fund or Highway Trust Fund construction and repair projects of five hundred thousand dollars ($500,000) or less, and maintenance projects of five hundred thousand dollars ($500,000) or less per year, the Board of Transportation may, after soliciting at least three informal bids in writing from Small Business Enterprises, award contracts to the lowest responsible bidder. The Department of Transportation may identify projects likely to attract increased participation by Small Business Enterprises, and restrict the solicitation and award to those bidders. The Board of Transportation may delegate full authority to award contracts, adopt necessary rules, and administer the provisions of this section to the Secretary of Transportation.

(b) The letting of contracts under this section is not subject to any of the provisions of G.S. 136-28.1 relating to the letting of contracts. The Department may waive the bonding requirements of Chapter 44A of the General Statutes and the licensing requirements of Chapter 87 for contracts awarded under this section.

(c) The Secretary of Transportation shall report quarterly to the Joint Legislative Transportation Oversight Committee on the implementation of this section. (1993, c. 561, s. 65; 1999-25, s. 1; 2009-266, s. 2.)

**Cross References.** — As to letting of contracts to bidders after advertisement and exceptions, see G.S. 136-28.1. As to State policy concerning participation by disadvantaged businesses in highway contracts, see G.S. 136-28.4.

**Editor's Note.** — Session Laws 1993, c. 561, s. 65, effective July 1, 1993, was codified as this section at the direction of the Revisor of Statutes.

**Effect of Amendments.** — Session Laws 2009-266, s. 2, effective August 1, 2009, in subsection (a), inserted "construction and repair" and "and maintenance projects of five hundred thousand dollars ($500,000) or less per year" in the first sentence.

## § 136-28.11. Design-build construction of transportation projects.

(a) Design-Build Contracts Authorized. — Notwithstanding any other provision of law, the Board of Transportation may award contracts for up to 25 projects each fiscal year for construction of transportation projects on a design-build basis.

(b) Design-Build Contract Amounts; Basis of Award. — The Department may award contracts for the construction of transportation projects on a design-build basis of any amount. The Department shall endeavor to ensure design-build projects are awarded on a basis to maximize participation, competition, and cost benefit. On any project for which the Department proposes to use the design-build contracting method, the Department shall attempt to structure and size the contracts for the project in order that contracting firms and engineering firms based in North Carolina have a fair and equal opportunity to compete for the contracts.

(c) Disadvantaged Business Participation Goals. — The provisions of G.S. 136-28.4 and 49 C.F.R. Part 26 shall apply to the award of contracts under this section.

(d) Findings Required. — These contracts may be awarded after a determination by the Department of Transportation that delivery of the projects must be expedited and that it is not in the public interest to comply with normal design and construction contracting procedures.

(e) Reporting Requirements. — The Department, for any proposed design-build project projected to have a construction cost in excess of fifty million dollars ($50,000,000), shall present to the Joint Legislative Transportation Oversight Committee information on the scope and nature of the project and the reasons the development of the project on a design-build basis will best serve the public interest. (2001-424, s. 27.2(a); 2002-151, s. 2; 2007-357, s. 1.)

**Cross References.** — For similiar provisions, see G.S. 136-28.1(j).

**Editor's Note.** — Session Laws 2001-424, s. 27.2(b), provides: "The Department of Transportation shall report to the Joint Legislative Transportation Oversight Committee on September 1, December 1, and March 1 of each year on the status of all design-build projects."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5, is a severability clause.

Session Laws 2002-60, s. 1, provides: "In addition to the authority granted by G.S. 136-28.11, the Department of Transportation may award contracts by the design-build method for the multilaning of US Highway 601 from the South Carolina State line to US Highway 74 in Union County."

## § 136-28.12. Litter removal coordinated with mowing of highway rights-of-way.

The Department of Transportation shall, to the extent practicable, schedule the removal of debris, trash, and litter from highways and highway rights-of-way prior to the mowing of highway rights-of-way. The Department of Transportation shall include as a term of any contract that it enters into for the mowing of a highway right-of-way that the contracting party shall, to the extent practicable, coordinate with the scheduled removal of debris, trash, and litter from the highway and highway right-of-way prior to the mowing of the highway right-of-way. (2001-512, s. 3.)

**Editor's Note.** — Session Laws 2001-512, s. 15, provides: "This act shall not be construed to obligate the General Assembly to appropriate any funds to implement the provisions of this act. Every agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to the agency."

## § 136-28.13. Participation in the energy credit banking and selling program.

The Department of Transportation shall participate in the energy credit banking and selling program under G.S. 143-58.4 and is eligible to receive proceeds from the Alternative Fuel Revolving Fund under G.S. 143-58.5 to purchase alternative fuel, develop alternative fuel refueling infrastructure, or purchase AFVs as defined in G.S. 143-58.4. (2005-413, s. 2.)

**Editor's Note.** — Session Laws 2005-413, s. 9, made this section effective January 1, 2006.

## § 136-28.14. Project contractor licensing requirements.

The letting of contracts under this Chapter for the following types of projects shall not be subject to the licensing requirements of Article 1 of Chapter 87 of the General Statutes:

(1) Routine maintenance and minor repair of pavements, bridges, roadside vegetation and plantings, drainage systems, concrete sidewalks, curbs, gutters, and rest areas.

(2) Installation and maintenance of pavement markings and markers, ground mounted signs, guardrail, fencing, and roadside vegetation and plantings. (2006-261, s. 1.)

**Editor's Note.** — Session Laws 2006-261, s. 7, made this section effective August 27, 2006.

Session Laws 2006-261, s. 6, is a severability clause.

## § 136-28.15. Diesel vehicles purchase warranty requirement.

Every new motor vehicle transferred to or purchased by the Department of Transportation that is designed to operate on diesel fuel shall be covered by an express manufacturer's warranty that allows the use of B-20 fuel, as defined in G.S. 143-58.4. This section does not apply if the intended use, as determined by the Department, of the new motor vehicle requires a type of vehicle for which an express manufacturer's warranty allows the use of B-20 fuel is not available. (2007-420, s. 3.)

**Cross References.** — As to manufacturer's warranty for State motor vehicles that operate on diesel fuel, see G.S. 20-351.11.

**Editor's Note.** — Session Laws 2007-420, s. 4, made this section effective January 1, 2008, and applicable to motor vehicles transferred to or purchased by the State on or after that date.

## § 136-29. Adjustment and resolution of Department of Transportation contract claim.

(a) A contractor who has completed a contract with the Department of Transportation let in accordance with Article 2 of this Chapter and who has not received the amount he claims is due under the contract may submit a verified written claim to the Secretary of Transportation for the amount the contractor claims is due. The claim shall be submitted within 60 days after the contractor receives his final statement from the Department and shall state the factual basis for the claim.

The Secretary or the Secretary's designee shall investigate a submitted claim within 90 days of receiving the claim or within any longer time period agreed to by the Secretary or the Secretary's designee and the contractor. The contractor may appear before the Secretary or the Secretary's designee, either in person or through counsel, to present facts and arguments in support of the claim. The Secretary or the Secretary's designee may allow, deny, or compromise the claim, in whole or in part. The Secretary or the Secretary's designee shall give the contractor a written statement of the decision on the contractor's claim.

(b) A contractor who is dissatisfied with the Secretary or the Secretary's designee's decision on the contractor's claim may commence a contested case on the claim under Chapter 150B of the General Statutes. The contested case shall be commenced within 60 days of receiving the written statement of the decision.

(c) As to any portion of a claim that is denied by the Secretary or the Secretary's designee, the contractor may, in lieu of the procedures set forth in subsection (b) of this section, within six months of receipt of the final decision, institute a civil action for the sum he claims to be entitled to under the contract by filing a verified complaint and the issuance of a summons in the Superior Court of Wake County or in the superior court of any county where the work under the contract was performed. The procedure shall be the same as in all civil actions except that all issues shall be tried by the judge, without a jury.

(d) The provisions of this section shall be part of every contract let in accordance with Article 2 of this Chapter between the Department of Transportation and a contractor. A provision in a contract that conflicts with this section is invalid. (1939, c. 318; 1947, c. 530; 1957, c. 65, s. 11; 1963, c. 667; 1965, c. 55, s. 11; 1967, c. 873; 1973, c. 507, ss. 5, 17, 18; 1977, c. 464, s. 7.1; 1983, c. 761, s. 191; 1987, c. 847, s. 3; 2009-266, s. 16.)

**Effect of Amendments.** — Session Laws 2009-266, s. 16, effective August 1, 2009, in the section catchline, substituted "Department of Transportation" for "highway construction;" substituted "Secretary or the Secretary's designee" for "State Highway Administrator" and "State Highway Administrator's" throughout the section; in subsection (a), in the first paragraph, substituted "let in accordance with Article 2 of this Chapter" for "to construct a State highway" and "Secretary of Transportation" for "State Highway Administrator" in the first sentence, and in the second paragraph, in the second sentence, substituted "the claim" for "his claim", and in the last sentence, deleted "State Highway Administrator's" preceding "decision"; in subsection (b), deleted "State Highway Administrator's" preceding "written" in the last sentence; and, in subsection (d), substituted "let in accordance with Article 2 of this Chapter" for "for State highway construction" in the first sentence.

**Legal Periodicals.** — For comment on this section prior to the 1963 amendment, see 17 N.C.L. Rev. 340 (1939).

For note on abrogation of contractual sovereign immunity, see 12 Wake Forest L. Rev. 1082 (1976).

For survey of North Carolina construction law, see 21 Wake Forest L. Rev. 633 (1986).

For article, "North Carolina Construction Law Survey II," see 22 Wake Forest L. Rev. 481 (1987).

## CASE NOTES

**Section Does Not Offend Constitutional Right to Jury.** — The constitutional guarantee of trial by jury applies only where the prerogative existed at common law or by statute at the time the Constitution was adopted. Prior to the enactment of this statute, and certainly at common law, a contractor could not institute this action against the State due to the doctrine of sovereign immunity. The right itself was created by this statute which never intended nor provided for a trial by jury. Therefore, the statute does not offend the constitutional guarantee to trial by jury. Huyck Corp. v. C.C. Mangum, Inc., 309 N.C. 788, 309 S.E.2d 183 (1983).

**Construction of Section.** — In determining whether this section authorizes a suit, the district court notes the principle that statutes in derogation of the common law are generally construed strictly. On the other hand, as a remedial statute, it ought to receive from the courts such a construction as will remedy the existing evil so as to advance the remedy and permit the courts to bring the parties to an issue. Wilmington Shipyard, Inc. v. North Carolina State Hwy. Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

The rule that statutes waiving governmental immunity must be strictly construed does not compel the court to take the strictest possible view of this section, permitting suit against the State Highway Commission (now Department of Transportation) on claims arising out of construction contracts, but the district court will simply examine the language of the statute within its context, mindful of the principle that the intent of the legislature controls the interpretation of a statute. Wilmington Shipyard, Inc. v. North Carolina State Hwy. Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

**The sole statutory grounds that allow suit against the State Highway Administrator** are provided in this section. In re Thompson-Arthur Paving Co., 81 N.C. App. 645, 344 S.E.2d 853, cert. denied, 318 N.C. 506, 349 S.E.2d 874 (1986).

**Contractor's Substantive Rights Not Expanded.** — Although this section, as amended in 1983, terms the board an alternative to civil suit, the claim allowed to the board is nevertheless a waiver of sovereign immunity, the terms of which are to be strictly construed. The same restrictions on maintaining a claim to the board as those for a claim to superior court will be applied, for there is no language, express or implied, that the creation of this alternative was to expand the substantive rights of the contractor against the sovereign immunity of the State. In re Thompson-Arthur Paving Co., 81 N.C. App. 645, 344 S.E.2d 853, cert. denied, 318 N.C. 506, 349 S.E.2d 874 (1986).

**Former Methods for Presenting Claims.** — Prior to enactment of this section, one who had any claim growing out of a contract with the State Highway Commission (now Department of Transportation) could not bring suit against the Commission (now Department), for it is a State agency and no consent to suit has been given. The claimant might present his claim to the General Assembly or he might invoke the original jurisdiction of the Supreme Court. The latter course was not very satisfactory for the court has said that in such a proceeding it will consider only questions of law. The decision of the court, if in favor of the claimant, was simply recommendatory and was reported to the next General Assembly for its action. Wilmington Shipyard, Inc. v. North Carolina State Hwy. Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

**General Assembly Relieved of Judicial Function.** — The attitude of the General Assembly which enacted this section was to relieve that body from the judicial function of passing upon certain claims against the State. Wilmington Shipyard, Inc. v. North Carolina State Hwy. Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

**Section Constitutes Remedy in Action on Contract.** — Subsection (d) of this section provides that the statute is deemed to be a part of "every contract" between Department of Transportation and "any contractor," and this section is therefore a remedy in an action upon such contract. Huyck Corp. v. C.C. Mangum, Inc., 58 N.C. App. 532, 293 S.E.2d 846 (1982), rev'd in part, 309 N.C. 788, 309 S.E.2d 183 (1983).

**Section Assumes Valid Contract Is Subsisting.** — The procedure under this section is available when the contractor has completed his contract with the State Highway Commission (now Department of Transportation) and fails to receive "such settlement as he claims to be entitled to under his contract." This assumes a valid contract is subsisting. Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

Unless the claim arises under a contract, the provisions of this section are not applicable. Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 4 N.C. App. 126, 166 S.E.2d 705 (1969).

When the North Carolina Department of Transportation (NCDOT) entered into an agreement with a developer to jointly fund a roadway to be built to state specifications by a contractor selected by the developer, which NCDOT approved, due to the involvement of public funds in the project, and the developer did not pay the contractor, the contractor could not sue NCDOT under G.S. 136-29 because NCDOT was neither a joint venturer nor a partner with the developer, and the contractor had not completed a contract with NCDOT under the provisions of G.S. 136-28.1. Rifenburg Constr., Inc. v. Brier Creek Assocs., L.P., 160 N.C. App. 626, 586 S.E.2d 812, 2003 N.C. App. LEXIS 1926 (2003), aff'd sub nom. Rifenburg Constr., Inc. v. Brier Creek Assocs.L.P., 358 N.C. 218, 593 S.E.2d 585 (2004).

**Recovery, if any, under the contract must be based on the terms and provisions thereof.** Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

The procedure is to resolve any controversy as to what (additional) amount, if any, the contractor is entitled to recover under the terms of the contract. Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965); Ray D. Lowder, Inc. v. North Carolina State Hwy. Comm'n, 26 N.C. App. 622, 217 S.E.2d 682, cert. denied, 288 N.C. 393, 218 S.E.2d 467 (1975).

Recovery, if any, must be within the terms and framework of the provisions of the contract. Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 4 N.C. App. 126, 166 S.E.2d 705 (1969); Blankenship Constr. Co. v. North Carolina State Hwy. Comm'n, 28 N.C. App. 593, 222 S.E.2d 452, cert. denied, 290 N.C. 550, 230 S.E.2d 765 (1976).

This section provides for recovery only within the terms and framework of the contract. Inland Bridge Co. v. North Carolina State Hwy. Comm'n, 30 N.C. App. 535, 227 S.E.2d 648 (1976).

**Administrative Remedies Must First Be Pursued.** — Before a party may pursue a judicial action against the state for money claimed to be due under a highway construction contract, it must first pursue its administrative remedies. Huyck Corp. v. C.C. Mangum, Inc., 309 N.C. 788, 309 S.E.2d 183 (1983).

Clearly, the requirement of proceeding first through administrative channels for a resolution of a claim and the requirement that if the claimant receives an adverse ruling a suit must be instituted within six months are conditions precedent and do not preempt the Rules of Civil Procedure. These conditions must be satisfied to vest the trial court with jurisdiction to hear the action. C.W. Matthews Contracting Co. v. State, 75 N.C. App. 317, 330 S.E.2d 630 (1985).

Because G.S. 136-29 was incorporated in a road construction contact, requiring that all claims be submitted to available administrative remedies, a motion for a stay pending the exhaustion of the administrative process as to a claim arising from the contact should have been granted. Nello L. Teer Co. v. Jones Bros., 182 N.C. App. 300, 641 S.E.2d 832, 2007 N.C. App. LEXIS 576 (2007).

**Timely Filing of Claim as Condition Precedent to Recovery.** — To satisfy this section the contractor must submit a claim, accompanied by evidence of verification, within the statutory time limit. Crow v. Citicorp Acceptance Co., 79 N.C. App. 447, 339 S.E.2d 437 (1986), rev'd on other grounds, 319 N.C. 274, 354 S.E.2d 459 (1987).

Where plaintiff's verification was not filed with its first claim and its second claim was not received within the prescribed period, plaintiff failed to fulfill a condition precedent to maintaining its action in superior court and plaintiff's complaint was properly dismissed. E.F. Blankenship Co. v. North Carolina Dep't of Transp., 79 N.C. App. 462, 339 S.E.2d 439 (1986), aff'd, 318 N.C. 685, 351 S.E.2d 293 (1987).

Motion to dismiss a third-party complaint for indemnification against the North Carolina Department of Transportation (NCDOT) should have been dismissed under G.S. 1A-1, N.C. R. Civ. P. 12(b)(1); the complaint, which was filed by a bridge contractor, was untimely because the contractor's G.S. 136-29 verified claim was filed more than 60 days after the contractor received NCDOT's payment on the final estimate for a bridge project, and thus, the trial court lacked subject matter jurisdiction over the action. A.H. Beck Found. Co. v. Jones Bros., 166 N.C. App. 672, 603 S.E.2d 819, 2004 N.C. App. LEXIS 2023 (2004).

**When Final Estimate Received by Contractor.** — Where the State Highway Commission (now Department of Transportation) sent its contractor a warrant for the balance of the contract price less an amount withheld as liquidated damages, with a letter characterizing the payment as "final payment of the contract," and the contractor returned the warrant with a request that it be reissued without words jeopardizing the contractor's right to contest the liquidated damages, the final estimate was received by the contractor within the purview of this section on the date he received a letter returning the warrant with notation permitting its negotiation without jeopardizing the contractor's claim, and the filing of claim by the contractor within 60 days thereafter was timely. L.A. Reynolds Co. v. State Hwy. Comm'n, 271 N.C. 40, 155 S.E.2d 473 (1967).

Although a final estimate sent to a contractor by the North Carolina Department of Transportation (NCDOT) for a bridge erection project was not properly labeled, "The Final Estimate," the statutory requirements of G.S. 136-29 were satisfied by the phrase "final estimate" was used five times within the payments cover letter and accompanying documents, the documents were sent via certified mail, and they followed an inquiry from the contractor regarding the status of the final estimate; the contractor's verified claim, filed 76 days after receipt of the final estimate payment, was untimely. A.H. Beck Found. Co. v. Jones Bros., 166 N.C. App. 672, 603 S.E.2d 819, 2004 N.C. App. LEXIS 2023 (2004).

**A ferryboat is included in the term "highway"** as used in this section. Wilmington Shipyard, Inc. v. North Carolina State Hwy. Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

**And Action on Contract for Maintenance and Reconditioning of Ferryboats Is Authorized.** — This section authorizes an action against the State Highway Commission (now Department of Transportation) on a contract for the maintenance and reconditioning of ferryboats used in the North Carolina highway system. Wilmington Shipyard, Inc. v. North Carolina State Hwy. Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

**As "Maintenance" Is Deemed to Be Included within "Construction" for Purposes of Section.** — A contract for the establishment of a ferry, which the State Highway Commission (now Department of Transportation) may undertake by G.S. 136-82, is equivalent to the "construction of a highway." Repair or reconditioning, i.e., "maintenance" — which the Commission (now Department) may undertake by G.S. 136-82 — as a means of reestablishing ferry service, is a lesser act and is deemed to be included within "construction" for the adjustment of claims under this section. Wilmington Shipyard, Inc. v. North Carolina State Hwy. Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

**Strict compliance with contract provisions is vital prerequisite for recovery of additional compensation** based on altered work, changed conditions or extra work. Blankenship Constr. Co. v. North Carolina State Hwy. Comm'n, 28 N.C. App. 593, 222 S.E.2d 452, cert. denied, 290 N.C. 550, 230 S.E.2d 765 (1976).

**Failure to Comply with Notice and Record-Keeping Requirements Is Bar to Recovery.** — The State should not be obligated to pay a claim for additional compensation unless it is given a reasonable opportunity to insure that the claim is based on accurate determinations of work and cost, and contract notice and record-keeping requirements constitute reasonable protective measures, so that a contractor's failure to adhere to the requirements is necessarily a bar to recovery for additional compensation. Blankenship Constr. Co. v. North Carolina State Hwy. Comm'n, 28 N.C. App. 593, 222 S.E.2d 452, cert. denied, 290 N.C. 550, 230 S.E.2d 765 (1976).

**Plaintiff paving company was not entitled to an equitable adjustment** to allow recovery of extra costs incurred because of underrun in amount of unclassified excavation based on "changed conditions" in the absence of a supplemental agreement. Thompson-Arthur Paving Co. v. North Carolina Dep't of Transp., 97 N.C. App. 92, 387 S.E.2d 72, cert. denied, 327 N.C. 145, 394 S.E.2d 186 (1990).

**Third Party Complaint Against Department of Transportation.** — This section does not prohibit a contractor from filing a third party complaint against Department of Transportation, arising out of the same transaction or occurrence, ancillary to an action brought by a party not privy to the contract. To compel a contractor to proceed first upon the settlement procedure of this section before joining the State and Department of Transportation in an action already filed could result in a forfeiture of that remedy under these circumstances. Huyck Corp. v. C.C. Mangum, Inc., 58 N.C. App. 532, 293 S.E.2d 846 (1982), rev'd in part, 309 N.C. 788, 309 S.E.2d 183 (1983).

**Categorization of Claims.** — Where plaintiff contractor submitted in its verified claim letter a claim for increased compensation due to the encountering of changed conditions, and where plaintiff, while identifying and categorizing certain claims for the benefit of the defendant, made it abundantly clear that any such claims not recognized in the separate categories as presented were to be included in an overall "changed conditions" claim, it was held that plaintiff did not pursue or recover at trial on a theory which had not been previously presented to the State Highway Administrator. S.J. Groves & Sons & Co. v. State, 50 N.C. App. 1, 273 S.E.2d 465 (1980), cert. denied, 302 N.C. 396, 279 S.E.2d 353 (1981).

**Claimant Allowed to Take Voluntary Dismissal and Refile Claim.** — Once the conditions of subsection (a) were satisfied, the trial court was vested with jurisdiction and the claimant was allowed, as a matter of right under G.S. 1A-1, Rule 41(a)(1), to take a voluntary dismissal and refile its claim within one year. C.W. Matthews Contracting Co. v. State, 75 N.C. App. 317, 330 S.E.2d 630 (1985).

**Where contractor changed both the theory and the substance of its claim after the claim was denied** by the Administrator, these changes divested the Board of jurisdiction to hear its appeal. In re Thompson-Arthur Paving Co., 81 N.C. App. 645, 344 S.E.2d 853, cert. denied, 318 N.C. 506, 349 S.E.2d 874 (1986).

**Waiver of Sovereign Immunity.** — Section 136-29 requires simply that the contractor's claim arise out of a breach of a contract or some provision thereof so as to entitle the contractor to some relief. Battle Ridge Cos. v. N.C. DOT, 161 N.C. App. 156, 587 S.E.2d 426, 2003 N.C. App. LEXIS 1981 (2003), cert. denied, 358 N.C. 233, 594 S.E.2d 191 (2004).

Trial court erred in dismissing, pursuant to G.S. 1A-1, Rule 12(b)(6), a construction company's breach of contract action against a state agency; G.S. 136-29 waived the agency's sovereign immunity, as the company complied with the statute and the claims arose under the contract. Battle Ridge Cos. v. N.C. DOT, 161 N.C. App. 156, 587 S.E.2d 426, 2003 N.C. App. LEXIS 1981 (2003), cert. denied, 358 N.C. 233, 594 S.E.2d 191 (2004).

**Applied** in Dickerson, Inc. v. Board of Transp., 26 N.C. App. 319, 215 S.E.2d 870 (1975); Propst Constr. Co. v. North Carolina Dep't of Transp., 307 N.C. 124, 296 S.E.2d 295 (1982); Allan Miles Cos. v. North Carolina Dep't of Transp., 68 N.C. App. 136, 314 S.E.2d 576 (1984).

**Cited** in Nat Harrison Assocs. v. North Carolina State Ports Auth., 280 N.C. 251, 185 S.E.2d 793 (1972); Smith v. State, 289 N.C. 303, 222

S.E.2d 412 (1976); Middlesex Constr. Corp. v. State ex rel. State Art Museum Bldg. Comm'n, 307 N.C. 569, 299 S.E.2d 640 (1983); Barrus Constr. Co. v. North Carolina Dep't of Transp., 71 N.C. App. 700, 324 S.E.2d 1 (1984); Hardaway Constructors, Inc. v. North Carolina DOT, 80 N.C. App. 264, 342 S.E.2d 52 (1986); DOT v. Blue, 147 N.C. App. 596, 556 S.E.2d 609, 2001 N.C. App. LEXIS 1235 (2001); Welch Contr., Inc. v. N.C. DOT, 175 N.C. App. 45, 622 S.E.2d 691, 2005 N.C. App. LEXIS 2725 (2005).

### § 136-30. Uniform signs and other traffic control devices on highways, streets, and public vehicular areas.

(a) State Highway System. — The Department of Transportation may number and mark highways in the State highway system. All traffic signs and other traffic control devices placed on a highway in the State highway system must conform to the Uniform Manual. The Department of Transportation shall have the power to control all signs within the right-of-way of highways in the State highway system. The Department of Transportation may erect signs directing persons to roads and places of importance.

(b) Municipal Street System. — All traffic signs and other traffic control devices placed on a municipal street system street must conform to the appearance criteria of the Uniform Manual. All traffic control devices placed on a highway that is within the corporate limits of a municipality but is part of the State highway system must be approved by the Department of Transportation.

(c) Public Vehicular Areas. — Except as provided in this subsection, all traffic signs and other traffic control devices placed on a public vehicular area, as defined in G.S. 20-4.01, must conform to the Uniform Manual. The owner of private property that contains a public vehicular area may place on the property a traffic control device, other than a sign designating a parking space for handicapped persons, as defined in G.S. 20-37.5, that differs in material from the uniform device but does not differ in shape, size, color, or any other way from the uniform device. The owner of private property that contains a public vehicular area may place on the property a sign designating a parking space for handicapped persons that differs in material and color from the uniform sign but does not differ in shape, size, or any other way from the uniform device.

(d) Definition. — As used in this section, the term "Uniform Manual" means the Manual on Uniform Traffic Control Devices for Streets and Highways, published by the United States Department of Transportation, and any supplement to that Manual adopted by the North Carolina Department of Transportation.

(e) Exception for Public Airport Traffic Signs. — Publicly owned airports, as defined in Chapter 63 of the General Statutes, shall be exempt from the requirements of subsections (b) and (c) of this section with respect to informational and directional signs, but not with respect to regulatory traffic signs. (1921, c. 2, ss. 9(a), 9(b); C.S., ss. 3846(q), 3846(r); 1927, c. 148, s. 54; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1991, c. 530, s. 1; 1991 (Reg. Sess., 1992), c. 818, s. 2; 1993, c. 51, s. 1.)

**Editor's Note.** — Session Laws 1991 (Reg. Sess., 1992), c. 860, s. 1, effective July 7, 1992, inserted "appearance criteria of the" in the first sentence of subsection (b). Section 2 of c. 860 made the act applicable to the City of Charlotte only, and provided that the act would expire when Session Laws 1991 (Reg. Sess., 1992), c. 818, s. 2 became effective. Chapter 818, s. 2 made the same amendment to this section in the form of general legislation, and became effective October 1, 1992, and applicable to offenses committed on or after that date.

Session Laws 1981-1194, s. 7.2, as added by Session Laws 2005-276, s. 28.14(a), provides: "At the request of the Roanoke Voyages Corridor Commission, the Department of Transportation may manufacture and install, on Roanoke Island and up to 30 miles off the island, way-finding signs that, by color, design, and lettering, do not comply with normal transportation signage standards. These signs shall be used to identify and give directions to historic, educational, and cultural attractions on the island. The Department of Transportation shall not erect any signage that would be impracticable, unfeasible, or that would result in an unsafe or hazardous condition.

Session Laws 2005-276, s. 28.14(b), provides: "At the request of the Blue Ridge National Heritage Area Partnership, as established by Public Law 108-108, Title I, Section 140(d)(3), the Department of Transportation may manufacture and install way-finding signs that, by color, design, and lettering, do not comply with normal transportation signage standards. Signage throughout the 25-county area, as defined in Public Law 108-108, Title I, Section 140(d)(2), of the Blue Ridge National Heritage Area shall be used to identify and give directions to historic, educational, and cultural attractions. The Department of Transportation shall not erect any signage that would be impracticable, unfeasible, or that would result in an unsafe or hazardous condition."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

### CASE NOTES

**Responsibility for City Streets Which Become Part of State System.** — When a city street becomes a part of the State highway system, the Board (now the Department) of Transportation is responsible for its maintenance thereafter which includes the control of all signs and structures within the right-of-way. Therefore, in the absence of any control over a State highway within its border, a municipality has no liability for injuries resulting from a dangerous condition of such street unless it created or increased such condition. Shapiro v. Toyota Motor Co., 38 N.C. App. 658, 248 S.E.2d 868 (1978).

**Department of Transportation Can Be Found Negligent.** — North Carolina Department of Transportation can, under G.S. 136-30(a), be found negligent based on a failure to comply with the United States Department of Transportation's Manuel on Uniform Control Devices for Streets and Highways when erecting a stop sign. Norman v. N.C. DOT, 161 N.C. App. 211, 588 S.E.2d 42, 2003 N.C. App. LEXIS 2043 (2003), review dismissed, review denied, 358 N.C. 235, 595 S.E.2d 153 (2004), cert. denied, 358 N.C. 545, 599 S.E.2d 404 (2004).

**Applied** in Estate of Jiggetts v. City of Gastonia, 128 N.C. App. 410, 497 S.E.2d 287 (1998).

**Cited** in Davis v. J.M.X., Inc., 137 N.C. App. 267, 528 S.E.2d 56, 2000 N.C. App. LEXIS 309 (2000).

## § 136-30.1. Center line and pavement edge line markings.

(a) The Department of Transportation shall mark with center lines and edge lines all interstate and primary roads and all paved secondary roads having an average traffic volume of 100 vehicles per day or more, and which are traffic service roads forming a connecting link in the State highway system. The Department of Transportation shall not be required to mark with center and edge lines local subdivision roads, loop roads, dead-end roads of less than one mile in length or roads the major purpose of which is to serve the abutting property, nor shall the Department of Transportation be required to mark with edge lines those roads on which curbing has been installed or which are less than 16 feet in width.

(b) Whenever the Department of Transportation shall construct a new paved road, relocate an existing paved road, resurface an existing paved road, or pave an existing road which under the provisions of subsection (a) hereof is required to be marked with lines, the Department of Transportation shall, within 30 days from the completion of the construction, resurfacing or paving, mark the said road with the lines required in subsection (a) hereof.

(c) Repealed by Session Laws 1991, c. 530, s. 2, effective January 1, 1992. (1969, c. 1172, s. 1; 1973, c. 496, ss. 1, 2; c. 507, s. 5; 1977, c. 464, s. 7.1; 1991, c. 530, s. 2.)

**§ 136-31:** Repealed by Session Laws 1991, c. 530, s. 3.

## § 136-32. Other than official signs prohibited.

No unauthorized person shall erect or maintain upon any highway any warning or direction sign, marker, signal or light or imitation of any official sign, marker, signal or light erected under the provisions of G.S. 136-30, except in cases of emergency. No person shall erect or maintain upon any highway any traffic or highway sign or signal bearing thereon any commercial advertising: Provided, nothing in this section shall be construed to prohibit the erection or maintenance of signs, markers, or signals bearing thereon the name of an organization authorized to erect the same by the Department of Transportation or by any local authority referred to in G.S. 136-31. Any person who shall violate any of the provisions of this section shall be guilty of a Class 1 misdemeanor. The Department of Transportation may remove any signs erected without authority. (1921, c. 2, s. 9(b); C.S., s. 3846(r); 1927, c. 148, ss. 56, 58; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1991 (Reg. Sess., 1992), c. 1030, s. 39; 1993, c. 539, s. 981; 1994, Ex. Sess., c. 24, s. 14(c).)

### CASE NOTES

**Department's Determination Exclusive.** — The State Highway Commission's (now Department of Transportation's) determination of what signs should be erected for the information of the traveling public was exclusive once it authorized the opening of a road for public use. Gilliam v. Propst Constr. Co., 256 N.C. 197, 123 S.E.2d 504 (1962).

## § 136-32.1. Misleading signs prohibited.

No person shall erect or maintain within 100 feet of any highway right-of-way any warning or direction sign or marker of the same shape, design, color and size of any official highway sign or marker erected under the provisions of G.S. 136-30, or otherwise so similar to an official sign or marker as to appear to be an official highway sign or marker. Any person who violates any of the provisions of this section is guilty of a Class 1 misdemeanor. (1955, c. 231; 1991 (Reg. Sess., 1992), c. 1030, s. 40; 1993, c. 539, s. 982; 1994, Ex. Sess., c. 24, s. 14(c).)

## § 136-32.2. Placing blinding, deceptive or distracting lights unlawful.

(a) If any person, firm or corporation shall place or cause to be placed any lights, which are flashing, moving, rotating, intermittent or steady spotlights, in such a manner and place and of such intensity:

(1) Which, by the use of flashing or blinding lights, blinds, tends to blind and effectively hampers the vision of the operator of any motor vehicle passing on a public highway; or

(2) Which involves red, green or amber lights or reflectorized material and which resembles traffic signal lights or traffic control signs; or

(3) Which, by the use of lights, reasonably causes the operator of any motor vehicle passing upon a public highway to mistakenly believe that there is approaching or situated in his lane of travel some other

motor vehicle or obstacle, device or barricade, which would impede his traveling in such lane;

[he or it] shall be guilty of a Class 3 misdemeanor.

(b) Each 10 days during which a violation of the provisions of this section is continued after conviction therefor shall be deemed a separate offense.

(c) The provisions of this section shall not apply to any lights or lighting devices erected or maintained by the Department of Transportation or other properly constituted State or local authorities and intended to effect or implement traffic control and safety. Nothing contained in this section shall be deemed to prohibit the otherwise reasonable use of lights or lighting devices for advertising or other lawful purpose when the same do not fall within the provisions of subdivisions (1) through (3) of subsection (a) of this section.

(d) The enforcement of this section shall be the specific responsibility and duty of the State Highway Patrol in addition to all other law-enforcement agencies and officers within this State; provided, however, no warrant shall issue charging a violation of this section unless the violation has continued for 10 days after notice of the same has been given to the person, firm or corporation maintaining or owning such device or devices alleged to be in violation of this section. (1959, c. 560; 1973, c. 507, s. 5; 1975, c. 716, s. 5; 1977, c. 464, ss. 7.1, 17; 1993, c. 539, s. 983; 1994, Ex. Sess., c. 24, s. 14(c).)

## § 136-32.3. Litter enforcement signs.

The Department of Transportation shall place signs on the Interstate Highway System notifying motorists of the penalties for littering. The signs shall include the amount of the maximum penalty for littering. The Department of Transportation shall determine the locations of and distance between the signs. (2001-512, s. 4.)

**Editor's Note.** — Session Laws 2001-512, s. 15, provides: "This act shall not be construed to obligate the General Assembly to appropriate any funds to implement the provisions of this act. Every agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to the agency."

## § 136-33. Damaging or removing signs; rewards.

(a) No person shall willfully deface, damage, knock down or remove any sign posted as provided in G.S. 136-26 or G.S. 136-30.

(b) No person, without just cause or excuse, shall have in his possession any highway sign as provided in G.S. 136-26 or G.S. 136-30.

(b1) Any person violating the provisions of this section shall be guilty of a Class 2 misdemeanor.

(c) The Department of Transportation is authorized to offer a reward not to exceed five hundred dollars ($500.00) for information leading to the arrest and conviction of persons who violate the provisions of this section, such reward to be paid from funds of the Department of Transportation.

(d) The enforcement of this section shall be the specific responsibility and duty of the State Highway Patrol in addition to all other law-enforcement agencies and officers within this State. (1927, c. 148, s. 57; 1971, c. 671; 1973, c. 507, s. 5; 1975, cc. 11, 93; c. 716, s. 7; 1977, c. 464, ss. 7.1, 18; 1991 (Reg. Sess., 1992), c. 1030, s. 41; 1993, c. 539, s. 984; 1994, Ex. Sess., c. 24, s. 14(c).)

## § 136-33.1. Signs for protection of cattle.

Upon written request of any owner of more than five head of cattle, the Department of Transportation shall erect appropriate and adequate signs on any road or highway under the control of the Department of Transportation, such signs to be so worded, designed and located as to give adequate warning of the presence and crossing of cattle. Such signs shall be located at points agreed upon by the owner and the Department of Transportation at points selected to give reasonable warning of places customarily or frequently used by the cattle of said owner to cross said road or highway, and no one owner shall be entitled to demand the placing of signs at more than one point on a single or abutting tracts of land. (1949, c. 812; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

**§ 136-33.2:** Repealed by Session Laws 2007-164, s. 2, effective July 1, 2007.

**Cross References.** — For current provisions as to signs marking beginning of speed zones, see G.S. 136-33.2A.

## § 136-33.2A. Signs marking beginning of reduced speed zones.

If a need to reduce speed in a speed zone is determined to exist by an engineer of the Department, there shall be a sign erected, of adequate size, at least 600 feet in advance of the beginning of any speed zone established by any agency of the State authorized to establish the same, which shall indicate a change in the speed limit. (2007-164, s. 3.)

**Editor's Note.** — Session Laws 2007-164, s. 8, made this section effective July 1, 2007.

## § 136-34. Department of Transportation authorized to furnish road equipment to municipalities.

The Department of Transportation is hereby authorized to furnish municipalities road maintenance equipment to aid such municipalities in the maintenance of streets upon such rental agreement as may be agreed upon by the Department of Transportation and the said municipality. Such rental, however, is to be at least equal to the cost of operation, plus wear and tear on such equipment; and the Department of Transportation shall not be required to furnish equipment when to do so would interfere with the maintenance of the streets and highways under the control of the Department of Transportation. (1941, c. 299; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, ss. 7.1, 19.)

## § 136-34.1. Department of Transportation authorized to furnish road maintenance materials to municipalities.

The Department of Transportation is authorized, in its discretion, to furnish municipalities road maintenance materials to aid municipalities in the maintenance of streets upon agreement for reimbursement, as may be required by the Department and agreed to by the municipality. The agreement shall provide for reimbursement in an amount at least equal to the cost of the materials, together with the actual reasonable cost of any handling and storage of the materials and of administering the reimbursement agreement, all as solely determined by the Department. In no event shall the Department of Transportation be required to furnish road maintenance materials when, in the sole determination of the Department of Transportation, to do so would interfere with the maintenance of the streets and highways under its control.

Notwithstanding any other provision of law, the provision of and reimbursement for materials under this section shall not be deemed a sale for any purpose. (2009-332, s. 3.)

**Editor's Note.** — Session Laws 2009-332, s. 4, made this section effective August 1, 2009.

## § 136-35. Cooperation with other states and federal government.

It shall also be the duty of the Department of Transportation, where possible, to cooperate with the state highway commissions of other states and with the federal government in the correlation of roads and other transportation systems so as to form a system of intercounty, interstate, and national highways and transportation systems. The Department of Transportation may enter into reciprocal agreements with other states and the United States Department of Transportation to perform inspection work and to pay reasonable fees for inspection work performed by others in connection with supplies and materials used in transportation construction and repair. (1915, c. 113, s. 12; C.S., s. 3584; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1985, c. 127; c. 689, s. 31; 2009-266, s. 17.)

**Effect of Amendments.** — Session Laws 2009-266, s. 17, effective August 1, 2009, in the first sentence, inserted "and other transportation systems" and "and transportation systems", and in the second sentence, substituted "United States Department of Transportation" for "Federal Highway Administration" and substituted "transportation construction and repair" for "highway construction and repair."

**§ 136-36:** Repealed by Session Laws 1951, c. 260, s. 4.

**§ 136-37:** Repealed by Session Laws 1959, c. 687, s. 5.

**§§ 136-38 through 136-41:** Repealed by Sessions Laws 1951, c. 260, s. 4.

## § 136-41.1. Appropriation to municipalities; allocation of funds generally; allocation to Butner.

(a) There is annually appropriated out of the State Highway Fund a sum equal to the net amount after refunds that was produced during the fiscal year by a one and three-fourths cents (1 3/4¢) tax on each gallon of motor fuel taxed under Article 36C of Chapter 105 of the General Statutes and on the equivalent amount of alternative fuel taxed under Article 36D of that Chapter. The amount appropriated shall be allocated in cash on or before October 1 of each year to the cities and towns of the State in accordance with this section. In addition, as provided in G.S. 136-176(b)(3), revenue is allocated and appropriated from the Highway Trust Fund to the cities and towns of this State to be used for the same purposes and distributed in the same manner as the revenue appropriated to them under this section from the Highway Fund. Like the appropriation from the Highway Fund, the appropriation from the Highway Trust Fund shall be based on revenue collected during the fiscal year preceding the date the distribution is made.

Seventy-five percent (75%) of the funds appropriated for cities and towns shall be distributed among the several eligible municipalities of the State in the percentage proportion that the population of each eligible municipality bears to the total population of all eligible municipalities according to the most recent annual estimates of population as certified to the Secretary of Revenue by the State Budget Officer. This annual estimation of population shall include increases in the population within the municipalities caused by annexations accomplished through July 1 of the calendar year in which these funds are distributed. Twenty-five percent (25%) of said fund shall be distributed among the several eligible municipalities of the State in the percentage proportion that the mileage of public streets in each eligible municipality which does not form a part of the State highway system bears to the total mileage of the public streets in all eligible municipalities which do not constitute a part of the State highway system.

It shall be the duty of the mayor of each municipality to report to the Department of Transportation such information as it may request for its guidance in determining the eligibility of each municipality to receive funds under this section and in determining the amount of allocation to which each is entitled. Upon failure of any municipality to make such report within the time prescribed by the Department of Transportation, the Department of Transportation may disregard such defaulting unit in making said allotment.

The funds to be allocated under this section shall be paid in cash to the various eligible municipalities on or before October 1 of each year. Provided that eligible municipalities are authorized within the discretion of their governing bodies to enter into contracts for the purpose of maintenance, repair, construction, reconstruction, widening, or improving streets of such municipalities at any time after January 1 of any calendar year in total amounts not to exceed ninety percent (90%) of the amount received by such municipality during the preceding fiscal year, in anticipation of the receipt of funds under this section during the next fiscal year, to be paid for out of such funds when received.

The Department of Transportation may withhold each year an amount not to exceed one percent (1%) of the total amount appropriated for distribution under this section for the purpose of correcting errors in allocations: Provided, that the amount so withheld and not used for correcting errors will be carried over and added to the amount to be allocated for the following year.

The word "street" as used in this section is hereby defined as any public road maintained by a municipality and open to use by the general public, and having an average width of not less than 16 feet. In order to obtain the necessary information to distribute the funds herein allocated, the Department of Transportation may require that each municipality eligible to receive funds under this section submit to it a statement, certified by a registered engineer or surveyor of the total number of miles of streets in such municipality. The Department of Transportation may in its discretion require the certification of mileage on a biennial basis.

(b) For purposes of this section and of G.S. 136-41.2 and 136-41.3, urban service districts defined by the governing board of a consolidated city-county in which street services are provided by the consolidated city-county, as defined by G.S. 160B-2(1), shall be considered eligible municipalities, and the allocations to be made thereby shall be made to the government of the consolidated city-county.

(c) Any funds allocated to the unincorporated area known as the Butner Reservation shall be transferred to the Town of Butner.

(d) Nature. — The General Assembly finds that the revenue distributed under this section is local revenue, not a State expenditure, for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold the distribution. (1951, c. 260, s. 2; c. 948, ss. 2, 3; 1953, c. 1127; 1957, c. 65, s. 11; 1963, c. 854, ss. 1, 2; 1969, c. 665, ss.

1, 2; 1971, c. 182, ss. 1-3; 1973, c. 476, s. 193; c. 500, s. 1; c. 507, s. 5; c. 537, s. 6; 1975, c. 513; 1977, c. 464, s. 7.1; 1979, 2nd Sess., c. 1137, s. 50; 1981, c. 690, s. 4; c. 859, s. 9.2; c. 1127, s. 54; 1985 (Reg. Sess., 1986), c. 982, s. 1; 1989, c. 692, s. 1.6; 1995, c. 390, s. 26; c. 461, s. 18; 1997-443, s. 11A.118(a); 2000-165, s. 1; 2002-120, s. 5; 2007-269, s. 13.)

**Local Modification.** — Cherokee: 1989 (Reg. Sess., 1990), c. 1049, s. 13(a); Henderson: 1957, c. 1181; village of Grandfather: 1987, c. 419, s. 1; village of Woodlake: 1991 (Reg. Sess., 1992), c. 859, s. 1 (contingent on referendum).

**Cross References.** — As to estimate of population authorizing participation in state-collected funds, see G.S. 160A-486.

**Editor's Note.** — Session Laws 2002-120, s. 9, contains a severability clause.

Session Laws 2002-159, s. 65, effective October 11, 2002, provides: "It is the intent of the General Assembly that Sections 1 through 7 of S.L. 2002-120 shall be effective prospectively only and shall not apply to pending litigation or claims that accrued before the effective date of S.L. 2002-120. Nothing in Section 1 through 7 of S.L. 2002-120 shall be construed as a waiver of the sovereign immunity of the State or any other defenses as to any claim for damages, other recovery of funds, including attorneys' fees, or injunctive relief from the State by any unit of local government or political subdivision of the State." Session Laws 2002-120, s. 5, effective September 24, 2002, added subsection (d).

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 30.18, provides: "In making loans from the State Infrastructure Bank with funds appropriated in this act, the Department of Transportation shall collect repayments by reducing funds allocated to the borrowers under G.S. 136-41.1."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2007-269, s. 14.1, provides: "Section 1.1 through 14 of this act shall become effective only if the Charter of the Town of Butner is approved under section 5 of the Voting Rights Act of 1965; provided, however, that if the Charter is not approved under section 5 of the Voting Rights Act of 1965 because of any provisions contained in Article III or Article IV of the Charter, the Butner Advisory Council established in accordance with G.S. 122C-413 may make such amendments to the Article III or IV of the Charter as it, in its sole discretion, deems necessary to obtain such approval, and such amendments shall be filed in accordance with G.S. 160A-111. If the Charter is not approved, Sections 1.1 through 14 of this act have no force and effect. If the Charter is approved, then those sections become effective on the first day of the next calendar month that begins more than three days after the approval, except that the persons appointed as temporary officers under Section 3.2 of the Charter may immediately take the oath of office and take such preliminary actions as may be necessary for initial organization, personnel actions, and budget adoption, in such special meetings as may be called under G.S. 160A-71." Preclearance was received from the United States Department of Justice by letter dated October 1, 2007.

## CASE NOTES

**Cited** in City of Winston-Salem v. Southern Ry., 248 N.C. 637, 105 S.E.2d 37 (1958).

## OPINIONS OF ATTORNEY GENERAL

**Municipalities not holding an election of municipal officials within four years of the Powell Bill allocation** in October of 1973 by reason of the Municipal Procedures Act are not ineligible for Powell Bill funds. Opinion of Attorney General to Mr. T.L. Waters, Department of Transportation and Highway Safety, 43 N.C.A.G. 103 (1973).

**Eligibility of Municipality Incorporated Prior to Jan. 1, 1945.** — See opinion of Attorney General to Mr. William F. Caddell, Jr., 41 N.C.A.G. 307 (1971).

**Improper to Spend Powell Bill Funds to Finance Engineering Studies Under the TOPICS Program.** — See opinion of Attorney General to Mr. James A. Hudson, 41 N.C.A.G. 359 (1971).

**Powell Bill funds are restricted to the**

**purposes enumerated under § 136-41.3,** and the expenditure for a bikeway system is not a purpose enumerated thereunder. Opinion of Attorney General to Mr. William F. Caddell, Jr., 45 N.C.A.G. 178 (1975).

## § 136-41.2. Eligibility for funds; municipalities incorporated since January 1, 1945.

(a) No municipality shall be eligible to receive funds under G.S. 136-41.1 unless it has conducted the most recent election required by its charter or the general law, whichever is applicable, for the purpose of electing municipal officials. The literal requirement that the most recent required election shall have been held may be waived only:

(1) Where the members of the present governing body were appointed by the General Assembly in the act of incorporation and the date for the first election of officials under the terms of that act has not arrived; or,

(2) Where validly appointed or elected officials have advertised notice of election in accordance with law, but have not actually conducted an election for the reason that no candidates offered themselves for office.

(b) No municipality shall be eligible to receive funds under G.S. 136-41.1 unless it has levied an ad valorem tax for the current fiscal year of at least five cents (5¢) on the one hundred dollars ($100.00) valuation upon all taxable property within its corporate limits, and unless it has actually collected at least fifty percent (50%) of the total ad valorem tax levied for the preceding fiscal year; provided, however, that, for failure to have collected the required percentage of its ad valorem tax levy for the preceding fiscal year:

(1) No municipality making in any year application for its first annual allocation shall be declared ineligible to receive such allocation; and

(2) No municipality shall be declared ineligible to receive its share of the annual allocation to be made in the year 1964.

(c) No municipality shall be eligible to receive funds under G.S. 136-41.1 unless it has formally adopted a budget ordinance in substantial compliance with G.S. 160-410.3, showing revenue received from all sources, and showing that funds have been appropriated for at least two of the following municipal services if the municipality was incorporated with an effective date prior to January 1, 2000, water distribution; sewage collection or disposal; garbage and refuse collection or disposal; fire protection; police protection; street maintenance, construction, or right-of-way acquisition; or street lighting, or at least four of the following municipal services if the municipality was incorporated with an effective date of on or after January 1, 2000: (i) police protection; (ii) fire protection; (iii) solid waste collection or disposal; (iv) water distribution; (v) street maintenance; (vi) street construction or right-of-way acquisition; (vii) street lighting; and (viii) zoning.

(d) The provisions of this section shall not apply to any municipality incorporated prior to January 1, 1945. (1963, c. 854, ss. 3, 3½; 1985 (Reg. Sess., 1986), c. 934, ss. 5, 6; 1999-458, s. 5.)

**Local Modification.** — Town of Red Cross: 2005-245, s. 2 (fiscal year 2002-2003 only); Community of Gray's Creek: 1999-458, s. 13 (contingent on petition filed before July 1, 2002); Community of Union Cross: 1999-458, s. 13 (contingent on petition filed before July 1, 2002).

**Editor's Note.** — Section 160-410.3, referred to in this section, was repealed by Session Laws 1971, c. 780, s. 13. See now G.S. 159-7 et seq.

Session Laws 1993, c. 321, s. 169.1, as amended by Session Laws 2000-165, s. 1.1, provides:

"Notwithstanding any other provision of law, the Department of Transportation shall maintain the streets and highways on the State highway system within municipalities that are not eligible for funds under G.S. 136-41.2. The Department of Transportation shall maintain the streets and highways as part of the State secondary system, and maintain the paving priority for the secondary roads the same as if the municipality were not incorporated, as long as the ineligibility for funds under G.S. 136-41.2 continues. The provisions of this section apply only to municipalities incorporated between July 1, 1989, and June 30, 1993 or between June 1, 1978 and June 30, 1978."

Session Laws 1993, c. 321, s. 321 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

Session Laws 1999-458, s. 12, provides that Section 1 of this act, which amended G.S. 120-163(c), applies with respect to municipalities for which the Joint Legislative Commission on Municipal Incorporations makes recommendations on or after August 13, 1999. Sections 1 through 11 of this act, other than the repeal of G.S. 120-169.1(a), do not apply to any community which first filed a petition with the Commission prior to July 20, 1999.

### CASE NOTES

**Cited** in City of Winston-Salem v. Southern Ry., 248 N.C. 637, 105 S.E.2d 37 (1958); Great Am. Ins. Co. v. Johnson, 257 N.C. 367, 126 S.E.2d 92 (1962); City of Raleigh v. Norfolk S. Ry., 4 N.C. App. 1, 165 S.E.2d 745 (1969); Southern Ry. v. City of Winston-Salem, 4 N.C. App. 11, 165 S.E.2d 751 (1969).

### OPINIONS OF ATTORNEY GENERAL

**The provisions of subsection (b) refer to the current fiscal year in which the funds are allocated and received** by the municipality. See opinion of Attorney General to Mr. John S. Freeman, Town Attorney, Town of Stallings, 46 N.C.A.G. 17 (1976).

**The appropriation of funds in a municipality's budget is all that is necessary under the fourth requirement of this section** and, therefore, a town's budgeting for solid waste services beginning January 1, 2002, was sufficient to satisfy as one of the designated services under subsection (c). See opinion of Attorney General to Michael R. Burgner, Hartsell Hartsell & White, P.A., 2001 N.C. AG LEXIS 25 (8/27/01).

## § 136-41.2A. Eligibility for funds; municipalities incorporated before January 1, 1945.

(a) No municipality shall be eligible to receive funds under G.S. 136-41.1 unless it has been within the four-year period next preceding the annual allocation of funds conducted an election for the purpose of electing municipal officials and currently imposes an ad valorem tax or provides other funds for the general operating expenses of the municipality.

(b) The provisions of this section apply only to municipalities incorporated prior to January 1, 1945. (1985 (Reg. Sess., 1986), c. 934, s. 4.)

## § 136-41.3. Use of funds; records and annual statement; excess accumulation of funds; contracts for maintenance, etc., of streets.

The funds allocated to cities and towns under the provisions of G.S. 136-41.2 shall be expended by said cities and towns only for the purpose of maintaining, repairing, constructing, reconstructing or widening of any street or public thoroughfare including bridges, drainage, curb and gutter, and other necessary appurtenances within the corporate limits of the municipality or for meeting the municipality's proportionate share of assessments levied for such purposes, or for the planning, construction and maintenance of bikeways located within the rights-of-way of public streets and highways, or for the planning, construction, and maintenance of sidewalks along public streets and highways.

Each municipality receiving funds by virtue of G.S. 136-41.1 and 136-41.2 shall maintain a separate record of accounts indicating in detail all receipts and expenditures of such funds. It shall be unlawful for any municipal employee or member of any governing body to authorize, direct, or permit the expenditure of any funds accruing to any municipality by virtue of G.S. 136-41.1 and 136-41.2 for any purpose not herein authorized. Any member of any governing body or municipal employee shall be personally liable for any unauthorized expenditures. On or before the first day of August each year, the treasurer, auditor, or other responsible official of each municipality receiving funds by virtue of G.S. 136-41.1 and 136-41.2 shall file a statement under oath with the Secretary of Transportation showing in detail the expenditure of funds received by virtue of G.S. 136-41.1 and 136-41.2 during the preceding year and the balance on hand.

No funds allocated to municipalities pursuant to G.S. 136-41.1 and 136-41.2 shall be permitted to accumulate for a period greater than permitted by this section. Interest on accumulated funds shall be used only for the purposes permitted by the provisions of G.S. 136-41.3. Any municipality having accumulated an amount greater than the sum of the past 10 allocations made, shall have an amount equal to such excess deducted from the next allocation after receipt of the report required by this section. Such deductions shall be carried over and added to the amount to be allocated to municipalities for the following year.

In the discretion of the local governing body of each municipality receiving funds by virtue of G.S. 136-41.1 and 136-41.2 it may contract with the Department of Transportation to do the work of maintenance, repair, construction, reconstruction, widening or improving the streets in such municipality; or it may let contracts in the usual manner as prescribed by the General Statutes to private contractors for the performance of said street work; or may undertake the work by force account. The Department of Transportation within its discretion is hereby authorized to enter into contracts with municipalities for the purpose of maintenance, repair, construction, reconstruction, widening or improving streets of municipalities. And the Department of Transportation in its discretion may contract with any city or town which it deems qualified and equipped so to do that the city or town shall do the work of maintaining, repairing, improving, constructing, reconstructing, or widening such of its streets as form a part of the State highway system.

In the case of each eligible municipality, as defined in G.S. 136-41.2, having a population of less than 5,000, the Department of Transportation shall upon the request of such municipality made by official action of its governing body, on or prior to June 1, 1953, or June 1 in any year thereafter, for the fiscal year beginning July 1, 1953, and for the years thereafter do such street construction, maintenance, or improvement on nonsystem streets as the municipality may request within the limits of the current or accrued payments made to the municipality under the provisions of G.S. 136-41.1.

In computing the costs, the Department of Transportation may use the same rates for equipment, rental, labor, materials, supervision, engineering and other items, which the Department of Transportation uses in making charges to one of its own department or against its own department, or the Department of Transportation may employ a contractor to do the work, in which case the charges will be the contract cost plus engineering and inspection. The municipality is to specify the location, extent, and type of the work to be done, and shall provide the necessary rights-of-way, authorization for the removal of such items as poles, trees, water and sewer lines as may be necessary, holding the Department of Transportation free from any claim by virtue of such items of cost and from such damage or claims as may arise therefrom except from negligence on the part of the Department of Transportation, its agents, or employees.

If a municipality elects to bring itself under the provisions of the two preceding paragraphs, it shall enter into a two-year contract with the Department of Transportation and if it desires to dissolve the contract at the end of any two-year period it shall notify the Department of Transportation of its desire to terminate said contract on or before April 1 of the year in which such contract shall expire; otherwise, said contract shall continue for an additional two-year period, and if the municipality elects to bring itself under the provisions of the two preceding paragraphs and thereafter fails to pay its account to the Department of Transportation for the fiscal year ending June 30, by August 1 following the fiscal year, then the Department of Transportation shall apply the said municipality's allocation under G.S. 136-41.1 to this account until said account is paid and the Department of Transportation shall not be obligated to do any further work provided for in the two preceding paragraphs until such account is paid.

Section 143-129 of the General Statutes relating to the procedure for letting of public contracts shall not be applicable to contracts undertaken by any municipality with the Department of Transportation in accordance with the provisions of the three preceding paragraphs.

The Department of Transportation is authorized to apply a municipality's share of funds allocated to a municipality under the provisions of G.S. 136-41.1 to any of the following accounts of the municipality with the said Department of Transportation, which the municipality fails to pay:

(1) Cost sharing agreements for right-of-way entered into pursuant to G.S. 136-66.3, but not to exceed ten percent (10%) of any one year's allocation until the debt is repaid,

(2) The cost of relocating municipally owned waterlines and other municipally owned utilities on a State highway project which is the responsibility of the municipality,

(3) For any other work performed for the municipality by the Department of Transportation or its contractor by agreement between the Department of Transportation and the municipality, and

(4) For any other work performed that was made necessary by the construction, reconstruction or paving of a highway on the State highway system for which the municipality is legally responsible. (1951, c. 260, s. 3; c. 948, s. 4; 1953, c. 1044; 1957, c. 65, s. 11; 1969, c. 665, ss. 3, 4; 1971, c. 182, s. 4; 1973, c. 193; c. 507, s. 5; 1977, c. 464, ss. 7.1, 20; c. 808; 1993 (Reg. Sess., 1994), c. 690, s. 1.1.)

## CASE NOTES

**Liability of City for Damages When Maintenance Contracted.** — An individual user of a street, which is part of the State highway system, who sustains personal injuries or property damage as the result of a dangerous condition of such street, cannot maintain an action for damages against a city which contracted with the Department of Transportation to repair or remove such condition and then did nothing whatsoever about it. Matternes v. City of Winston-Salem, 286 N.C. 1, 209 S.E.2d 481 (1974).

**Cited** in City of Winston-Salem v. Southern Ry., 248 N.C. 637, 105 S.E.2d 37 (1958); Great Am. Ins. Co. v. Johnson, 257 N.C. 367, 126 S.E.2d 92 (1962).

## OPINIONS OF ATTORNEY GENERAL

**Use of Funds for Drainage Purposes.** — Powell Bill funds may not be used for drainage purposes generally but may be used to pay for a portion of the cost of drainage facilities on a State highway system street which is necessary to provide for drainage arising from streets on the municipal street system for which the municipality is responsible. Opinion of Attorney General to Mr. William S. Withers, 41 N.C.A.G. 656 (1971).

## § 136-41.4. Municipal use of allocated funds; election.

A municipality that qualifies for an allocation of funds pursuant to G.S. 136-41.1 shall have the option to accept all funds allocated to the municipality, under that section, for the repair, maintenance, construction, reconstruction, widening, or improving of the municipality's streets, or the municipality may elect to have some or all of the allocation reprogrammed for any Transportation Improvement Project currently on the approved project list within the municipality's limits or within the area of any metropolitan planning organization or rural planning organization.

If a municipality chooses to have its allocation reprogrammed, the minimum amount that may be reprogrammed is an amount equal to that amount necessary to complete one full phase of the project selected by the municipality or an amount that, when added to the amount already programmed for the Transportation Improvement Project selected, would permit the completion of at least one full phase of the project. (2007-428, s. 5.)

**Editor's Note.** — Session Laws 2007-428, s. 6, made this section effective October 1, 2007.

## § 136-42: Transferred to G.S. 136-42.2 by Session Laws 1971, c. 345, s. 2.

## § 136-42.1. Archaeological objects on highway right-of-way.

The Department of Transportation is authorized to expend highway funds for reconnaissance surveys, preliminary site examinations and salvage work necessary to retrieve and record data and the preservation of archaeological and paleontological objects of value which are located within the right-of-way acquired for highway construction. The Department of Cultural Resources shall be consulted when objects of scientific or historical significance might be anticipated or encountered in highway right-of-way and a determination made by that Department as to the national, State, or local importance of preserving any or all fossil relics, artifacts, monuments or buildings. The Department of Cultural Resources shall request advice from other agencies or institutions having special knowledge or skills that may not be available in the said Department for the determination of the presence of or for the evaluation and salvage of prehistoric archaeological or paleontological remains within the highway right-of-way. The Department of Transportation is authorized to contract with the Department of Cultural Resources and to provide funds necessary to perform reconnaissance surveys, preliminary site examination and salvage operation at those sites determined by the Department of Cultural Resources to be of sufficient importance to be preserved for the inspiration and benefit of the people of North Carolina. The Department of Cultural Resources is authorized to enter into contracts and to make arrangements to perform the necessary work pursuant to this section. The Department of Cultural Resources shall assume possession and responsibility for any and all historical objects and is authorized to enter into agreements with governmental units and agencies thereof, institutions, and charitable organizations for the preservation of any or all fossil relics, artifacts, monuments, or buildings. (1971, c. 345, s. 1; 1973, c. 476, s. 48; c. 507, s. 5; 1977, c. 464, s. 7.1.)

### CASE NOTES

**Cited** in Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina DOT, 46 N.C. App. 350, 265 S.E.2d 890 (1980).

## § 136-42.2. Markers on highway; cooperation of Department of Transportation.

The Department of Transportation is hereby authorized to cooperate with the Department of Cultural Resources in marking historic spots along the State highways. (1927, c. 226, s. 1; 1933, c. 172, s. 17; 1943, c. 237; 1957, c. 65, s. 11; 1971, c. 345, s. 2; 1973, c. 476, s. 48; c. 507, s. 5; 1977, c. 464, s. 7.1.)

## § 136-42.3. Historical marker program.

The Department of Transportation may spend up to forty thousand dollars ($40,000) a year to purchase historical markers prepared and delivered to it by the Department of Cultural Resources. The Department of Transportation shall erect the markers on sites selected by the Department of Cultural Resources. This expenditure is hereby declared to be a valid expenditure of State highway maintenance funds. No provision in this section shall be construed to prevent the expenditure of any federal highway funds that may be available for this purpose. (1935, c. 197; 1943, c. 237; 1951, c. 766; 1955, c. 543, s. 2; 1957, c. 65, s. 11; 1971, c. 345, s. 2; 1973, c. 476, s. 48; c. 507, s. 5; 1977, c. 464, s. 7.1; 1983 (Reg. Sess., 1984), c. 1034, s. 129.)

**Local Modification.** — Town of Lillington: 2002-47, s. 1.

### OPINIONS OF ATTORNEY GENERAL

**Funds for Historical Markers Not to Be Used for Other Purchases.** — See opinion of Attorney General to Mr. George S. Willoughby, Jr., State Highway Commission (now Department of Transportation), 41 N.C.A.G. 241 (1971).

**§ 136-43:** Transferred to § 136-42.3 by Session Laws 1971, c. 345, s. 2.

## § 136-43.1. Procedure for correction and relocation of historical markers.

Any person, firm or corporation who has knowledge or information, supported by historical data, books, records, writings, or other evidence, that any historical marker has been erected at an erroneous or mistaken site, or that the inscription appearing on any historical marker contains erroneous or mistaken information, shall have the privilege of presenting such knowledge or information and supporting evidence to the advisory committee described in the preamble of Public Laws 1935, c. 197 for its consideration. Upon being informed that any person desires to present such information, the Secretary of Cultural Resources shall notify such person of the date, place and time of the next meeting of the advisory committee. Any person, firm or corporation desiring to present such information to the advisory committee shall be allowed to appear before the committee for that purpose.

If, after considering the information and evidence presented, the advisory committee should find that any historical marker has been erected on an erroneous or mistaken site, or that erroneous or mistaken information is contained in the inscription appearing on any historical marker, it shall so inform the Department of Cultural Resources and the Department of Cultural Resources shall cause such marker to be relocated at the correct site, or shall cause the erroneous or mistaken inscription to be corrected, or both as the case may be. (1961, c. 267; 1973, c. 476, s. 48.)

## § 136-44. Maintenance of grounds.

The Department of Transportation is hereby authorized and directed through the highway supervisor of the district that includes Warren County to clean off and keep clean the premises and grounds at the old home of Nathaniel Macon, known as "Buck Springs," which are owned by the County of Warren, and also to look after the care and keeping the grounds surrounding the grave of Miss Anne Carter Lee, daughter of General Robert E. Lee, in Warren County.

The Department of Transportation is authorized and directed through the highway supervisor of the district that includes Pender County to maintain the grounds surrounding the grave of Governor Samuel Ashe in Pender County. (1939, c. 38; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 2001-487, s. 125.1.)

## ARTICLE 2A.

## *State Transportation Generally.*

## § 136-44.1. Statewide transportation system; policies.

The Department of Transportation shall develop and maintain a statewide system of roads, highways, and other transportation systems commensurate with the needs of the State as a whole and it shall not sacrifice the general statewide interest to the purely local desires of any particular area. The Board of Transportation shall formulate general policies and plans for a statewide transportation system. The Board shall formulate policies governing the construction, improvement and maintenance of roads, highways, and other transportation systems of the State with due regard to farm-to-market roads and school bus routes. (1973, c. 507, s. 3; 1975, c. 716, s. 7; 2009-266, s. 18.)

**Local Modification.** — Village of Bald Head Island: 1997-324, s. 1.

**Editor's Note.** — Session Laws 2009-266, s. 18, effective August 1, 2009, substituted "Transportation" for "Roads" in the article heading.

**Effect of Amendments.** — Session Laws 2009-266, s. 18, effective August 1, 2009, in the section catchline, substituted "transportation" for "road"; in the first and last sentences, substituted "roads, highways, and other transportation systems" for "roads and highways"; and, in the second sentence, substituted "transportation system" for "system of highways" at the end.

**Legal Periodicals.** — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1026 (1981).

### CASE NOTES

**Cited** in Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina DOT, 46 N.C. App. 350, 265 S.E.2d 890 (1980).

## § 136-44.2. Budget and appropriations.

The Director of the Budget shall include in the "Current Operations Appropriations Act" an enumeration of the purposes or objects of the proposed expenditures for each of the construction and maintenance programs for that budget period for the State primary, secondary, State parks road systems, and other transportation systems. The State primary system shall include all portions of the State highway system located both inside and outside municipal corporate limits that are designated by N.C., U.S. or Interstate numbers. The State secondary system shall include all of the State highway system located both inside and outside municipal corporate limits that is not a part of the State primary system. The State parks system shall include all State parks roads and parking lots that are not also part of the State highway system. The transportation systems shall include State-maintained, nonhighway modes of transportation as well.

All construction and maintenance programs for which appropriations are requested shall be enumerated separately in the budget. Programs that are entirely State funded shall be listed separately from those programs involving the use of federal-aid funds. Proposed appropriations of State matching funds for each of the federal-aid construction programs shall be enumerated separately as well as the federal-aid funds anticipated for each program in order that the total construction requirements for each program may be provided for in the budget. Also, proposed State matching funds for the highway planning and research program shall be included separately along with the anticipated federal-aid funds for that purpose.

Other program categories for which appropriations are requested, such as, but not limited to, maintenance, channelization and traffic control, bridge maintenance, public service and access road construction, transportation projects and systems, and ferry operations shall be enumerated in the budget.

The Department of Transportation shall have all powers necessary to comply fully with provisions of present and future federal-aid acts. No federally eligible construction project may be funded entirely with State funds unless the Department of Transportation has first reported to the Joint Legislative Commission on Governmental Operations. For purposes of this section, "federally eligible construction project" means any construction project except secondary road projects developed pursuant to G.S. 136-44.7 and 136-44.8 eligible for federal funds under any federal-aid act, whether or not federal funds are actually available.

The "Current Operations Appropriations Act" shall also contain the proposed appropriations of State funds for use in each county for maintenance and construction of secondary roads, to be allocated in accordance with G.S. 136-44.5 and 136-44.6. State funds appropriated for secondary roads shall not be transferred nor used except for the construction and maintenance of secondary roads in the county for which they are allocated pursuant to G.S. 136-44.5 and 136-44.6.

If the unreserved credit balance in the Highway Fund on the last day of a fiscal year is greater than the amount estimated for that date in the Current Operations Appropriations Act for the following fiscal year, the excess shall be used in accordance with this paragraph. The Director of the Budget may allocate part or all of the excess among reserves for access and public roads, for unforeseen events requiring prompt action, or for other urgent needs. The amount not allocated to any of these reserves by the Director of the Budget shall be credited to a reserve for maintenance. The Board of Transportation shall report monthly to the Joint Legislative Transportation Oversight Committee and the Fiscal Research Division on the use of funds in the maintenance reserve.

The Department of Transportation may provide for costs incurred or accrued for traffic control measures to be taken by the Department at major events which involve a high degree of traffic concentration on State highways, and which cannot be funded from regular budgeted items. This authorization applies only to events which are expected to generate 30,000 vehicles or more per day. The Department of Transportation shall provide for this funding by allocating and reserving up to one hundred thousand dollars ($100,000) before any other allocations from the appropriations for State maintenance for primary, secondary, and urban road systems are made, based upon the same proportion as is appropriated to each system. (1973, c. 507, s. 3; 1977, c. 464, s. 7.1; 1981, c. 859, s. 84; 1983, c. 717, ss. 46, 47; 1987, c. 830, s. 113(b); 1989,

c. 799, s. 12(a); 1991 (Reg. Sess., 1992), c. 907, s. 2; c. 1044, s. 35; 1997-443, s. 32.5; 2005-276, s. 28.1; 2005-382, s. 1; 2009-266, s. 19.)

**Effect of Amendments.** — Session Laws 2009-266, s. 19, effective August 1, 2009, in the first paragraph, in the first sentence, substituted "Act" for "Bill" near the beginning, inserted "and other transportation systems" at the end, and made a related stylistic change, and added the last sentence; in the third paragraph, inserted "transportation projects and systems"; and, in the fifth paragraph, substituted "Act" for "Bill" in the first sentence.

## § 136-44.2A. Secondary road improvement program.

There shall be annually allocated from the Highway Fund to the Department of Transportation for secondary road improvement programs developed pursuant to G.S. 136-44.7 and 136-44.8, a sum equal to that allocation made from the Highway Fund under G.S. 136-41.1(a). In addition, as provided in G.S. 136-176(b)(4) and G.S. 20-85(b), revenue is annually allocated from the Highway Trust Fund for secondary road construction. Of the funds allocated from the Highway Fund, the sum of sixty-eight million six hundred seventy thousand dollars ($68,670,000) shall be allocated among the counties in accordance with G.S. 136-44.5(b). All funds allocated from the Highway Fund for secondary road improvements in excess of that amount shall be allocated among the counties in accordance with G.S. 136-44.5(c). All funds allocated from the Highway Trust Fund for secondary road improvement programs shall be allocated in accordance with G.S. 136-182. (1981, c. 690, s. 6; 1989, c. 692, s. 1.7; 2005-404, s. 1; 2006-258, s. 1.)

**Editor's Note.** — The section originally codified as G.S. 136-44.2A was recodified by Session Laws 1981, c. 690, s. 5, as G.S. 136-44.2B.

Session Laws 2009-451, s. 25.4(a), provides: "Notwithstanding the provisions of G.S. 136-44.2A regarding the annual allocation of funds from the Highway Fund to the Department of Transportation for secondary road improvement programs, fifty million four hundred ninety-seven thousand six hundred seventy-one dollars ($50,497,671) of the funds required to be allocated for the secondary road improvement programs, established pursuant to G.S. 136-44.7 and G.S. 136-44.8, for fiscal year 2009-2010, shall remain in the Highway Fund for highway maintenance."

Session Laws 2009-451, s. 25.4(b), provides: "Notwithstanding the provisions of G.S. 136-44.2A regarding the annual allocation of funds from the Highway Fund to the Department of Transportation for secondary road improvement programs, thirty-one million five hundred ninety-three thousand three hundred fifty-nine dollars ($31,593,359) of the funds required to be allocated for the secondary road improvement programs, established pursuant to G.S. 136-44.7 and G.S. 136-44.8, for fiscal year 2010-2011, shall remain in the Highway Fund for highway maintenance."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

## § 136-44.2B. Reports to appropriations committees of General Assembly.

In each year that an appropriation bill is considered by the General Assembly, the Department of Transportation shall make a report to the appropriations committee of each House on all services provided by the Department to the public for which a fee is charged. The report shall include an analysis of the cost of each service and the fee charged for that service. (1975, c. 875, s. 8; 1981, c. 690, s. 5.)

**Editor's Note.** — This section was originally codified as G.S. 136-44.2A. It was recodified as G.S. 136-44.2B by Session Laws 1981, c. 690, s. 5.

## § 136-44.2C. Special appropriations for State construction.

Special appropriations for the construction of State highways may be used for the planning, design, right-of-way acquisition, and construction of transportation projects for the State Transportation System and Federal Aid System, including secondary roads, contained in the Transportation Improvement Program prepared pursuant to G.S. 143B-350(f)(4). Funding from the special appropriations used for secondary road projects in the Transportation Improvement Program is not subject to the allocation formula and restrictions of G.S. 136-44.2, 136-44.2A, or 136-44.5. (1991, c. 689, s. 210.1; 2009-266, s. 20.)

**Effect of Amendments.** — Session Laws 2009-266, s. 20, effective August 1, 2009, substituted "transportation projects" for "highway projects" and "State Transportation System" for "State Highway System" in the first sentence.

## § 136-44.3. Maintenance program.

The Department shall establish performance standards for the maintenance and operation of the State highway system. In each even-numbered year, the Department of Transportation shall survey the condition of the State highway system and shall prepare a report of the findings of the survey. The report shall provide both quantitative and qualitative descriptions of the condition of the system and shall provide estimates of the following:

(1) The annual cost to meet and sustain the established performance standards for the primary and secondary highway system, to include: (i) routine maintenance and operations, (ii) system preservation, and (iii) pavement and bridge rehabilitation.

(2) Projected system condition and corresponding optimal funding requirements for a seven-year plan to sustain established performance standards.

On the basis of the report and from funds available, the Department of Transportation shall develop a statewide annual maintenance program for the State highway system, which shall be subject to the approval of the Board of Transportation and is consistent with performance standards.

The report on the condition of the State highway system and maintenance funding needs shall be presented to the Joint Legislative Transportation Oversight Committee by December 31 of each even-numbered year, and copies shall be made available to any member of the General Assembly upon request. (1973, c. 507, s. 3; 1975, c. 716, s. 7; 1977, c. 464, s. 39; 1997-443, s. 32.19; 2007-164, s. 1.)

## § 136-44.4. Annual construction program; State primary and urban systems.

The Department of Transportation shall develop an annual construction program for the state-funded improvements on the primary and urban system highways and for all other federal-aid construction programs which shall be approved by the Board of Transportation. It shall include a statement of the immediate and long-range goals. The Department shall develop criteria for determining priorities of projects to insure that the long-range goals and the statewide needs as a whole are met, which shall be approved by the Board of Transportation. The annual construction program shall list all projects according to priority. A brief description of each project shall be given, identifying the highway number, county, nature of the improvement and the estimated cost of the project shall be indicated. Other transportation systems shall be similarly identified. Copies of the most recent annual work program shall be made available to any member of the General Assembly upon request. The Department of Transportation shall make annual reports after the completion of the fiscal year to be made available to the legislative committees and subcommittees for highway matters, county commissioners, and other persons upon request. These reports shall indicate the expenditure on each of the projects and the status of all projects set out in the work program. (1973, c. 507, s. 3; 1975, c. 716, s. 7; 1977, c. 464, s. 40; 2009-266, s. 21.)

**Effect of Amendments.** — Session Laws 2009-266, s. 21, effective August 1, 2009, inserted "other" preceding "federal-aid construction programs" in the first sentence, and added the sixth sentence.

CASE NOTES

**Cited** in Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina DOT, 46 N.C. App. 350, 265 S.E.2d 890 (1980).

## § 136-44.5. Secondary roads; mileage study; allocation of funds.

(a) Before July 1, in each calendar year, the Department of Transportation shall make a study of all State-maintained unpaved and paved secondary roads in the State. The study shall determine:

(1) The number of miles of unpaved State-maintained roads in each county eligible for paving and the total number of miles that are ineligible;

(2) The total number of miles of unpaved State-maintained roads in the State eligible for paving and the total number of miles that are ineligible; and

(3) The total number of paved State-maintained roads in each county, and the total number of miles of paved State-maintained roads in the State.

In this subsection, (i) ineligible unpaved mileage is defined as the number of miles of unpaved roads that have unavailable rights-of-way or for which environmental permits cannot be approved to allow for paving, and (ii) eligible unpaved mileage is defined as the number of miles of unpaved roads that have not been previously approved for paving by any funding source or has the potential to be programmed for paving when rights-of-way or environmental permits are secured. Except for federal-aid programs, the Department shall allocate all secondary road improvement funds on the basis of a formula using the study figures.

(b) The first sixty-eight million six hundred seventy thousand dollars ($68,670,000) shall be allocated as follows: Each county shall receive a percentage of these funds, the percentage to be determined as a factor of the number of miles of paved and unpaved State-maintained secondary roads in the county divided by the total number of miles of paved and unpaved State-maintained secondary roads in the State, excluding those unpaved secondary roads that have been determined to be eligible for paving as defined in subsection (a) of this section. Beginning in fiscal year 2010-2011, allocations pursuant to this subsection shall be based on the total number of secondary miles in a county in proportion to the total State-maintained secondary road mileage.

(c) Funds allocated for secondary road construction in excess of sixty-eight million six hundred seventy thousand dollars ($68,670,000) shall be allocated to each county based on the percentage proportion that the number of miles in the county of State-maintained unpaved secondary roads bears to the total number of miles in the State of State-maintained unpaved secondary roads. In a county that has roads with eligible miles, these funds shall only be used for paving unpaved secondary road miles in that county. In a county where there are no roads eligible to be paved as defined in subsection (a) of this section, the funds may be used for improvements on the paved and unpaved secondary roads in that county. Beginning in fiscal year 2010-2011, allocations pursuant to this subsection shall be based on the total number of secondary miles in a county in proportion to the total State-maintained secondary road mileage.

(d) Copies of the Department study of unpaved and paved State-maintained secondary roads and copies of the individual county allocations shall be made available to newspapers having general circulation in each county. (1973, c. 507, s. 3; 1975, c. 716, s. 7; 1989, c. 692, s. 1.8; 2005-404, s. 2; 2006-258, ss. 1, 2.)

**Editor's Note.** — Session Laws 2006-258, s. 5, provides: "The Joint Legislative Transportation Oversight Committee shall conduct a study of the cost of paving and maintenance of both paved and unpaved secondary roads in different geographic areas of the State. The Committee shall complete its report by March 1, 2007."

Session Laws 2009-451, s. 25.3, provides: "Of the funds appropriated in this act to the Department of Transportation:

"(1) Seven million dollars ($7,000,000) shall be allocated in each fiscal year for small construction projects recommended by the member of the Board of Transportation representing the Division in which the project is to be constructed in consultation with the Division Engineer and approved by the Secretary of the Department of Transportation. These funds shall be allocated equally in each fiscal year of the biennium among the 14 Highway Divisions for small construction projects.

"(2) Twelve million dollars ($12,000,000) in fiscal year 2009-2010 and twelve million dollars ($12,000,000) in fiscal year 2010-2011 shall be used statewide for rural or small urban highway improvements and related transportation enhancements to public roads and public facilities, industrial access roads, and spot safety projects, including pedestrian walkways that enhance highway safety. Projects funded pursuant to this subdivision shall be approved by the Secretary of Transportation.

"None of these funds used for rural secondary road construction are subject to the county allocation formulas in G.S. 136-44.5(b) and (c).

"These funds are not subject to G.S. 136-44.7.

"The Department of Transportation shall report to the members of the General Assembly on projects funded pursuant to this section in each member's district prior to construction. The Department shall make a quarterly comprehensive report on the use of these funds to the Joint Legislative Transportation Oversight Committee and the Fiscal Research Division."

For prior similar provisions, see Session Laws 2007-323, s. 27.5.

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

## § 136-44.6. Uniformly applicable formula for the allocation of secondary roads maintenance funds.

The Department of Transportation shall develop a uniformly applicable formula for the allocation of secondary roads maintenance funds for use in each county. The formula shall take into consideration the number of paved and unpaved miles of state-maintained secondary roads in each county and such other factors as experience may dictate. (1973, c. 507, s. 3; 1975, c. 716, s. 7; c. 753.)

## § 136-44.7. Secondary roads; annual work program.

(a) The Department of Transportation shall be responsible for developing criteria for improvements and maintenance of secondary roads. The criteria shall be adopted by the Board of Transportation before it shall become effective. The Department of Transportation shall be responsible for developing annual work programs for both construction and maintenance of secondary roads in each county in accordance with criteria developed. It shall reflect the long-range and immediate goals of the Department of Transportation. Projects on the annual construction program for each county shall be rated according to their priority based upon the secondary road criteria and standards which shall be uniform throughout the State. Tentative construction projects and estimated funding shall also be listed in accordance to priority. The annual construction program shall be adopted by the Board of Transportation before it shall become effective.

(b) When a secondary road in a county is listed in the first 10 secondary roads to be paved during a year on a priority list issued by the Department of Transportation under this section, the secondary road cannot be removed from the top 10 of that list or any subsequent list until it is paved. All secondary roads in a county shall be paved, insofar as possible, in the priority order of the list. When a secondary road in the top 10 of that list is removed from the list because it has been paved, the next secondary road on the priority list shall be moved up to the top 10 of that list and shall remain there until it is paved.

(c) When it is necessary for the Department of Transportation to acquire a right-of-way in accordance with (a) and (b) of this section in order to pave a secondary road or undertake a maintenance project, the Department shall negotiate the acquisition of the right-of-way for a period of up to six months. At the end of that period, if one or more property owners have not dedicated the necessary right-of-way and at least seventy-five percent (75%) of the property owners adjacent to the project and the owners of the majority of the road frontage adjacent to the project have dedicated the necessary property for the right-of-way and have provided funds required by Department rule to the Department to cover the costs of condemning the remaining property, the Department shall initiate condemnation proceedings pursuant to Article 9 of this Chapter to acquire the remaining property necessary for the project. (1973, c. 507, s. 3; 1975, c. 716, s. 7; 1977, c. 464, s. 8; 1989, c. 692, s. 1.9; 1991 (Reg. Sess., 1992), c. 900, s. 99; 2001-501, s. 2; 2002-86, s. 1.)

**Editor's Note.** — Session Laws 2009-451, s. 25.3, provides: "Of the funds appropriated in this act to the Department of Transportation:

"(1) Seven million dollars ($7,000,000) shall be allocated in each fiscal year for small construction projects recommended by the member of the Board of Transportation representing the Division in which the project is to be constructed in consultation with the Division Engineer and approved by the Secretary of the Department of Transportation. These funds shall be allocated equally in each fiscal year of the biennium among the 14 Highway Divisions for small construction projects.

"(2) Twelve million dollars ($12,000,000) in fiscal year 2009-2010 and twelve million dollars ($12,000,000) in fiscal year 2010-2011 shall be used statewide for rural or small urban highway improvements and related transportation enhancements to public roads and public facilities, industrial access roads, and spot safety projects, including pedestrian walkways that enhance highway safety. Projects funded pursuant to this subdivision shall be approved by the Secretary of Transportation.

"None of these funds used for rural secondary road construction are subject to the county allocation formulas in G.S. 136-44.5(b) and (c).

"These funds are not subject to G.S. 136-44.7.

"The Department of Transportation shall report to the members of the General Assembly on projects funded pursuant to this section in each member's district prior to construction. The Department shall make a quarterly comprehensive report on the use of these funds to the Joint Legislative Transportation Oversight Committee and the Fiscal Research Division."

For prior similar provisions, see Session Laws 2007-323, s. 27.5.

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

## § 136-44.7A. Submission of secondary roads construction programs to State agencies.

When the Department of Transportation proposes to pave an unpaved secondary road that crosses land controlled by a State agency, the Department of Transportation shall obtain the approval of that State agency before paving that secondary road. (1996, 2nd Ex. Sess., c. 18, s. 19.7.)

## § 136-44.7B. Permit issuance by Department of Environment and Natural Resources transportation construction projects.

Once the Department of Environment and Natural Resources or any agency within the Department of Environment and Natural Resources has issued a permit that is required for a transportation construction project to be undertaken by or on behalf of the Department of Transportation pursuant to the Transportation Improvement Program, that permit shall remain in effect until the project is completed. The permit shall not expire and shall not be modified or canceled for any reason, including a subsequent change in federal law or regulations or in State law or rules, unless at least one of the following occurs:

(1) The modification or cancellation is requested by the Department of Transportation.

(2) The modification or cancellation is clearly required by a change in federal law or regulations and a failure to modify or cancel the permit by the Department of Environment and Natural Resources will or may result in a loss of federal program delegation or a significant reduction in the availability of federal funds to the Department of Environment and Natural Resources or to the Department of Transportation.

(3) The modification or cancellation is clearly required by a change in State law as a result of an act of the General Assembly that includes a statement that the General Assembly specifically intends the change in State law to apply to ongoing transportation construction projects.

(4) The modification or cancellation is ordered by a court of competent jurisdiction.

(5) The nature or scope of the transportation construction project is significantly expanded or otherwise altered.

(6) Federal law or regulation requires that the permit expire at the end of a specific term of years. (2003-284, s. 29.6.)

## § 136-44.7C. Analysis and approval of Department of Transportation environmental policies or guidelines affecting transportation projects.

(a) Analysis Required. — The Department of Transportation shall conduct an analysis of any proposed environmental policy or guideline adopted by the Department that affects Department of Transportation projects to determine if the policy or guideline will result in an increased cost to Department of Transportation projects.

(b) Report of Analysis; Approval of Policy or Guideline Required. — The analysis of a proposed policy or guideline required by subsection (a) of this section shall be reported to the Board of Transportation at least 30 days prior to the proposed effective date of the policy or guideline, and shall not go into effect until approved by the Board of Transportation. (2005-276, s. 28.8(b).)

## § 136-44.7D. Bridge construction guidelines.

A bridge crossing rivers and streams in watersheds shall be constructed to accommodate the hydraulics of a flood water level equal to the water level projected for a 100-year flood for the region in which the bridge is built. The bridge shall be built without regard for the riparian buffer zones as designated by the Department of Environment and Natural Resources, Division of Water Quality. No Memorandums of Agreement may be made between Departments to bypass this construction mandate. No agency rules shall be enacted contrary to this section. (2007-551, s. 4.)

**Editor's Note.** — Session Laws 2007-551, s. 6, made this section effective August 31, 2007.

## § 136-44.7E. Compliance with federal guidelines for transportation projects.

The Department may continue to use the Merger '01 process provided the relevant portions of P.L. 109-59, Section 6002, (SAFETEA-LU) are incorporated to ensure the Department as the recipient agency is the co-lead agency with the United States Department of Transportation, delegating all other federal, state, or local agencies as participating or cooperating agencies. The Department's designation as a co-lead agency shall inure to the Department the authority to determine the purpose and need of a project and to determine viable alternatives. Any conflict between cooperating or participating agencies and the Department shall be resolved by the Department in favor of the completion of the project in conflict. (2007-551, s. 5.)

**Editor's Note.** — Session Laws 2007-551, s. 6, made this section effective August 31, 2007.

## § 136-44.8. Submission of secondary roads construction programs to the Boards of County Commissioners.

(a) The Department of Transportation shall post in the county courthouse a county map showing tentative secondary road paving projects rated according to the priority of each project in accordance with the criteria and standards adopted by the Board of Transportation. The map shall be posted at least two weeks prior to the public meeting of the county commissioners at which the Department of Transportation representatives are to meet and discuss the proposed secondary road construction program for the county as provided in subsection (c).

(b) The Department of Transportation shall provide a notice to the public of the public meeting of the board of county commissioners at which the annual secondary road construction program for the county proposed by the Department is to be presented to the board and other citizens of the county as provided in subsection (c). The notice shall be published in a newspaper published in the county or having a general circulation in the county once a week for two succeeding weeks prior to the meeting. The notice shall also advise that a county map is posted in the courthouse showing tentative secondary road paving projects rated according to the priority of each project.

(c) Representatives of the Department of Transportation shall meet with the board of county commissioners at a regular or special public meeting of the board of county commissioners for each county and present to and discuss with the board of county commissioners and other citizens present, the proposed secondary road construction program for the county. The presentation and discussion shall specifically include the priority rating of each tentative secondary road paving project included in the proposed construction program, according to the criteria and standards adopted by the Board of Transportation.

At the same meeting after the presentation and discussion of the annual secondary road construction program for the county or at a later meeting, the board of county commissioners may (i) concur in the construction program as proposed, or (ii) take no action, or (iii) make recommendations for deviations in the proposed construction program, except as to paving projects and the priority of paving projects for which the board in order to make recommendations for deviations, must vote to consider the matter at a later public meeting as provided in subsection (d).

(d) The board of county commissioners may recommend deviations in the paving projects and the priority of paving projects included in the proposed secondary road construction program only at a public meeting after notice to the public that the board will consider making recommendations for deviations in paving projects and the priority of paving projects included in the proposed annual secondary road construction program. Notice of the public meeting shall be published by the board of county commissioners in a newspaper published in the county or having a general circulation in the county. After discussion by the members of the board of county commissioners and comments and information presented by other citizens of the county, the board of county commissioners may recommend deviations in the paving projects and in the paving priority of secondary road projects included in the proposed secondary road construction program. Any recommendation made by the board of county commissioners for a deviation in the paving projects or in the priority for paving projects in the proposed secondary road construction program shall state the specific reason for each such deviation recommended.

(e) The Board of Transportation shall adopt the annual secondary construction program for each county after having given the board of county commissioners of each county an opportunity to review the proposed construction program and to make recommendations as provided in this section. The Board of Transportation shall consider such recommendations insofar as they are compatible with its general plans, standards, criteria and available funds, but having due regard to development plans of the county and to the maintenance and improvement needs of all existing roads in the county. However, no consideration shall be given to any recommendation by the board of county commissioners for a deviation in the paving projects or in the priority for paving secondary road projects in the proposed construction program that is not made in accordance with subsection (d).

(f) The secondary road construction program adopted by the Board of Transportation shall be followed by the Department of Transportation unless changes are approved by the Board of Transportation and notice of any changes is given the board of county commissioners. The Department of Transportation shall post a copy of the adopted program, including a map showing the secondary road paving projects rated according to the approved priority of each project, at the courthouse, within 10 days of its adoption by the

Board of Transportation. The board of county commissioners may petition the Board of Transportation for review of any changes to which it does not consent and the determination of the Board of Transportation shall be final. Upon request, the most recent secondary road construction programs adopted shall be submitted to any member of the General Assembly. The Department of Transportation shall make the annual construction program for each county available to the newspapers having a general circulation in the county. (1973, c. 507, s. 3; 1975, c. 716, s. 7; 1977, c. 464, s. 9; 1981, c. 536.)

## § 136-44.9. Secondary roads; annual statements.

The Department of Transportation shall, before the end of the calendar year, prepare and file with the board of county commissioners a statement setting forth (i) each secondary highway designated by number, located in the county upon which the paving or improvement was made during the calendar year; (ii) the amount expended for improvements of each such secondary highway during the calendar year; and (iii) the nature of such improvements. The Department of Transportation, in its annual report, shall report on each secondary road construction project including the stage of completion and funds expended. The pertinent portion of these reports for each county shall be made available to the board of county commissioners. (1973, c. 507, s. 3; 1975, c. 615; c. 716, s. 7.)

## § 136-44.10. Additions to secondary road system.

The Board of Transportation shall adopt uniform statewide or regional standards and criteria which the Department of Transportation shall follow for additions to the secondary road system. These standards and criteria shall be promulgated and copies made available for free distribution. (1973, c. 507, s. 3; 1975, c. 716, s. 7; 1977, c. 464, ss. 8, 21.)

## § 136-44.11. Right-of-way acquisitions; preliminary engineering annual report.

(a) The Department of Transportation shall include in its annual report projects for which preliminary engineering has been performed more than two years but where there has been no right-of-way acquisition, projects where right-of-way has been acquired more than two years but construction contracts have not been let. The report shall include the year or years in which the preliminary engineering was performed and the cost incurred, the number of right-of-way acquisitions for each project, the dates of the first and last acquisition and the total expenditure for right-of-way acquisition. The report shall include the status of the construction project for which the preliminary engineering was performed or the right-of-way acquired and the reasons for delay, if any.

(b) Requests to the Board of Transportation for allocation of funds for the purchase of right-of-way shall include an estimated time schedule to complete all necessary right-of-way purchases related to a specific project, and a proposed date to award construction contracts for that project. If the anticipated construction contract date is more than two years beyond the estimated completion of the related right-of-way purchases, the approval of both the Board of Transportation and the Director of the Budget is required. (1973, c. 507, s. 3; 1975, c. 716, s. 7; 1981, c. 859, s. 69.)

## § 136-44.12. Maintenance of roads and parking lots in areas administered by the Division of Parks and Recreation.

The Department of Transportation shall maintain all roads and parking lots which are not part of the State Highway System, leading into and located within the boundaries of all areas administered by the Division of Parks and Recreation of the Department of Environment and Natural Resources.

All such roads and parking lots shall be planned, designed, and engineered through joint action between the Department of Transportation and the Division of Parks and Recreation of the Department of Environment and Natural Resources. This joint action shall encompass all accepted park planning and design principles. Particular concern shall be given to traffic counts and vehicle weight, minimal cutting into or through any natural and scenic areas, width of shoulders, the cutting of natural growth along roadways, and the reduction of any potential use of roads or parking lots for any purpose other than by park users. All State park roads and parking lots shall conform to the standards regarding width and other roadway specifications as agreed upon by the Division of Parks and Recreation of the Department of Environment and Natural Resources and the Department of Transportation.

The State park road systems may be closed to the public in accordance with approved park practices that control the use of State areas so as to protect these areas from overuse and abuse and provide for functional use of the park areas, or for any other purpose considered in the best interest of the public by the Division of Parks and Recreation of the Department of Environment and Natural Resources.

Nothing herein shall be construed to include the transfer to the Department of Transportation the powers now vested in the Division of Parks and Recreation of the Department of Environment and Natural Resources relating to the patrol and safeguarding of State park roads or State park parking lots. (1973, c. 123, ss. 1-3; 1977, c. 771, s. 4; 1989, c. 727, s. 218(89); c. 799, s. 12(b); 1991 (Reg. Sess., 1992), c. 907, s. 3; 1997-443, s. 11A.119(a).)

## § 136-44.13: Reserved for future codification purposes.

## § 136-44.14. Curb ramps or curb cuts for handicapped persons.

(a) Curbs constructed on each side of any street or road, where curbs and sidewalks are provided and at other major points of pedestrian flow, shall meet the following minimum requirements:

(1) No less than two curb ramps or curb cuts shall be provided per lineal block, located at intersections.

(2) In no case, shall the width of a curb ramp or curb cut be less than 40 inches.

(3) The maximum gradient of such curb ramps or curb cuts shall be eight and thirty-three one-hundredths percent (8.33%) (12 inches slope for every one-inch rise) in relationship to the grade of the street or road.

(4) One curb ramp or curb cut may be provided under special conditions between each radius point of a street turnout of an intersection, if adequate provisions are made to prevent vehicular traffic from encroaching on the ramp.

(b) Minimum requirements for curb ramps or curb cuts under subsection (a) shall be met (i) in the initial construction of such curbs, and (ii) whenever such curbs are reconstructed, including, but not limited to, reconstruction for maintenance procedures and traffic operations, repair, or correction of utilities.

(c) The Department of Transportation, Division of Highways, Highway Design Section, is authorized and directed to develop guidelines to implement this Article in consultation with the Governor's Study Committee on Architectural Barriers (or the Committee on Barrier-Free Design of the Governor's Committee on Employment of the Handicapped if the Governor's Study Committee on Architectural Barriers ceases to exist). All curb ramps or curb cuts constructed or reconstructed in North Carolina shall conform to the guidelines of the Highway Design Section.

(d) The Department of Transportation, Division of Highways, Highway Design Section, is authorized and directed to provide free copies of this Article together with implementary guidelines and standards, to municipal and county governments and public utilities operating within the State. (1973, c. 718, ss. 1-4.)

## § 136-44.15: Expired.

**Editor's Note.** — This section was enacted by Session Laws 1987, c. 324 s. 1. Section 2 of the act provided that it would expire June 30, 1988.

## § 136-44.16. Authorized use of contract maintenance resurfacing program funds.

Of the contract maintenance resurfacing program funds appropriated by the General Assembly to the Department of Transportation, an amount not to exceed fifteen percent (15%) of the Board of Transportation's allocation of these funds may be used for widening existing narrow pavements. (1997-443, s. 32.12; 2003-112, s. 1.)

## §§ 136-44.17 through 136-44.19: Reserved for future codification purposes.

## Article 2B.

## *Public Transportation.*

## § 136-44.20. Department of Transportation designated agency to administer and fund public transportation programs; authority of political subdivisions.

(a) The Department of Transportation is hereby designated as the agency of the State of North Carolina responsible for administering all federal and/or State programs relating to public transportation; and the Department is hereby granted authority to do all things required under applicable federal and/or State legislation to administer properly public transportation programs within North Carolina. Such authority shall include, but shall not be limited to, the power to receive federal funds and distribute federal and State financial assistance for inter-city rail or bus passenger service crossing one or more county lines.

(b) The Department of Transportation, upon approval by the Board of Transportation, is authorized to provide the matching share of federal public transportation assistance programs through private resources, local government funds, or State appropriations provided by the General Assembly.

(b1) The Secretary may, subject to the appropriations made by the General Assembly for any fiscal year, enter into State Full Funding Grant Agreements with a Regional Public Transportation Authority (RPTA) duly created and existing pursuant to Article 26 of Chapter 160A, a Regional Transportation Authority (RTA) duly created and existing pursuant to Article 27 of Chapter 160A, or a city organized under the laws of this State as defined in G.S. 160A-1(2), to provide State matching funds for "new start" fixed guideway projects in development by any entity pursuant to 49 U.S.C. § 5309. These grant agreements shall be executable only upon an Authority's or city's completion of and the Federal Transit Administration (FTA) approval of Preliminary Engineering and Environmental Impact Studies in anticipation of federal funding pursuant to 49 U.S.C. § 5309.

Prior to executing State Full Funding Grant Agreements, the Secretary shall submit proposed grant agreements or amendments to the Joint Legislative Transportation Oversight Committee for review. The agreements, consistent with federal guidance, shall define the limits of the "new starts" projects within the State, commit maximum levels of State financial participation, and establish terms and conditions of State financial participation.

State Full Funding Grant Agreements may provide for contribution of State funds in multiyear allotments. The multiyear allotments shall be based upon the Department's estimates, made in conjunction with an Authority or city, of the grant amount required for "new start" project work to be performed in the appropriation fiscal year.

State funds may be used to fund fixed guideway projects developed without federal funding by the Department, a Regional Public Transportation Authority (RPTA) duly created and existing pursuant to Article 26 of Chapter 160A of the General Statutes, a Regional Transportation Authority (RTA) duly created and existing pursuant to Article 27 of Chapter 160A of the General Statutes, or a unit of local government. In addition, State funds may be used to pay administrative costs incurred by the Department while participating in such fixed guideway projects.

(c) Nothing herein shall be construed to prevent a political subdivision of the State of North Carolina from applying for and receiving direct assistance from the United States government under the provisions of any applicable legislation.

(d) Of the amount appropriated to the Department each year for State construction under the Transportation Improvement Program, the Department may use up to five million dollars ($5,000,000) to develop economical transit alternatives to highway construction. These alternatives may include high occupancy vehicle lanes and rail routes and providing the matching share of federal grants for transit alternatives to highway construction. (1975, c. 451; 1977, c. 341, s. 2; 1983, c. 616; 1989, c. 692, s. 2.3; c. 700, s. 1; 1993, c. 488, s. 2; 2000-67, s. 25.7; 2009-409, s. 1.)

**Effect of Amendments.** — Session Laws 2009-409, s. 1, effective July 1, 2009, added the last paragraph in subsection (b1).

## § 136-44.21. Ridesharing arrangement defined.

Ridesharing arrangement means the transportation of persons in a motor vehicle where such transportation is incidental to another purpose of the driver and is not operated or provided for profit. The term shall include ridesharing arrangements such as carpools, vanpools and buspools. (1981, c. 606, s. 1.)

## § 136-44.22. Workers' Compensation Act does not apply to ridesharing arrangements.

Chapter 97 of the General Statutes shall not apply to a person injured while participating in a ridesharing arrangement between his or her place of residence and a place of employment or termini near such place, provided that if the employer owns, leases or contracts for the motor vehicle used in such an arrangement, Chapter 97 of the General Statutes shall apply. (1981, c. 606, s. 1.)

## § 136-44.23. Ridesharing arrangement benefits are not income.

Any benefits, other than salary or wages, received by a driver or a passenger while in a ridesharing arrangement shall not constitute income for the purposes of Article 4 of Chapter 105 of the General Statutes. (1981, c. 606, s. 1.)

## § 136-44.24. Ridesharing arrangements exempt from municipal licenses and taxes.

No county, city, town or other municipal corporation may require a business license for a ridesharing arrangement, nor may they require any additional tax, fee, or registration on a vehicle used in a ridesharing arrangement. (1981, c. 606, s. 1.)

## § 136-44.25. Wage and Hour Act inapplicable to ridesharing arrangements.

The provisions of Article 2A of Chapter 95 of the General Statutes of North Carolina shall not apply to an employee while participating in any ridesharing arrangement as defined in G.S. 136-44.21, as provided in G.S. 95-25.14(b)(6). (1981, c. 606, s. 1; c. 663, s. 14.)

## § 136-44.26. Use of public motor vehicles for ridesharing.

Motor vehicles owned or operated by any State or local agency may be used in ridesharing arrangements for public employees, provided the public employees benefiting from said ridesharing arrangements shall pay fees which shall cover all capital operating costs of the ridesharing arrangements. (1981, c. 606, s. 1.)

## § 136-44.27. North Carolina Elderly and Disabled Transportation Assistance Program.

(a) There is established the Elderly and Disabled Transportation Assistance Program that shall provide State financed elderly and disabled transportation services for counties within the State. The Department of Transportation is designated as the agency of the State responsible for administering State funds appropriated to purchase elderly and disabled transportation services for counties within the State. The Department shall develop appropriate procedures regarding the distribution and use of these funds and shall adopt rules to implement these procedures. No funds appropriated pursuant to this act may be used to cover State administration costs.

(b) For the purposes of this section, an elderly person is defined as one who has reached the age of 60 or more years, and a disabled person is defined as one who has a physical or mental impairment that substantially limits one or more major life activities, an individual who has a record of such impairment, or an individual who is regarded as having such an impairment. Certification of eligibility shall be the responsibility of the county.

(c) All funds distributed by the Department under this section are intended to purchase additional transportation services, not to replace funds now being used by local governments for that purpose. These funds are not to be used towards the purchase of transportation vehicles or equipment. To this end, only those counties maintaining elderly and disabled transportation services at a level consistent with those in place on January 1, 1987, shall be eligible for additional transportation assistance funds.

(d) The Public Transportation Division of the Department of Transportation shall distribute these funds to the counties according to the following formula: fifty percent (50%) divided equally among all counties; twenty-two and one-half percent (221/2%) based upon the number of elderly residents per county as a percentage of the State's elderly population; twenty-two and one-half percent (221/2%) based upon the number of disabled residents per county as a percentage of the State's disabled population; and, the remaining five percent (5%) based upon a population density factor that recognizes the higher transportation costs in sparsely populated counties.

(e) Funds distributed by the Department under this section shall be used by counties in a manner consistent with transportation development plans which have been approved by the Department and the Board of County Commissioners. To receive funds apportioned for a given fiscal year, a county shall have an approved transportation development plan. Funds that are not obligated in a given fiscal year due to the lack of such a plan will be distributed to the eligible counties based upon the distribution formula prescribed by subsection (d) of this section. (1987 (Reg. Sess., 1988), c. 1095, ss. 1(a), 1(b); c. 1101, s. 8.2; 1989, c. 752, s. 105(b); 1993, c. 321, s. 147.)

**§§ 136-44.28, 136-44.29:** Reserved for future codification purposes.

## ARTICLE 2C.

## *House Movers Licensing Board.*

**§§ 136-44.30 through 136-44.34:** Repealed by Session Laws 1977, c. 579.

**Cross References.** — As to professional housemoving, see G.S. 20-356 through 20-372.

## ARTICLE 2D.

## *Railroad Revitalization.*

### § 136-44.35. Railroad revitalization and corridor preservation a public purpose.

The General Assembly hereby finds that programs for railroad revitalization which assure the maintenance of safe, adequate, and efficient rail transportation services and that programs for railway corridor preservation which assure the availability of such corridors in the future are vital to the continued growth and prosperity of the State and serve the public purpose. (1979, c. 658, s. 1; 1989, c. 600, s. 1.)

**Editor's Note.** — This section was enacted by Session Laws 1979, c. 658, s. 1. Former G.S. 136-44.35, which was derived from Session Laws 1977, c. 584, was rewritten and renumbered as G.S. 136-44.36 by Session Laws 1979, c. 658, ss. 1, 2.

The preamble to Session Laws 2005-222, provides: "Whereas, expanding and upgrading passenger, freight, commuter, and short line rail service is important to the economy of North Carolina; and

"Whereas, the citizens of this State have stated their support for expanded passenger rail service through resolutions from over 100 cities, towns, and organizations submitted to the House Interim Committee on Expanding Rail Service in the fall of 2004; and

"Whereas, Congress is debating reauthorization of the federal Surface Transportation Program; and

"Whereas, Congress is considering new and innovative means of financing construction of transportation infrastructure, including highways, transit, intermodal, and rail projects; and

"Whereas, Congress is debating reform of the National Railroad Passenger Corporation, known as Amtrak, and the result may be more responsibilities for rail transferred to the states; and

"Whereas, it is in the best interest of the State of North Carolina to respond in a timely way to these proposed changes as they impact our transportation programs and economic development opportunities; and

"Whereas, many rail corridors in the State, such as the Wallace to Castle Hayne rail corridor, are in need of restoration and improvement; and

"Whereas, many rail initiatives in the State, including service to western and southeastern North Carolina, are in need of federal and State investment; Now, therefore, The General Assembly of North Carolina enacts:"

## § 136-44.36. Department of Transportation designated as agency to administer federal and State railroad revitalization programs.

The General Assembly hereby designates the Department of Transportation as the agency of the State of North Carolina responsible for administering all State and federal railroad revitalization programs. The Department of Transportation is authorized to develop, and the Board of Transportation is authorized to adopt, a State railroad plan, and the Department of Transportation is authorized to do all things necessary under applicable State and federal legislation to properly administer State and federal railroad revitalization programs within the State. Such authority shall include, but shall not be limited to, the power to receive federal funds and distribute and expend federal and State funds for rail programs designated to cover the costs of acquiring, by purchase, lease or other manner as the department considers appropriate, a railroad line or other rail property to maintain existing or to provide future rail service; the costs of rehabilitating and improving rail property on railroad lines to the extent necessary to permit safe, adequate and efficient rail service on such lines; and the costs of constructing rail or rail related facilities for the purpose of improving the quality, efficiency and safety of rail service. The Department shall also have the authority to preserve railroad corridors for future railroad use and interim compatible uses and may lease such corridors for interim compatible uses. Such authority shall also include the power to receive and administer federal financial assistance without State financial participation to railroad companies to cover the costs of local rail service continuation payments, of rail line rehabilitation, and of rail line construction as listed above. This Article shall not be construed to grant to the department the power or authority to operate directly any rail line or rail facilities. (1979, c. 658, s. 2; 1987 (Reg. Sess., 1988), c. 1071, s. 1; 1989, c. 600, s. 2.)

**Editor's Note.** — This section was formerly G.S. 136-44.35. It was rewritten and renumbered by Session Laws 1979, c. 658, ss. 1, 2.

## § 136-44.36A. Railway corridor preservation.

The North Carolina Department of Transportation is authorized, pursuant to 16 U.S.C.A. § 1247(d), to preserve rail transportation corridors and permit compatible interim uses of such corridors. (1987 (Reg. Sess., 1988), c. 1071, s. 2.)

**Editor's Note.** — Session Laws 1987 (Reg. Sess., 1988), c. 1071, s. 7 made this section effective upon ratification and applicable only to railroad corridors and abandonments after that date. The act was ratified July 7, 1988.

Session Laws 1987 (Reg. Sess., 1988), c. 1071, ss. 3 through 5, provided:

"Sec. 3. If the Congress of the United States repeals the authorization contained in 16 U.S.C.A. 1247(d) or if a court of competent jurisdiction declares the provisions to be unconstitutional or otherwise invalid, following any appellate review, then Section 2 of this act [which enacted this section] shall expire upon certification by the Secretary of State that the federal authorization has been repealed or has been invalidated.

"Sec. 4. The Department of Transportation is authorized to proceed under Section 2 of this act, but the payment of just compensation may be provided to the underlying fee owners in accordance with Article 9 of Chapter 136 of the General Statutes, the same as if the railroad had been abandoned rather than preserved for future railroad use and compatible interim uses.

"Sec. 5. The Department of Transportation shall develop a proposed high speed rail corridor plan for North Carolina, in conjunction with the Department's railway corridor preservation program. The Department shall present its plan to the 1989 General Assembly for its review and approval."

**Legal Periodicals.** — For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

## § 136-44.36B. Power of Department to preserve and acquire railroad corridors.

In exercising its power to preserve railroad corridors, the Department of Transportation may acquire property for new railroad corridors and may acquire property that is or has been part of a railroad corridor by purchase, gift, condemnation, or other method, provided that the Department may not condemn part of an existing, active railroad line. The procedures in Article 9 of this Chapter apply when the Department condemns property to preserve or acquire a railroad corridor. (1989, c. 600, s. 3; 1991, c. 673, s. 1.)

**Legal Periodicals.** — For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

### CASE NOTES

**Power to Acquire Property.** — Although G.S. 62-220 (recodified at G.S. 136-1190), which lists the powers of a railroad, did not include the power to sell real property, the Department of Transportation had the power, under G.S. 136-44.36B, to acquire property that was or had been part of a railroad corridor by purchase, gift, condemnation, or other method, provided that the Department could not condemn part of an existing, active railroad line. Therefore, a railroad had the power to sell or transfer its right of way, even without an execution sale. City of Charlotte v. BMJ of Charlotte. LLC, — N.C. App. —, 675 S.E.2d 59, 2009 N.C. App. LEXIS 647 (Apr. 7, 2009).

## § 136-44.36C. Installment contracts authorized.

The Department of Transportation may purchase active or inactive railroad lines, corridors, rights-of-way, locomotives, rolling stock, and other rail property, both real and personal, by installment contracts which create in the property purchased a security interest to secure payment of the purchase money. No deficiency judgment may be rendered against the Department of Transportation in any action for breach of a contractual obligation authorized by this section, and the taxing power of the State is not and may not be pledged directly or indirectly to secure any money due the seller. (1991, c. 673, s. 2.)

## § 136-44.36D. Recreational leasing requirements.

Portions of rail corridors held by the North Carolina Department of Transportation in fee simple absolute may be leased by the Department for interim public recreation use provided the following conditions are met:

(1) Before requesting trail use, a sponsoring unit of local government has held a public hearing in accordance with G.S. 143-318.12 and notified the owners of all parcels of land abutting the corridor as shown on the county tax listing of the hearing date, place, and time by first-class mail at the last addresses listed for such owners on the county tax abstracts. A transcript of all public comments presented at the hearing has been sent to the North Carolina Department of Transportation at the time of requesting use of the corridor.

(2) A unit of local government has requested use of the rail corridor or a portion thereof for interim public recreational trail use, and agrees in writing to assume all development costs as well as management, security, and liability responsibilities as defined by the North Carolina Department of Environment and Natural Resources and the North Carolina Department of Transportation.

(3) Adjacent property owners are offered broad voting representation by membership in the organization, if any, that is delegated most immediate responsibility for development and management of the rail-trail by the sponsoring local government.

(4) The North Carolina Department of Transportation has determined that there will not likely be a need to resume active rail service in the leased portion of the rail corridor for at least 10 years.

(5) Any lease or other agreement allowing trail use includes terms for resumption of active rail use which will assure unbroken continuation of the corridor's perpetual use for railroad purposes and interim compatible uses.

(6) Use of the rail corridor or portions thereof as a recreational trail does not interfere with the ultimate transportation purposes of the corridor as determined by the North Carolina Department of Transportation. (1991, c. 751, s. 1; 1997-443, s. 11A.119(a).)

**Editor's Note.** — This section was enacted as G.S. 136-44.36C. It was renumbered at the direction of the Revisor of Statutes.

**Legal Periodicals.** — For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

## § 136-44.37. Department to provide nonfederal matching share.

The Department of Transportation upon approval by the Board of Transportation and the Director of the Budget may provide for the matching share of federal rail revitalization assistance programs through private resources, county funds or State appropriations as may be provided by the General Assembly. (1979, c. 658, s. 3; 1983, c. 717, s. 48; 1985 (Reg. Sess., 1986), c. 955, ss. 47, 48; 2006-203, s. 76.)

**Editor's Note.** — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 76, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, deleted the last sentence which read: "Prior to taking any action under this section, the Director of the Budget may consult with the Advisory Budget Commission."

### § 136-44.38. Department to provide State and federal financial assistance to cities and counties for rail revitalization.

(a) The Department of Transportation is authorized to distribute to cities and counties State financial assistance for local rail revitalization programs provided that every rail revitalization project for which State financial assistance would be utilized must be approved by the Board of Transportation and by the Director of the Budget.

(b) Repealed by Session Laws 1989, c. 600, s. 4. (1979, c. 658, s. 3; 1983, c. 717, s. 48; 1985 (Reg. Sess., 1986), c. 955, ss. 49, 50; 1989, c. 600, s. 4; 2006-203, s. 77.)

**Editor's Note.** — This section is set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 77, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, deleted the former last sentence in subsection (a), which read: "Prior to taking any action under this section, the Director of the Budget may consult with the Advisory Budget Commission."

**§§ 136-44.39 through 136-44.49:** Reserved for future codification purposes.

## Article 2E.

## *Transportation Corridor Official Map Act.*

### § 136-44.50. Transportation corridor official map act.

(a) A transportation corridor official map may be adopted or amended by any of the following:

(1) The governing board of any local government for any thoroughfare included as part of a comprehensive plan for streets and highways adopted pursuant to G.S. 136-66.2 or for any proposed public transportation corridor included in the adopted long-range transportation plan.

(2) The Board of Transportation, or the governing board of any county, for any portion of the existing or proposed State highway system or for any public transportation corridor, to include rail; that is in the Transportation Improvement Program.

(3) Regional public transportation authorities created pursuant to Article 26 of Chapter 160A of the General Statutes or regional transportation authorities created pursuant to Article 27 of Chapter 160A of the General Statutes for any portion of the existing or proposed State highway system, or for any proposed public transportation corridor, or adjacent station or parking lot, included in the adopted long-range transportation plan.

(4) The North Carolina Turnpike Authority for any project being studied pursuant to G.S. 136-89.183.

(5) The Wilmington Urban Area Metropolitan Planning Organization for any project that is within its urbanized boundary and identified in G.S. 136-179.

Before a city adopts a transportation corridor official map that extends beyond the extraterritorial jurisdiction of its building permit issuance and subdivision control ordinances, or adopts an amendment to a transportation corridor official map outside the extraterritorial jurisdiction of its building permit issuance and subdivision control ordinances, the city shall obtain approval from the Board of County Commissioners.

(a1) No property may be regulated under this Article until:

(1) The governing board of the city, the county, the regional transportation authority, the North Carolina Turnpike Authority, or the Department of Transportation has held a public hearing in each county affected by the map on the proposed map or amendment. Notice of the hearing shall be provided:

a. By publication at least once a week for four successive weeks prior to the hearing in a newspaper having general circulation in the county in which the transportation corridor to be designated is located.

b. By two week written notice to the Secretary of Transportation, the Chairman of the Board of County Commissioners, and the Mayor of any city or town through whose corporate or extraterritorial jurisdiction the transportation corridor passes.

c. By posting copies of the proposed transportation corridor map or amendment at the courthouse door for at least 21 days prior to the hearing date. The notice required in sub-subdivision a. above shall make reference to this posting.

d. By first-class mail sent to each property owner affected by the corridor. The notice shall be sent to the address listed for the owner in the county tax records.

(1a) The transportation corridor official map has been adopted or amended by the governing board of the city, the county, the regional transportation authority, the North Carolina Turnpike Authority, or the Department.

(2) A permanent certified copy of the transportation corridor official map or amendment has been filed with the register of deeds. The boundaries may be defined by map or by written description, or a combination thereof. The copy shall measure approximately 20 inches by 12 inches, including no less than one and one-half inches binding space on the left-hand side.

(3) The names of all property owners affected by the corridor have been submitted to the Register of Deeds.

(b) Transportation corridor official maps and amendments shall be distributed and maintained in the following manner:

(1) A copy of the official map and each amendment thereto shall be filed in the office of the city clerk and in the office of the district engineer.

(2) A copy of the official map, each amendment thereto and any variance therefrom granted pursuant to G.S. 136-44.52 shall be furnished to

the tax supervisor of any county and tax collector of any city affected thereby. The portion of properties embraced within a transportation corridor and any variance granted shall be clearly indicated on all tax maps maintained by the county or city for such period as the designation remains in effect.

(3) Notwithstanding any other provision of law, the certified copy filed with the register of deeds shall be placed in a book maintained for that purpose and cross-indexed by number of road, street name, or other appropriate description. The register of deeds shall collect a fee of five dollars ($5.00) for each map sheet or page recorded.

(4) The names submitted as required under subdivision (a1)(3) of this section shall be indexed in the "grantor" index by the Register of Deeds.

(c) Repealed by Session Laws 1989, c. 595, s. 1.

(d) Within one year following the establishment of a transportation corridor official map or amendment, work shall begin on an environmental impact statement or preliminary engineering. The failure to begin work on the environmental impact statement or preliminary engineering within the one-year period shall constitute an abandonment of the corridor, and the provisions of this Article shall no longer apply to properties or portions of properties embraced within the transportation corridor. A local government may prepare environmental impact studies and preliminary engineering work in connection with the establishment of a transportation corridor official map or amendments to a transportation corridor official map. When a city or county prepares a transportation corridor official map for a street or highway that has been designated a State responsibility pursuant to G.S. 136-66.2, the environmental impact study and preliminary engineering work shall be reviewed and approved by the Department of Transportation. An amendment to a corridor shall not extend the one-year period provided by this section unless it establishes a substantially different corridor in a primarily new location.

(e) The term "amendment" for purposes of this section includes any change to a transportation corridor official map, including:

(1) Failure of the Department of Transportation, the North Carolina Turnpike Authority, a city, a county, or a regional transportation authority to begin work on an environmental impact statement or preliminary engineering as required by this section; or

(2) Deletion of the corridor from the transportation corridor official map by action of the Board of Transportation, the North Carolina Turnpike Authority, or deletion of the corridor from the long-range transportation plan of a city, county, or regional transportation authority by action of the city, county, or regional transportation authority governing Board.

(f) The term "transportation corridor" as used in this Article does not include bikeways or greenways. (1987, c. 747, s. 19; 1989, c. 595, s. 1; 1998-184, s. 1; 2005-275, s. 1; 2005-418, s. 9; 2006-237, s. 1; 2008-180, s. 3; 2009-332, ss. 1, 2; 2009-570, s. 44.)

**Editor's Note.** — Session Laws 1987, c. 747, which enacted this Article, provided in s. 25 that, as used in the act, the word "municipality" means a "city" as defined by G.S. 160A-1.

Session Laws 2005-418, s. 14, provides: "The provisions of this act shall not be deemed to repeal or amend the validity or enforceability of any local act or charter provision previously enacted by the General Assembly."

**Effect of Amendments.** — Session Laws 2008-180, s. 3, effective August 4, 2008, in subdivision (a)(1), substituted "local government" for "city"; in subdivision (a1)(1), inserted "the county" near the beginning; in subsection (d), substituted "local government" for "city" in the third sentence, inserted "or county" in the fourth sentence; in subdivision (e)(1), inserted "a county"; and in subdivision (e)(2), inserted "county" both times it appears.

Session Laws 2009-332, ss. 1 and 2, effective

August 1, 2009, in subdivision (a)(1), inserted "or the governing board of any county"; in subdivision (a)(3), inserted "portion of the existing or proposed State highway system, or for any"; in subsection (a1), substituted "property may" for "transportation corridor official map shall be adopted or amended, nor may any property" in the introductory language; and added subdivision (a1)(1a).

Session Laws 2009-570, s. 44, effective August 28, 2009, substituted "subdivision (a1)(3) of this section" for "subdivision (a)(3) of this section" in subdivision (b)(4).

**Legal Periodicals.** — See legislative survey, 21 Campbell L. Rev. 323 (1999).

### CASE NOTES

**Cited** in Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989).

## § 136-44.51. Effect of transportation corridor official map.

(a) After a transportation corridor official map is filed with the register of deeds, no building permit shall be issued for any building or structure or part thereof located within the transportation corridor, nor shall approval of a subdivision, as defined in G.S. 153A-335 and G.S. 160A-376, be granted with respect to property within the transportation corridor. The Secretary of Transportation or his designee, the director of a regional public transportation authority, or the director of a regional transportation authority, as appropriate, shall be notified within 10 days of all requests for building permits or subdivision approval within the transportation corridor. The provisions of this section shall not apply to valid building permits issued prior to August 7, 1987, or to building permits for buildings and structures which existed prior to the filing of the transportation corridor provided the size of the building or structure is not increased and the type of building code occupancy as set forth in the North Carolina Building Code is not changed.

(b) In any event, no application for building permit issuance or subdivision plat approval for a tract subject to a valid transportation corridor official map shall be delayed by the provisions of this section for more than three years from the date of its original submittal. (1987, c. 747, s. 19; 1998-184, s. 1.)

### CASE NOTES

**Cited** in Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989).

## § 136-44.52. Variance from transportation corridor official map.

(a) The Department of Transportation, the regional public transportation authority, the regional transportation authority, or the local government which initiated the transportation corridor official map shall establish procedures for considering petitions for variance from the requirements of G.S. 136-44.51.

(b) The procedure established by the State shall provide for written notice to the Mayor and Chairman of the Board of County Commissioners of any affected city or county, and for the hearing to be held in the county where the affected property is located.

(c) Local governments may provide for petitions for variances to be heard by the board of adjustment or other boards or commissions which can hear variances authorized by G.S. 160A-388. The procedures for boards of adjustment shall be followed except that no vote greater than a majority shall be required to grant a variance.

(c1) The procedure established by a regional public transportation authority or a regional transportation authority pursuant to subsection (a) of this section shall provide for a hearing de novo by the Department of Transportation for any petition for variance which is denied by the regional public transportation authority or the regional transportation authority. All hearings held by the Department of Transportation under this subsection shall be conducted in accordance with procedures established by the Department of Transportation pursuant to subsection (a) of this section.

(d) A variance may be granted upon a showing that:

(1) Even with the tax benefits authorized by this Article, no reasonable return may be earned from the land; and

(2) The requirements of G.S. 136-44.51 result in practical difficulties or unnecessary hardships. (1987, c. 747, s. 19; 1998-184, s. 1; 2008-180, s. 4.)

**Effect of Amendments.** — Session Laws 2008-180, s. 4, effective August 4, 2008, in subsection (a), substituted "local government" for "city"; and in subsection (c), substituted "local governments" for "cities" in the first sentence.

**Legal Periodicals.** — See legislative survey, 21 Campbell L. Rev. 323 (1999).

## § 136-44.53. Advance acquisition of right-of-way within the transportation corridor.

(a) After a transportation corridor official map is filed with the register of deeds, a property owner has the right of petition to the filer of the map for acquisition of the property due to an imposed hardship. The Department of Transportation, the regional public transportation authority, the regional transportation authority, or the local government that initiated the transportation corridor official map may make advanced acquisition of specific parcels of property when that acquisition is determined by the respective governing board to be in the best public interest to protect the transportation corridor from development or when the transportation corridor official map creates an undue hardship on the affected property owner. The procedure established by a regional public transportation authority or a regional transportation authority pursuant to subsection (b) of this section shall provide for a hearing de novo by the Department of Transportation for any request for advance acquisition due to hardship that is denied by an authority. All hearings held by the Department under this subsection shall be conducted in accordance with procedures established by the Department pursuant to subsection (b) of this section. Any decision of the Department pursuant to this subsection shall be final and binding. Any property determined eligible for hardship acquisition shall be acquired within three years of the finding or the restrictions of the map shall be removed from the property.

(b) Prior to making any advanced acquisition of right-of-way under the authority of this Article, the Board of Transportation or the respective governing board which initiated the transportation corridor official map shall develop and adopt appropriate policies and procedures to govern the advanced acquisition of right-of-way and to assure that the advanced acquisition is in the best overall public interest.

(c) When a local government makes an advanced right-of-way acquisition of property within a transportation corridor official map for a street or highway that has been determined to be a State responsibility pursuant to the provisions of G.S. 136-66.2, the Department of Transportation shall reimburse the local government for the cost of any advanced right-of-way acquisition at the time the street or highway is constructed. The Department of Transportation shall have no responsibility to reimburse a municipality for any advanced right-of-way acquisition for a street or highway that has not been designated a State responsibility pursuant to the provisions of G.S. 136-66.2 prior to the initiation of the advanced acquisition by the city. The local government shall obtain the concurrence of the Department of Transportation in all instances of advanced acquisition.

(d) In exercising the authority granted by this section, a local government is authorized to expend its funds for the protection of rights-of-way shown on a duly adopted transportation corridor official map whether the right-of-way to be acquired is located inside or outside the municipal corporate limits. (1987, c. 747, s. 19; 1998-184, s. 1; 2008-180, s. 5; 2008-187, s. 47.7.)

**Editor's Note.** — Session Laws 2008-187, s. 47.7, which amended subsection (d), was contingent on House Bill 2314, 2007 Regular Session (Session Laws 2008-180) becoming law, which it did.

**Effect of Amendments.** — Session Laws 2008-180, s. 5, effective August 4, 2008, in subsection (a), substituted "local government that" for "city which"; in subsection (c), substituted "local government" for "city" three times; and in subsection (d), substituted "local government" for "municipality," and substituted "its funds" for "municipal funds."

Session Laws 2008-187, s. 47.7, effective August 7, 2008, substituted "outside the municipal" for "outside a municipal" in subsection (d).

**Legal Periodicals.** — See legislative survey, 21 Campbell L. Rev. 323 (1999).

## § 136-44.54. Standard for appraisal of right-of-way within corridor.

The Department shall utilize the criteria contained in 49 C.F.R. § 24.103 (1997) when appraising right-of-way in a transportation corridor designated under this Article. (1998-184, s. 1.)

# Article 3.

## *State Highway System.*

## Part 1. Highway System.

## § 136-45. General purpose of law; control, repair and maintenance of highways.

The general purpose of the laws creating the Department of Transportation is that said Department of Transportation shall take over, establish, construct, and maintain a statewide system of hard-surfaced and other dependable highways running to all county seats, and to all principal towns, State parks, and principal State institutions, and linking up with state highways of adjoining states and with national highways into national forest reserves by the most practical routes, with special view of development of agriculture, commercial and natural resources of the State, and, except as otherwise provided by law, for the further purpose of permitting the State to assume control of the State highways, repair, construct, and reconstruct and maintain said highways at the expense of the entire State, and to relieve the counties and cities and towns of the State of this burden. (1921, c. 2, s. 2; C.S., s. 3846(a); 1943, c. 410; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 2007-428, s. 2.)

### CASE NOTES

**This section and § 136-54 were not repealed with respect to municipal streets by enactment of § 136-66.2.** This section and G.S. 136-54 have both been amended numerous times since 1959, and there has been no mention of their repeal. Repeal by implication is not favored in the law, and statutes dealing with the same subject matter must be construed in pari materia, and harmonized if possible to give each effect. Town of Morehead City v. North Carolina Dep't of Transp., 74 N.C. App. 66, 327 S.E.2d 602 (1985).

**As to the general policy of the State as to highways,** see Young v. Board of Comm'rs, 190 N.C. 52, 128 S.E. 401 (1925).

**Department Is Agency Created to Conduct and Maintain Highway System.** — The State Highway Commission (now Department of Transportation) is the State agency created for the purpose of constructing and maintaining statewide highways at the expense of the entire State. North Carolina Tpk. Auth. v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965).

**Laws Repealed.** — Former G.S. 3580 through 3593 of the Consolidated Statutes were repealed by this Article insofar as the former conflicted with the latter and under the latter power is conferred on the State Highway Commission (now Department of Transportation) to take over county highways as a part of the highway system upon such terms and agreements with the county commissioners as may be made by them as authorized by this Article. Lassiter v. Board of Comm'rs, 188 N.C. 379, 124 S.E. 738 (1924).

**Statutes Construed in Pari Materia.** — The statute relating to the creation, maintenance, etc., of a statewide system of public roads, and the amendatory act providing for the taking over of county highways for State maintenance are to be construed together in pari materia. Board of Comm'rs v. State Hwy. Comm'n, 195 N.C. 26, 141 S.E. 539 (1928).

**The purpose of the act of 1921** was to encourage cooperation between the State Highway Commission (now Department of Transportation) and the county authorities. Young v. Board of Comm'rs, 190 N.C. 52, 128 S.E. 401 (1925).

**The State Highway Commission (now Department of Transportation) is an administrative body.** Cameron v. State Hwy. Comm'n, 188 N.C. 84, 123 S.E. 465 (1924).

**Broad Discretion Given.** — This section and G.S. 136-18, subdivision (2), give broad discretionary powers to the State Highway Commission (now Department of Transportation) in establishing, altering and changing the route of county roads that are or are proposed to be absorbed in the State highway system of public roads. Road Comm'n v. State Hwy. Comm'n, 185 N.C. 56, 115 S.E. 886 (1923).

**Protection of Integrity of Rights-of-Way.** — It is clear that the authority and powers set forth in G.S. 136-18 are intended to allow the Department of Transportation (DOT) to protect the integrity of its rights-of-way, which are there to begin with to accommodate the construction and maintenance of roads and highways. Baldwin v. GTE S., Inc., 110 N.C. App. 54, 428 S.E.2d 857, cert. denied, 334 N.C. 619, 435 S.E.2d 331 (1993), rev'd on other grounds, 335 N.C. 544, 439 S.E.2d 108 (1994).

**Control of Discretion as to Change of Highway.** — The State Highway Commission (now Department of Transportation) cannot be controlled beforehand, either by contract or otherwise, in the exercise of its discretion conferred on it by statute as to the change of location of a public highway. Johnson v. Board of Comm'rs, 192 N.C. 561, 135 S.E. 618 (1926).

**Change of Route Not Violating Rights of Property Owners.** — Those who acquired property along the "proposed" route, as shown in connection with the consideration by the legislature of the bill which became enacted into what is now this Article, acted with implied notice of the powers conferred upon the State Highway Commission (now Department of Transportation) in changing the route, and could not maintain the position that they had been deprived of in violation of the due-process-of-law provision in the Constitution, whether of a vested right or otherwise. Cameron v. State Hwy. Comm'n, 188 N.C. 84, 123 S.E. 465 (1924).

**Liability of Department for Torts, etc.** — The State Highway Commission (now Department of Transportation) is an unincorporated agency of the State to perform specific duties in relation to the highways of the State and is not liable in damages for the torts of its subagencies, and an action may not be maintained against it or a county acting thereunder in trespassing upon the lands of a private owner, or for the faulty construction of its drains, or the taking of a part of the lands of such owner for the use of the highway, the remedy prescribed by the statute being exclusive. Latham v. State Hwy. Comm'n, 191 N.C. 141, 131 S.E. 385 (1926).

**Liability for Defects in Highway.** — Counties in North Carolina are not liable for damage resulting from defective condition of their highways, being political agencies of the State; nor are county commissioners individually liable, unless they acted corruptly or out of malice. Thompson Caldwell Constr. Co. v. Young, 294 F. 145 (4th Cir. 1923).

An individual user of a street, which is part of the State highway system, who sustains personal injuries or property damage as the result of a dangerous condition of such street, cannot maintain an action for damages against a city which contracted with the Department of Transportation to repair or remove such condition and then did nothing whatsoever about it. Matternes v. City of Winston-Salem, 286 N.C. 1, 209 S.E.2d 481 (1974).

Where the portions of roads in question were part of the state highway system, and as such, the responsibility of the N.C. Department of Transportation (NCDOT), apart from its contract with the NCDOT, city had no responsibility for the maintenance or condition of the traffic signal in question. Colombo v. Dorrity, 115 N.C. App. 81, 443 S.E.2d 752, cert. denied, 337 N.C. 689, 448 S.E.2d 517 (1994).

**Power of County Commissioners and Department to Contract.** — The boards of county commissioners and the State Highway Commission (now Department of Transportation) are vested with powers to enter into contracts and agreements for the construction of roads forming a part of the State highway system. Young v. Board of Comm'rs, 190 N.C. 52, 128 S.E. 401 (1925).

**Actions in Regard to Condemnation.** — The State Highway Commission (now Department of Transportation) is an unincorporated agency of the State, charged with the duty of exercising certain governmental functions, and like the State may only be sued by a citizen when authority is granted by the General Assembly, and the methods prescribed for the entertainment of such an action are exclusive. While the various acts creating the State Highway Commission (now Department of Transportation) and prescribing its powers and duties do not declare in so many words that it may "sue and be sued," it sufficiently appears from the language of the statutes that in the matter of condemnation of land for highway purposes, and with respect to the method of arriving at compensation therefor, right of action lies in the manner set out by the statutes, and the procedure prescribed is open to the property owner as well as to the State Highway Commission (now Department of Transportation). Yancey v. North Carolina State Hwy. & Pub. Works Comm'n, 222 N.C. 106, 22 S.E.2d 256 (1942).

**Department Has No Power to Condemn Property for Private Use.** — This section and G.S. 136-18 vest in the State Highway Commission (now Department of Transportation) broad discretionary powers in establishing, constructing, and maintaining highways as part of a statewide system of hard-surfaced and other dependable highways, but the State Highway Commission (now Department of Transportation) has no power to condemn private property to construct a road for the private use of any person or group of persons, and if it does so, it is an arbitrary act and an abuse of the discretion vested in it. State Hwy. Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

**Injunction.** — The action of the State Highway Commission (now Department of Transportation) in building the highways and bridges of the State is of public interest and equity will not enjoin them in this work when injury by flooding lands may probably result in the future, there being an adequate remedy at law. Town of Greenville v. State Hwy. Comm'n, 196 N.C. 226, 145 S.E. 31 (1928).

**Cited** in Parker v. State Hwy. Comm'n, 195 N.C. 783, 143 S.E. 871 (1928); C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962); Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina DOT, 46 N.C. App. 350, 265 S.E.2d 890 (1980); Estate of Jiggetts v. City of Gastonia, 128 N.C. App. 410, 497 S.E.2d 287 (1998).

**§§ 136-46, 136-47:** Repealed by Session Laws 1977, c. 464, s. 22.

**§§ 136-48 through 136-50:** Repealed by Session Laws 1943, c. 410.

## Part 2. County Public Roads Incorporated into State Highway System.

### § 136-51. Maintenance of county public roads vested in Department of Transportation.

From and after July 1, 1931, the exclusive control and management and responsibility for all public roads in the several counties shall be vested in the Department of Transportation as hereinafter provided, and all county, district, and township highway or road commissioners, by whatever name designated, and whether created under public, public-local, or private acts, shall be abolished:

Provided, that for the purpose of providing for the payment of any bonded or other indebtedness, and for the interest thereon, that may be outstanding as an obligation of any county, district, or township commission herein abolished, the boards of county commissioners of the respective counties are hereby constituted fiscal agents, and are vested with authority and it shall be their duty to levy such taxes on the taxable property or persons within the respective county, district, or township by or for which said bonds or other indebtedness were issued or incurred and as are now authorized by law to the extent that the same may be necessary to provide for the payment of such obligations; and the respective commissions herein abolished shall on or before July 1, 1931, turn over to said boards of county commissioners any moneys on hand or evidences of indebtedness properly applicable to the discharge of any such indebtedness (except such moneys as are mentioned in paragraph (a) above); and all uncollected special road taxes shall be payable to said boards of county commissioners, and the portion of said taxes applicable to indebtedness shall be applied by said commissioners to said indebtedness, or invested in a sinking fund according to law. All that portion of said taxes or other funds coming into the hands of said county commissioners and properly applicable to the maintenance or improvement of the public roads of the county shall be held by them as a special road fund and disbursed upon proper orders of the Department of Transportation.

Provided, further, that in order to fully carry out the provisions of this section the respective boards of county commissioners are vested with full authority to prosecute all suitable legal actions.

Nothing in this section shall prevent a county from participating in the cost of rights-of-way, construction, reconstruction, improvement, or maintenance of a road on the State highway system under agreement with the Department of Transportation. A county is authorized and empowered to acquire land by dedication and acceptance, purchase, or eminent domain and make improvements to portions of the State highway system lying within or outside the county limits utilizing local funds that have been authorized for that purpose. The provisions of G.S. 153A-15 apply to any county attempting to acquire property outside its limits. All improvements to the State highway system shall be done in accordance with the specifications and requirements of the Department of Transportation. (1931, c. 145, s. 7; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 2007-428, s. 3.)

**Editor's Note.** — In bringing forward Public Acts 1931, c. 145, s. 7, to appear as this section of the General Statutes, the paragraph formerly designated as subsection (a) was omitted, but the reference to it in the present second paragraph of the section was retained.

CASE NOTES

**Jurisdiction over Cartway Proceedings.** — The Act of 1931 incorporated in this section discloses no legislative intent to withdraw from the Board of Commissioners of Buncombe County jurisdiction over cartway proceedings instituted under the provisions of Chapter 328, section 18, Pub. Local Laws of 1923. Merrell v. Jenkins, 242 N.C. 636, 89 S.E.2d 242 (1955).

**Cited** in In re Edwards, 206 N.C. 549, 174 S.E. 505 (1934); Grady v. Grady, 209 N.C. 749, 184 S.E. 512 (1936); Cahoon v. Roughton, 215 N.C. 116, 1 S.E.2d 362 (1939); Moore v. Clark, 235 N.C. 364, 70 S.E.2d 182 (1952); Reynolds v. J.C. Critcher, Inc., 256 N.C. 309, 123 S.E.2d 738 (1962).

### §§ 136-52, 136-53: Repealed by Session Laws 1977, c. 464, s. 22.

## Part 3. Power to Make Changes in Highway System.

### § 136-54. Power to make changes.

The Board of Transportation shall be authorized, when in its judgment the public good requires it, to change, alter, add to, or abandon and substitute new sections for, any portion of the State highway system. (1927, c. 46, s. 1; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1965, c. 538, s. 2; 1967, c. 1128, s. 1; 1973, c. 507, s. 5; 1977, c. 464, s. 23.)

**Cross References.** — See case notes under G.S. 136-20.

### CASE NOTES

**Validity of Statute.** — Chapter 46 of Public Laws 1927 held valid. Parker v. State Hwy. Comm'n, 195 N.C. 783, 143 S.E. 871 (1928).

**Section 136-45 and this section were not repealed with respect to municipal streets by enactment of § 136-66.2.** Section 136-45 and this section have both been amended numerous times since 1959, and there has been no mention of their repeal. Repeal by implication is not favored in the law, and statutes dealing with the same subject matter must be construed in pari materia, and harmonized if possible to give each effect. Town of Morehead City v. North Carolina Dep't of Transp., 74 N.C. App. 66, 327 S.E.2d 602 (1985).

**Powers over Roads of Highway System.** — The State Highway Commission (now Department of Transportation) has authority to change, alter, add to or discontinue roads of the State highway system. Snow v. North Carolina State Hwy. Comm'n, 262 N.C. 169, 136 S.E.2d 678 (1964).

**Exercise of the Board's discretionary authority, conferred upon it by this section, is not subject to judicial review,** unless its action is so clearly unreasonable as to amount to oppressive and manifest abuse. Guyton v. North Carolina Bd. of Transp., 30 N.C. App. 87, 226 S.E.2d 175 (1976); Town of Morehead City v. North Carolina Dep't of Transp., 74 N.C. App. 66, 327 S.E.2d 602 (1985).

**Elimination of Underpass.** — Where the State Highway Commission (now Department of Transportation), in the interest of public safety, builds an overpass and relocates a highway to cut out dangerous curves and an inadequate underpass, it has the authority to order the underpass closed, if not by authority expressly conferred, then in the exercise of the police power by an appropriate agency of the State. Mosteller v. Southern Ry., 220 N.C. 275, 17 S.E.2d 133 (1941).

**Cited** in North Carolina State Hwy. Comm'n v. Asheville School, Inc., 5 N.C. App. 684, 169 S.E.2d 193 (1969); North Carolina State Hwy. Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970).

## § 136-55: Repealed by Session Laws 1979, c. 143, s. 1.

## § 136-55.1. Notice of abandonment.

(a) At least 60 days prior to any action by the Department of Transportation abandoning a segment of road and removing the same from the State highway system for maintenance, except roads abandoned on request of the county commissioners under G.S. 136-63, the Department of Transportation shall notify by registered mail or personal delivery all owners of property adjoining the section of road to be abandoned whose whereabouts can be ascertained by due diligence. Said notice shall describe the section of road which is proposed to be abandoned and shall give the date, place and time of the Department of Transportation meeting at which the action abandoning said section of road is to be taken.

(b) In keeping with its overall zoning scheme and long-range plans regarding the extraterritorial jurisdiction area, a municipality may keep open and assume responsibility for maintenance of a road within one mile of its corporate limits once it is abandoned from the State highway system. (1957, c. 1063; 1967, c. 1128, s. 3; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1993, c. 533, s. 13.)

## § 136-56: Repealed by Session Laws 1967, c. 1128, s. 4.

## § 136-57: Repealed by Session Laws 1965, c. 538, s. 1.

## § 136-58: Repealed by Session Laws 1977, c. 464, s. 22.

## § 136-59. No court action against Board of Transportation.

No action shall be maintained in any of the courts of this State against the Board of Transportation to determine the location of any State highways or portion thereof, by any person, corporation, or municipal corporation. (1927, c. 46, s. 7; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1967, c. 1128, s. 5; 1973, c. 507, s. 5.)

**Legal Periodicals.** — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1026 (1981).

### CASE NOTES

**Two Well-Established Exceptions.** — Review of a decision of the State Board of Transportation as to the location of an interstate highway may be sought under two well-established exceptions to the doctrine of sovereign immunity, which would by necessity also be exceptions to this section: (1) when public officers whose duty it is to supervise and direct a state agency attempt to enforce an invalid ordinance or regulation, or invade or threaten to invade the personal or property rights of a citizen in disregard to law; and (2) where plaintiffs have asserted their status as taxpayers and are trying to prevent the expenditure of money unauthorized by statute or in disregard to law. Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina Dep't of Transp., 46 N.C. App. 350, 265 S.E.2d 890 (1980).

**Cited** in Reed v. State Hwy. & Pub. Works Comm'n, 209 N.C. 648, 184 S.E. 513 (1936).

## §§ 136-60, 136-61: Repealed by Session Laws 1973, c. 507, s. 23.

## § 136-62. Right of petition.

The citizens of the State shall have the right to present petitions to the board of county commissioners, and through the board to the Department of Transportation, concerning additions to the system and improvement of roads. The board of county commissioners shall receive such petitions, forwarding them on to the Board of Transportation with their recommendations. Petitions on hand at the time of the periodic preparation of the secondary road plan shall be considered by the representatives of the Department of Transportation in preparation of that plan, with report on action taken by these representatives on such petitions to the board of commissioners at the time of consultation. The citizens of the State shall at all times have opportunities to discuss any aspect of secondary road additions, maintenance, and construction, with representatives of the Department of Transportation in charge of the preparation of the secondary road plan, and if not then satisfied opportunity to discuss any such aspect with the division engineer, the Secretary of Transportation, and the Board of Transportation in turn. (1931, c. 145, s. 14; 1933, c. 172, s. 17; 1957, c. 65, s. 7; 1965, c. 55, s. 12; 1973, c. 507, s. 5; 1977, c. 464, ss. 7.1, 24, 24.1.)

### CASE NOTES

**Cited** in Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina Dep't of Transp., 46 N.C. App. 350, 265 S.E.2d 890 (1980); DOT v. Blue, 147 N.C. App. 596, 556 S.E.2d 609, 2001 N.C. App. LEXIS 1235 (2001).

## § 136-63. Change or abandonment of roads.

(a) The board of county commissioners of any county may, on its own motion or on petition of a group of citizens, request the Board of Transportation to change or abandon any road in the secondary system when the best interest of the people of the county will be served thereby. The Board of Transportation shall thereupon make inquiry into the proposed change or abandonment, and if in its opinion the public interest demands it, shall make such change or abandonment. If the change or abandonment shall affect a road connecting with any street of a city or town, the change or abandonment shall not be made until the street-governing body of the city or town shall have been duly notified and given opportunity to be heard on the question. Any request by a board of county commissioners or street-governing body of a city refused by the Board of Transportation may be presented again upon the expiration of 12 months.

(b) In keeping with its overall zoning scheme and long-range plans regarding the extraterritorial jurisdiction area, a municipality may keep open and assume responsibility for maintenance of a road within one mile of its corporate limits once it is abandoned from the State highway system. (1931, c. 145, s. 15; 1957, c. 65, s. 8; 1965, c. 55, s. 13; 1973, c. 507, s. 221/2; 1975, c. 19, s. 45; 1977, c. 464, s. 25; 1993, c. 533, s. 14.)

### CASE NOTES

**Cited** in Whitehead Community Club v. Hoppers, 43 N.C. App. 671, 260 S.E.2d 94 (1979).

## § 136-64. Filing of complaints with Department of Transportation; hearing and appeal.

In the event of failure to maintain the roads of the State highway system or any county road system in good condition, the board of county commissioners of such county may file complaint with the Department of Transportation. When any such complaint is filed, the Department of Transportation shall at once investigate the same, and if the same be well founded, the said Department of Transportation shall at once order the repair and maintenance of the roads complained of and investigate the negligence of the persons in charge of the roads so complained of, and if upon investigation the person in charge of the road complained of be at fault, he may be discharged from the service of the Department of Transportation. The board of commissioners of any county, who shall feel aggrieved at the action of the Department of Transportation upon complaint filed, may appeal from the decision of the Department of Transportation to the Governor, and it shall be the duty of the Governor to adjust the differences between the board of county commissioners and the Department of Transportation. (1921, c. 2, s. 20; C.S., s. 3846(11); 1931, c. 145, s. 17; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

## § 136-64.1. Applications for intermittent closing of roads within watershed improvement project by Department of Transportation; notice; regulation by Department; delegation of authority; markers.

(a) Upon proper application by the board of commissioners of a drainage district established under the provisions of Chapter 156 of the General

Statutes of North Carolina, by the board of trustees of a watershed improvement district established under the provisions of Article 2 of Chapter 139 of the General Statutes, by the board of county commissioners of any county operating a county watershed improvement program under the provisions of Article 3 of Chapter 139 of the General Statutes, by the board of commissioners of any watershed improvement commission appointed by a board of county commissioners or by the board of supervisors of any soil and water conservation district designated by a board of county commissioners to exercise authority in carrying out a county watershed improvement program, the Department of Transportation, for roads coming under its jurisdictional control, is hereby authorized to permit the intermittent closing of any secondary road within the boundaries of any watershed improvement project operated by the applicants, whenever in the judgment of the Department of Transportation it is necessary to do so, and when the secondary road will be intermittently subject to inundation by floodwaters retained by an approved watershed improvement project.

(b) Before any permit may be issued for the temporary inundation and closing of such a road, an application for such permit shall be made to the Department of Transportation by the public body having jurisdiction over the watershed improvement project. The application shall specify the secondary road involved, the anticipated frequency and duration of intermittent flooding of the secondary road involved, and shall request that a permit be granted to the applicant public body to allow the intermittent closing of the road.

(c) Upon receipt of such an application the Department of Transportation shall give public notice of the proposed action by publication once each week for two consecutive weeks in a newspaper of general circulation in the county or counties within which the proposed intermittent closing of road or roads would occur; and such notices shall contain a description of the places of beginning and the places of ending of such intermittent closing. In addition, the Department of Transportation shall give notice to all public utilities or common carriers having facilities located within the rights-of-way of any roads being closed by mailing copies of such notices to the appropriate offices of the public utility or common carrier having jurisdiction over the affected facilities of the public utility or common carrier. Not sooner than 14 days after publication and mailing of notices, the Department of Transportation or the municipality may issue its permit with respect to such road.

(d) The Department of Transportation shall have the discretion to deny any application submitted pursuant to this section, or it may grant a permit on any condition it deems warranted. The Department, however, shall consider the use of alternate routes available during flooding of the roads, and any inconvenience to the public or temporary loss of access to business, homes and property. The Department shall have the authority to promulgate regulations for the issuance of permits under this section and it may delegate the authority for the consideration, issuance or denial of such permits to the State Highway Administrator. Any applicant granted a permit pursuant to this section shall cause suitable markers to be installed on the secondary road to advise the general public of the intermittent closing of the road or roads involved. Such markers shall be located and approved by the State Highway Administrator. (1975, c. 639, s. 1; 1977, c. 464, s. 7.1.)

**§§ 136-65, 136-66:** Repealed by Session Laws 1943, c. 410.

## ARTICLE 3A.

## *Transportation Systems in and around Municipalities.*

### § 136-66.1. Responsibility for streets inside municipalities.

Responsibility for streets and highways inside the corporate limits of municipalities is hereby defined as follows:

(1) The State Highway System. — The State highway system inside the corporate limits of municipalities shall consist of a system of major streets and highways necessary to move volumes of traffic efficiently and effectively from points beyond the corporate limits of the municipalities through the municipalities and to major business, industrial, governmental and institutional destinations located inside the municipalities. The Department of Transportation shall be responsible for the maintenance, repair, improvement, widening, construction and reconstruction of this system. These streets and highways within corporate limits are of primary benefit to the State in developing a statewide coordinated system of primary and secondary streets and highways. Each highway division shall develop an annual work plan for maintenance and contract resurfacing, within their respective divisions, consistent with the needs, inasmuch as possible, as identified in the report developed in accordance with G.S. 136-44.3. In developing the annual work plan, the highway division shall give consideration to any special needs or information provided by the municipalities within their respective divisions. The plan shall be made available to the municipalities within the respective divisions upon request.

(2) The Municipal Street System. — In each municipality the municipal street system shall consist of those streets and highways accepted by the municipality which are not a part of the State highway system. The municipality shall be responsible for the maintenance, construction, reconstruction, and right-of-way acquisition for this system.

(3) Maintenance of State Highway System by Municipalities. — Any city or town, by written contract with the Department of Transportation, may undertake to maintain, repair, improve, construct, reconstruct or widen those streets within municipal limits which form a part of the State highway system, and may also, by written contract with the Department of Transportation, undertake to install, repair and maintain highway signs and markings, electric traffic signals and other traffic-control devices on such streets. All work to be performed by the city or town under such contract or contracts shall be in accordance with Department of Transportation standards, and the consideration to be paid by the Department of Transportation to the city or town for such work, whether in money or in services, shall be adequate to reimburse the city or town for all costs and expenses, direct or indirect, incurred by it in the performance of such work. The city or town under contract with the Department shall develop an annual work plan for maintenance of the State highway system consistent with the needs, inasmuch as possible, as identified in the report developed in accordance with G.S. 136-44.3. The annual work plan shall be submitted to the respective division engineers and shall be mutually agreeable to both parties.

(4) If the governing body of any municipality determines that it is in the best interest of its citizens to do so, it may expend its funds for the

purpose of making any of the following improvements on streets that are within its corporate limits and form a part of the State highway system:

a. Construction of curbing and guttering.
b. Adding of lanes for automobile parking.
c. Constructing street drainage facilities which may by reasonable engineering estimates be attributable to that amount of surface water collected upon and flowing from municipal streets which do not form a part of the State highway system.
d. Constructing sidewalks.
e. Intersection improvements, if the governing body determines that such improvements will decrease traffic congestion, improve safety conditions, and improve air quality.

In exercising the authority granted herein, the municipality may, with the consent of the Department of Transportation, perform the work itself, or it may enter into a contract with the Department of Transportation to perform such work. Any work authorized by this subdivision shall be financed entirely by the municipality and be approved by the Department of Transportation.

The cost of any work financed by a municipality under this subdivision may be assessed against the properties abutting the street or highway upon which such work was performed in accordance with the procedures of either Article 10 of Chapter 160A of the General Statutes or any charter provisions or local acts applicable to the particular municipality. (1959, c. 687, s. 1; 1969, cc. 798, 978; 1973, c. 507, s. 5; 1975, c. 664, s. 3; 1977, c. 464, s. 7.1; 1987, c. 747, s. 2; 1993 (Reg. Sess., 1994), c. 690, s. 1; 1995, c. 163, s. 14; 2005-382, s. 2.)

**Editor's Note.** — Session Laws 2009-266, s. 22, effective August 1, 2009, substituted "Transportation Systems" for "Streets and Highways" in the Article heading.

## CASE NOTES

**Department Is Responsible for City Street in State System.** — When a city street becomes a part of the State highway system, the State Highway Commission (now Department of Transportation) is responsible for its condition thereafter to the same extent as if originally constructed by it; and this applies to the fill and culvert as well as to the surface areas of the highway. Sherrill v. North Carolina State Hwy. Comm'n, 264 N.C. 643, 142 S.E.2d 653 (1965).

This section and G.S. 160-54 (now repealed) and 136-93 indicate that the State Highway Commission (now Department of Transportation) is under a statutory obligation with reference to the construction, maintenance and repair of all city streets, including culverts which support city streets, which constitute a part of the State highway system. Milner Hotels, Inc. v. City of Raleigh, 271 N.C. 224, 155 S.E.2d 543 (1967).

**Reasons for Deletion of Street from State Highway System.** — When read together, this section and G.S. 136-66.2 and 136-66.3 indicate that a municipal street or road is included within the State highway system because it possesses certain characteristics that distinguish it from other streets in the municipality. From the language in the applicable statutes, these characteristics relate primarily to the function served by the particular street. In contrast, public roads not within municipalities are part of the State highway system not because of their function, but because of their geographic location outside the corporate limits of a municipality. Thus, there is a qualitative distinction between roads which are a part of the State highway system because they are not within a municipality and roads which are in a municipality but are nevertheless part of the State highway system because of the function they serve. It follows logically that the reasons justifying deletion of a street from the State system and incorporating it into a municipality system will vary according to the reasons why it was in the State system to begin with. City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983).

**Municipality May Not Contract to Take Over Obligations of Department.** — This section and G.S. 160-54 (now repealed) and 136-93 do not authorize a municipality, in the absence of specific legislative authority, to contract to take over the responsibilities of the State Highway Commission (now Department of Transportation) with reference to the construction, maintenance and repair of city streets and supporting culverts which constitute a part of the State highway system. Milner Hotels, Inc. v. City of Raleigh, 271 N.C. 224, 155 S.E.2d 543 (1967).

**City Not Responsible for Controlled Access Areas.** — All areas within the boundaries of the "controlled access" area are part of the State Highway system and were excepted from contract between the city and NCDOT; thus, city was not responsible for dangerous conditions within the "controlled access" areas. Eakes v. City of Durham, 125 N.C. App. 551, 481 S.E.2d 403 (1997).

**Liability of City When Maintenance Contracted.** — An individual user of a street, which is part of the State highway system, who sustains personal injuries or property damage as the result of a dangerous condition of such street, cannot maintain an action for damages against a city which contracted with the Department of Transportation to repair or remove such condition and then did nothing whatsoever about it. Matternes v. City of Winston-Salem, 286 N.C. 1, 209 S.E.2d 481 (1974).

**Limited Liability of City When Street Becomes Part of State System.** — When a city street becomes a part of the State highway system, the Board of Transportation is responsible for its maintenance thereafter which includes the control of all signs and structures within the right-of-way. Therefore, in the absence of any control over a State highway within its border, a municipality has no liability for injuries resulting from a dangerous condition of such street unless it created or increased such condition. Shapiro v. Toyota Motor Co., 38 N.C. App. 658, 248 S.E.2d 868 (1978).

**City Had No Responsibility for Maintenance or Condition of Traffic Signal.** — Where the portions of roads in question were part of the state highway system, and as such, the responsibility of the N.C. Department of Transportation (NCDOT), apart from its contract with the NCDOT, city had no responsibility for the maintenance or condition of the traffic signal in question. Colombo v. Dorrity, 115 N.C. App. 81, 443 S.E.2d 752, cert. denied, 337 N.C. 689, 448 S.E.2d 517 (1994).

**Cited** in Coleman v. Burris, 265 N.C. 404, 144 S.E.2d 241 (1965); General Greene Inv. Co. v. Greene, 48 N.C. App. 29, 268 S.E.2d 810 (1980); Town of Emerald Isle ex rel. Smith v. State, 320 N.C. App. 640, 360 S.E.2d 756 (1987); Estate of Jiggetts v. City of Gastonia, 128 N.C. App. 410, 497 S.E.2d 287 (1998).

### OPINIONS OF ATTORNEY GENERAL

**No Retroactive Application to Allow Payment for.** — See opinion of Attorney General to Mr. Hobart Brantley, Spring Hope Town Attorney, 40 N.C.A.G. 515 (1970).

**Use of Powell Bill Funds.** — Powell Bill funds may not be used for drainage purposes generally but may be used to pay for a portion of the cost of drainage facilities on a State highway system street which is necessary to provide for drainage arising from streets in the municipal street system for which the municipality is responsible. Opinion of Attorney General to Mr. William S. Withers, 41 N.C.A.G. 656 (1971).

**Maintenance of Streets and Highways.** — Municipalities have the duty and responsibility of constructing and maintaining streets and highways on the Municipal Street System and the Department of Transportation has the duty and responsibility to maintain streets and highways on the State Highway System. See opinion of the Attorney General to Mr. Ralph D. Karpinos, Town Attorney, Chapel Hill, 58 N.C.A.G. 17 (Feb. 26, 1988).

## § 136-66.2. Development of a coordinated transportation system and provisions for streets and highways in and around municipalities.

(a) Each municipality, not located within a metropolitan planning organization (MPO) as recognized in G.S. 136-200.1, with the cooperation of the Department of Transportation, shall develop a comprehensive transportation plan that will serve present and anticipated travel demand in and around the municipality. The plan shall be based on the best information available including, but not limited to, population growth, economic conditions and prospects, and patterns of land development in and around the municipality, and shall provide for the safe and effective use of the transportation system. In the development of the plan, consideration shall be given to all transportation modes including, but not limited to, the street system, transit alternatives, bicycle, pedestrian, and operating strategies. The Department of Transportation may provide financial and technical assistance in the preparation of such plans. Each MPO, with cooperation of the Department of Transportation, shall develop a comprehensive transportation plan in accordance with 23 U.S.C. § 134. In addition, an MPO may include projects in its transportation plan that are not included in a financially constrained plan or are anticipated to be needed beyond the horizon year as required by 23 U.S.C. § 134. For municipalities located within an MPO, the development of a comprehensive transportation plan will take place through the metropolitan planning organization. For purposes of transportation planning and programming, the MPO shall represent the municipality's interests to the Department of Transportation.

(b) After completion and analysis of the plan, the plan shall be adopted by both the governing body of the municipality or MPO and the Department of Transportation as the basis for future transportation improvements in and around the municipality or within the MPO. The governing body of the municipality and the Department of Transportation shall reach agreement as to which of the existing and proposed streets and highways included in the adopted plan will be a part of the State highway system and which streets will be a part of the municipal street system. As used in this Article, the State highway system shall mean both the primary highway system of the State and the secondary road system of the State within municipalities.

(b1) The Department of Transportation may participate in the development and adoption of a transportation plan or updated transportation plan when all local governments within the area covered by the transportation plan have adopted land development plans within the previous five years. The Department of Transportation may participate in the development of a transportation plan if all the municipalities and counties within the area covered by the transportation plan are in the process of developing a land development plan. The Department of Transportation may not adopt or update a transportation plan until a local land development plan has been adopted. A qualifying land development plan may be a comprehensive plan, land use plan, master plan, strategic plan, or any type of plan or policy document that expresses a jurisdiction's goals and objectives for the development of land within that jurisdiction. At the request of the local jurisdiction, the Department may review and provide comments on the plan but shall not provide approval of the land development plan.

(b2) The municipality or the MPO shall provide opportunity for public comments prior to adoption of the transportation plan.

(b3) Each county, with the cooperation of the Department of Transportation, may develop a comprehensive transportation plan utilizing the procedures specified for municipalities in subsection (a) of this section. This plan may be adopted by both the governing body of the county and the Department of Transportation. For portions of a county located within an MPO, the development of a comprehensive transportation plan shall take place through the metropolitan planning organization.

(b4) To complement the roadway element of the transportation plan, municipalities and MPOs may develop a collector street plan to assist in developing the roadway network. The Department of Transportation may review and provide comments but is not required to provide approval of the collector street plan.

(c) From and after the date that the plan is adopted, the streets and highways designated in the plan as the responsibility of the Department of Transportation shall become a part of the State highway system and all such system streets shall be subject to the provisions of G.S. 136-93, and all streets designated in the plan as the responsibility of the municipality shall become a part of the municipal street system.

(d) For municipalities not located within an MPO, either the municipality or the Department of Transportation may propose changes in the plan at any time by giving notice to the other party, but no change shall be effective until it is adopted by both the Department of Transportation and the municipal governing board. For MPOs, either the MPO or the Department of Transportation may propose changes in the plan at any time by giving notice to the other party, but no change shall be effective until it is adopted by both the Department of Transportation and the MPO.

(e) Until the adoption of a comprehensive transportation plan that includes future development of the street system in and around municipalities, the Department of Transportation and any municipality may reach an agreement as to which existing or proposed streets and highways within the municipal boundaries shall be added to or removed from the State highway system.

(f) Streets within municipalities which are on the State highway system as of July 1, 1959, shall continue to be on that system until changes are made as provided in this section.

(g) The street and highway elements of the plans developed pursuant to G.S. 136-66.2 shall serve as the plan referenced in G.S. 136-66.10(a). (1959, c. 687, s. 2; 1969, c. 794, s. 3; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 2001-168, s. 1.)

**Local Modification.** — Village of Bald Head Island: 1997-324, s. 1.

### CASE NOTES

**Sections 136-45 and 136-54 were not repealed with respect to municipal streets by enactment of this section.** Sections 136-45 and 136-54 have both been amended numerous times since 1959, and there has been no mention of their repeal. Repeal by implication is not favored in the law, and statutes dealing with the same subject matter must be construed in pari materia, and harmonized if possible to give each effect. Town of Morehead City v. North Carolina Dep't of Transp., 74 N.C. App. 66, 327 S.E.2d 602 (1985).

**Municipalities Are Subordinate to Department of Transportation.** — The general grant of authority to municipalities over streets is subordinate to the Department of Transportation's rights and duties to maintain the State highway system. Town of Morehead City v. North Carolina Dep't of Transp., 74 N.C. App. 66, 327 S.E.2d 602 (1985).

**Reasons for Deletion of Street from State Highway System.** — When read together, this section and G.S. 136-66.1 and 136-66.3 indicate that a municipal street or road is included within the State highway system because it possesses certain characteristics that distinguish it from other streets in the municipality. From the language in the applicable statutes, these characteristics relate primarily to the function served by the particular street. In contrast, public roads not within municipalities are part of the State highway system not because of their function, but because of their geographic location outside the corporate limits of a municipality. Thus, there is a qualitative distinction between roads which are a part of the State highway system because they are not within a municipality and roads which are in a municipality but are nevertheless part of the State highway system because of the function they serve. It follows logically that the reasons justifying deletion of a street from the State system and incorporating it into a municipality system will vary according to the reasons why it was in the State system to begin with. City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983).

**Cited** in Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989).

## § 136-66.3. Local government participation in improvements to the State transportation system.

(a) Municipal Participation Authorized. — A municipality may, but is not required to, participate in the right-of-way and construction cost of a State transportation improvement approved by the Board of Transportation under

G.S. 143B-350(f)(4) that is located in the municipality or its extraterritorial jurisdiction.

(b) Process for Initiating Participation. — A municipality interested in participating in the funding of a State highway improvement project may submit a proposal to the Department of Transportation. The Department and the municipality shall include their respective responsibilities for a proposed municipal participation project in any agreement reached concerning participation.

(c) Type of Participation Authorized. — A municipality is authorized and empowered to acquire land by dedication and acceptance, purchase, or eminent domain, and make improvements to portions of the State transportation system lying within or outside the municipal corporate limits utilizing local funds that have been authorized for that purpose. All improvements to State transportation systems shall be done in accordance with the specifications and requirements of the Department of Transportation.

(c1) No TIP Disadvantage for Participation. — If a county or municipality participates in a State transportation system improvement project, as authorized by this section, or by G.S. 136-51 and G.S. 136-98, the Department shall ensure that the local government's participation does not cause any disadvantage to any other project in the Transportation Improvement Program under G.S. 143B-350(f)(4).

(c2) Distribution of State Funds Made Available by County or Municipal Participation. — Any State or federal funds allocated to a project that are made available by county or municipal participation in a project contained in the Transportation Improvement Program under G.S. 143B-350(f)(4) shall remain in the same funding region that the funding was allocated to under the distribution formula contained in G.S. 136-17.2A.

(c3) Limitation on Agreements. — The Department shall not enter into any agreement with a county or municipality to provide additional total funding for highway construction in the county or municipality in exchange for county or municipal participation in any project contained in the Transportation Improvement Program under G.S. 143B-350(f)(4).

(d) Authorization to Participate in Development-Related Improvements. — When in the review and approval by a local government of plans for the development of property abutting a State transportation system it is determined by the municipality that improvements to the State highway system are necessary to provide for the safe and orderly movement of traffic, the local government is authorized to construct, or have constructed, said improvements to the State transportation system in vicinity of the development. For purposes of this section, improvements include but are not limited to additional travel lanes, turn lanes, curb and gutter, drainage facilities, and other transportation system improvements. All improvements to a State transportation system shall be constructed in accordance with the specifications and requirements of the Department of Transportation and be approved by the Department of Transportation.

(e) Authorization to Participate in Project Additions. — Pursuant to an agreement with the Department of Transportation, a county or municipality may reimburse the Department of Transportation for the cost of all improvements, including additional right-of-way, for a street, highway improvement projects, or other transportation system improvements approved by the Board of Transportation under G.S. 143B-350(f)(4), that are in addition to those improvements that the Department of Transportation would normally include in the project.

(e1) Reimbursement Procedure. — Upon request of the county or municipality, the Department of Transportation shall allow the local government a period of not less than three years from the date construction of the project is initiated to reimburse the Department their agreed upon share of the costs necessary for the project. The Department of Transportation shall not charge a local government any interest during the initial three years.

(f) Report to General Assembly. — The Department shall report in writing, on a monthly basis, to the Joint Legislative Commission on Governmental Operations on all agreements entered into between counties, municipalities and the Department of Transportation. The report shall state in summary form the contents of such agreements.

(g) Local Government Acquisition of Rights-of-Way. — In the acquisition of rights-of-way for any State street, highway, or other transportation project, the county or municipality shall be vested with the same authority to acquire such rights-of-way as is granted to the Department of Transportation in this Chapter. In the acquisition of such rights-of-way, counties and municipalities may use the procedures provided in Article 9 of this Chapter, and wherever the words "Department of Transportation" appear in Article 9 they shall be deemed to include "county," "municipality" or local governing body, and wherever the words "Administrator," "Administrator of Highways," "Administrator of the Department of Transportation," or "Chairman of the Department of Transportation" appear in Article 9 they shall be deemed to include "county or municipal clerk". It is the intention of this subsection that the powers herein granted to municipalities for the purpose of acquiring rights-of-way shall be in addition to and supplementary to those powers granted in any local act or in any other general statute, and in any case in which the provisions of this subsection or Article 9 of this Chapter are in conflict with the provisions of any local act or any other provision of any general statute, then the governing body of the county or municipality may in its discretion proceed in accordance with the provisions of such local act or other general statute, or, as an alternative method of procedure, in accordance with the provisions of this subsection and Article 9 of this Chapter.

(h) Department Authority Concerning Rights-of-Way. — In the absence of an agreement, the Department of Transportation shall retain authority to pay the full cost of acquiring rights-of-way where the proposed project is deemed important to a coordinated State transportation system.

(i) Changes to Local Government Participation Agreement. — Either the local government or the Department of Transportation may at any time propose changes in the agreement setting forth their respective responsibilities by giving notice to the other party, but no change shall be effective until it is adopted by both the municipal governing body and the Department of Transportation.

(j) Local Governments Party to Rights-of-Way Proceeding. — Any municipality that agrees to contribute any part of the cost of acquiring rights-of-way for any State transportation system shall be a proper party in any proceeding in court relating to the acquisition of such rights-of-way.

(k) Repealed by Session Laws 2008-180, s. 6, effective August 4, 2008. (1959, c. 687, s. 3; 1965, c. 867; 1967, c. 1127; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1987, c. 747, s. 3; 1989, c. 595, ss. 2, 3; 1991, c. 21, s. 1; 2000-188, s. 1; 2001-245, s. 2; 2008-180, s. 6; 2009-266, s. 23.)

**Local Modification.** — Cities of Charlotte, Concord, and Monroe and the towns of Cary and Weddington: 2001-245, s. 2.

**Effect of Amendments.** — Session Laws 2008-180, s. 6, effective August 4, 2008, substituted "local government" for "municipal" and inserted "county or" preceding "municipal" or "municipality" throughout the section and in the catchline; in subsection (c1), inserted "or by G.S. 136-51 and G.S. 136-98," substituted "G.S. 143B-350(f)(4)" for "G.S. 143B-350(f)(4) and located outside the municipality"; in subsection (f), inserted "counties"; in subsection (g), in the first sentence, substituted "highway, the county or municipality" for "highway in or around a municipality, the municipality," in the second sentence, inserted "counties and," substituted "'county,' 'municipality' or local" for "'municipality' or municipal," and inserted "county or"; and deleted subsection (k), relating to Specified County Participation.

Session Laws 2009-266, s. 23, effective August 1, 2009, substituted "transportation" for "highway" throughout the section; in subsection (c), substituted "to transportation systems" for "the State highway system" in the last sentence; in subsection (d), substituted "a State transportation system" for "the State highway system" in the first and last sentences, and in the second sentence, inserted "and other transportation system improvements" at the end, and made a related stylistic and punctuation change; in subsection (e), inserted "or other transportation system improvements" and made a related stylistic and punctuation change; in subsection (g), substituted "State street, highway, or other transportation project" for "State highway system street or"; and in subsection (j), substituted "transportation system" for "highway system street or highway."

### CASE NOTES

**Section does not apply to streets within municipalities that are not part of the State highway system** or that have been properly deleted therefrom. City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983).

**Reasons for Deletion of Street from State Highway System.** — When read together, this section and G.S. 136-66.1 and 136-66.2 indicate that a municipal street or road is included within the State highway system because it possesses certain characteristics that distinguish it from other streets in the municipality. From the language in the applicable statutes, these characteristics relate primarily to the function served by the particular street. In contrast, public roads not within municipalities are part of the State highway system not because of their function, but because of their geographic location outside the corporate limits of a municipality. Thus, there is a qualitative distinction between roads which are a part of the State highway system because they are not within a municipality and roads which are in a municipality but are nevertheless part of the State highway system because of the function they serve. It follows logically that the reasons justifying deletion of a street from the State system and incorporating it into a municipality system will vary according to the reasons why it was in the State system to begin with. City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983).

**City's Request for Deletion of Road from System Presumed in Good Faith.** — Since a city's request for the deletion of a road from the State highway system is a discretionary act, the city is presumed to have acted in good faith. Good faith in this context requires the city to furnish to the Board of Transportation sufficient information to allow it to make a proper decision. City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983).

**Cited** in City of Durham v. Bates, 273 N.C. 336, 160 S.E.2d 60 (1968).

## § 136-66.4. Rules and regulations; authority of municipalities.

The Department of Transportation shall have authority to adopt such rules and regulations as are necessary to carry out the responsibilities of the Department of Transportation under this Article, and municipalities shall have and may exercise such authority as is necessary to carry out their responsibilities under this Article. (1959, c. 687, s. 4; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

## § 136-66.5. Improvements in urban areas to reduce traffic congestion.

(a) The Department of Transportation is authorized to enter into contracts with municipalities for improvement projects which are a part of an overall plan authorized under the provisions of section 135 of Title 23 of the United States Code, the purpose of which is to facilitate the flow of people and goods in urban areas. In connection with these contracts, the Department of Transportation and the municipalities are authorized to enter into contracts for improvement projects on the municipal system of streets, and pursuant to contract with the municipalities, the Department of Transportation is authorized to construct or to let to contract the said improvement projects on streets on the municipal street system or other transportation system; provided that no portion of the cost of the improvements made on the municipal system shall be paid from Department of Transportation funds except the proportionate share of funds received from the United States Department of Transportation and allocated for the purposes set out in section 135 of Title 23 of the United States Code. Pursuant to contract with the Department of Transportation, the municipalities may construct or let to contract the said improvement projects on the municipal system and the Department of Transportation is authorized to pay over to the municipalities the proportionate share of funds received pursuant to section 135 of Title 23 of the United States Code; provided that no portion of the costs of the improvements made on the municipal system shall be paid for from the State Highway Fund except those received from the United States Department of Transportation and allocated for the purpose set out in section 135 of Title 23 of the United States Code.

(b) The municipalities are authorized to enter into contracts with the Department of Transportation for improvement projects which are a part of an overall plan authorized under the provisions of section 135 of Title 23 of the United States Code, the purpose of which is to facilitate the flow of traffic in urban areas, on the State highway system streets within the municipalities with the approval of the United States Department of Transportation. Pursuant to contract for the foregoing improvement projects, the municipalities are authorized to construct or let to contract the said improvement projects and the Department of Transportation is authorized to reimburse the municipalities for the cost of the construction of the said improvement projects.

(c) The municipalities in which improvements are made pursuant to section 135 of Title 23 of the United States Code shall provide proper maintenance and operation of such completed projects and improvements on the municipal system streets and other transportation infrastructure or will provide other means for assuring proper maintenance and operation as is required by the Department of Transportation. In the event the municipality fails to maintain such project or provide for their proper maintenance, the Department of Transportation is authorized to maintain the said projects and improvements and deduct the cost from allocations to the municipalities made under the provisions of G.S. 136-41.1. (1969, c. 794, s. 1; 1973, c. 507, ss. 5, 19; 1977, c. 464, s. 7.1; 2009-266, s. 24.)

**Effect of Amendments.** — Session Laws 2009-266, s. 24, effective August 1, 2009, in the section catchline, substituted "urban areas" for "urban area streets"; substituted "United States Department of Transportation" for "Federal Highway Administration" throughout the section; in subsection (a), deleted "street" preceding "system shall" and "system and", in the first sentence, deleted "highway" preceding "improvement" near the middle, and substituted "people and goods" for "traffic" near the end, in the second sentence, inserted "system or other transportation" near the middle; and in subsection (c), inserted "and other transportation infrastructure" in the first sentence.

## § 136-66.6. Arrangements in a consolidated city-county.

The provisions of this Article applying to municipalities apply to each consolidated city-county with respect to each urban service district defined by its governing board that includes the total area of a previously existing municipality in the same manner as if the urban service district were a municipality. The provisions of this Article do not apply to any consolidated city-county with respect to an urban service district defined by its governing board within previously unincorporated areas of the county unless the governing board determines that street services are to be provided within such urban service district. (1973, c. 537, s. 7.)

### § 136-66.7. Authority to include a Municipal Street System street in right-of-way of State Highway System.

(a) Notwithstanding any other provisions of Article 3A of Chapter 136, the provisions of Article 15 of Chapter 160A, or of any other statute, the Department of Transportation may include all or part of a Municipal Street System street as part of the right-of-way of a State Highway System street, highway, or bridge whenever the Board of Transportation determines that inclusion of the Municipal Street System street is necessary to improve, relocate, or construct a State Highway System street, highway, or bridge.

(b) Beginning January 1, 1985, the Department may not exercise such authority unless 90 days written notice to the governing body of the affected municipality is provided; and the Department shall hold a public hearing on the issue with 30 days published notice upon the written official request of the governing body received by the Department no less than 45 days after receipt of the notice to the governing body. (1983 (Reg. Sess., 1984), c. 1020.)

### § 136-66.8. Agreements with units of local government to expedite projects.

(a) Agreements Authorized. — The Department of Transportation may enter into agreements with units of local government for the purpose of expediting transportation projects currently programmed in the Transportation Improvement Plan.

(b) Form of Agreements. — The agreements affected by this section shall be between the Department of Transportation and units of local government. The agreements may authorize units of local government to construct projects scheduled in the Transportation Improvement Plan more than two years from the date of the agreement. The units of local government shall fund one hundred percent (100%) of the project at current prices. In a future year, when the project is funded from State and federal sources, the units of local government shall be reimbursed an appropriate share of the funds, at the future programmed project funding amount, as identified and scheduled in the Transportation Improvement Plan.

(c) Report. — The Department of Transportation shall report to the Joint Legislative Transportation Oversight Committee by December 1, 2006, on any agreements executed with units of local government pursuant to this section. (2006-135, s. 3.)

**§ 136-66.9:** Reserved for future codification purposes.

## ARTICLE 3B.

## *Dedication of Right-of-Way with Density or Development Rights Transfer.*

### § 136-66.10. Dedication of right-of-way under local ordinances.

(a) Whenever a tract of land located within the territorial jurisdiction of a city or county's zoning or subdivision control ordinance or any other land use control ordinance authorized by local act is proposed for subdivision or for use pursuant to a zoning or building permit, and a portion of it is embraced within a corridor for a street or highway on a plan established and adopted pursuant to G.S. 136-66.2, a city or county zoning or subdivision ordinance may provide for the dedication of right-of-way within that corridor pursuant to any applicable legal authority, or:

(1) A city or county may require an applicant for subdivision plat approval or for a special use permit, conditional use permit, or special exception, or for any other permission pursuant to a land use control ordinance authorized by local act to dedicate for street or highway purpose, the right-of-way within such corridor if the city or county allows the applicant to transfer density credits attributable to the dedicated right-of-way to contiguous land owned by the applicant. No dedication of right-of-way shall be required pursuant to this subdivision unless the board or agency granting final subdivision plat approval or the special use permit, conditional use permit, special exception, or permission shall find, prior to the grant, that the dedication does not result in the deprivation of a reasonable use of the original tract and that the dedication is either reasonably related to the traffic generated by the proposed subdivision or use of the remaining land or the impact of the dedication is mitigated by measures provided in the local ordinance.

(2) If a city or county does not require the dedication of right-of-way within the corridor pursuant to subdivision (1) of this subsection or other applicable legal authority, but an applicant for subdivision plat approval or a zoning or building permit, or any other permission pursuant to a land use control ordinance authorized by local act elects to dedicate the right-of-way, the city or county may allow the applicant to transfer density credits attributable to the dedicated right-of-way to contiguous land that is part of a common development plan or to transfer severable development rights attributable to the dedicated right-of-way to noncontiguous land in designated receiving districts pursuant to G.S. 136-66.11.

(b) When used in this section, the term "density credit" means the potential for the improvement or subdivision of part or all of a parcel of real property, as permitted under the terms of a zoning and/or subdivision ordinance, and/or other land use control ordinance authorized by local act, expressed in dwelling unit equivalents or other measures of development density or intensity or a fraction or multiple of that potential that may be transferred to other portions of the same parcel or to contiguous land in that is part of a common development plan. (1987, c. 747, s. 7, 1989, c. 595, s. 4.)

**Cross References.** — As to street and highway elements of the plans developed pursuant to G.S. 136-66.2 serving as the plan referred to in G.S. 136-66.10(a), see G.S. 136-66.2.

**Editor's Note.** — Session Laws 1987, c. 747, s. 25 provided that as used in the act, the word "municipality" means a "city" as defined by G.S. 160A-1.

## CASE NOTES

**Merely providing municipal services to homeowners in a subdivision** within a municipality does not constitute an implied acceptance by the municipality of dedication of a road when the homeowners have paid for those services by the payment of their ad valorem taxes. Concerned Citizens of Brunswick County Taxpayer's Ass'n v. State ex rel. Rhodes, 95 N.C. App. 38, 381 S.E.2d 810, rev'd on other grounds, 329 N.C. 37, 404 S.E.2d 677 (1991).

**Cited** in Dellinger v. City of Charlotte, 114 N.C. App. 146, 441 S.E.2d 626 (1994); Wright v. Town of Matthews, 177 N.C. App. 1, 627 S.E.2d 650, 2006 N.C. App. LEXIS 702 (2006).

## § 136-66.11. Transfer of severable development rights.

(a) When used in this section and in G.S. 136-66.10, the term "severable development right" means the potential for the improvement or subdivision of part or all of a parcel of real property, as permitted under the terms of a zoning and/or subdivision ordinance, expressed in dwelling unit equivalents or other measures of development density or intensity or a fraction or multiple of that potential that may be severed or detached from the parcel from which they are derived and transferred to one or more other parcels located in receiving districts where they may be exercised in conjunction with the use or subdivision of property, in accordance with the provisions of this section.

(b) A city or county may provide in its zoning and subdivision control ordinances for the establishment, transfer, and exercise of severable development rights to implement the provisions of G.S. 136-66.10 and this section.

(c) City or county zoning or subdivision control provisions adopted pursuant to this authority shall provide that if right-of-way area is dedicated and severable development rights are provided pursuant to G.S. 136-66.10(a)(2) and this section, within 10 days after the approval of the final subdivision plat or issuance of the building permit, the city or county shall convey to the dedicator a deed for the severable development rights that are attributable to the right-of-way area dedicated under those subdivisions. If the deed for the severable development rights conveyed by the city or county to the dedicator is not recorded in the office of the register of deeds within 15 days of its receipt, the deed shall be null and void.

(d) In order to provide for the transfer of severable development rights pursuant to this section, the governing board shall amend the zoning ordinance to designate severable development rights receiving districts. These districts may be designated as separate use districts or as overlaying other zoning districts. No severable development rights shall be exercised in conjunction with the development of subdivision of any parcel of land that is not located in a receiving district. A city or county may, however, limit the maximum development density or intensity or the minimum size of lots allowed when severable development rights are exercised in conjunction with the development or subdivision of any eligible site in a receiving district. No plat for a subdivision in conjunction with which severable development rights are exercised shall be recorded by the register of deeds, and no new building, or part thereof, or addition to or enlargement of an existing building, that is part of a development project in conjunction with which severable development rights are exercised shall be occupied, until documents have been recorded in the office of the register of deeds transferring title from the owner of the severable development rights to the granting city or county and providing for their subsequent extinguishment. These documents shall also include any other information that the city or county ordinance may prescribe.

(e) In order to implement the purposes of this section a city or county may by ordinance adopt regulations consistent with the provisions of this section.

(f) A severable development right shall be treated as an interest in real property. Once a deed for severable development rights has been transferred by a city or county to the dedicator and recorded, the severable development rights shall vest and become freely alienable. (1987, c. 747, s. 7.)

## ARTICLE 4.

### *Neighborhood Roads, Cartways, Church Roads, etc.*

## § 136-67. Neighborhood public roads.

All those portions of the public road system of the State which have not been taken over and placed under maintenance or which have been abandoned by the Department of Transportation, but which remain open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families, and all those roads that have been laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Health and Human Services, and all other roads or streets or portions of roads or streets whatsoever outside of the boundaries of any incorporated city or town in the State which serve a public use and as a means of ingress or egress for one or more families, regardless of whether the same have ever been a portion of any State or county road system, are hereby declared to be neighborhood public roads and they shall be subject to all of the provisions of G.S. 136-68, 136-69 and 136-70 with respect to the alteration, extension, or discontinuance thereof, and any interested party is authorized to institute such proceeding, and in lieu of personal service with respect to this class of roads, notice by publication once a week in any newspaper published in said county, or in the event there is no such newspaper, by posting at the courthouse door and three other public places, shall be deemed sufficient: Provided, that this definition of neighborhood public roads shall not be construed to embrace any street, road or driveway that serves an essentially private use, and all those portions and segments of old roads, formerly a part of the public road system, which have not been taken over and placed under maintenance and which have been abandoned by the Department of Transportation and which do not serve as a necessary means of ingress to and egress from an occupied dwelling house are hereby specifically excluded from the definition of neighborhood public roads, and the owner of the land, burdened with such portions and segments of such old roads, is hereby invested with the easement or right-of-way for such old roads heretofore existing.

Upon request of the board of county commissioners of any county, the Department of Transportation is permitted, but is not required, to place such neighborhood public roads as above defined in a passable condition without incorporating the same into the State or county system, and without becoming obligated in any manner for the permanent maintenance thereof.

This section shall not authorize the reopening on abandoned roads of any railroad grade crossing that has been closed by order of the Department of Transportation in connection with the building of an overhead bridge or underpass to take the place of such grade crossing. (1929, c. 257, s. 1; 1933, c. 302; 1941, c. 183; 1949, c. 1215; 1957, c. 65, s. 11; 1969, c. 982; 1973, c. 476, s. 138; c. 507, s. 5; 1977, c. 464, s. 7.1; 1997-443, s. 11A.122.)

**Legal Periodicals.** — For note discussing the acquisition of the public use of roadways by statute and prescriptive easement in North Carolina, in light of West v. Slick, 313 N.C. 33, 326 S.E.2d 601 (1985), see 21 Wake Forest L. Rev. 807 (1986).

## CASE NOTES

I. General Consideration.
II. Practice and Procedure.

### I. GENERAL CONSIDERATION.

**Purpose of Section.** — See Speight v. Anderson, 226 N.C. 492, 39 S.E.2d 371 (1946).

**Legislative Intent.** — In enacting this section, the legislature intended to preserve the public right to use roads that would no longer be maintained by any government. Jarvis v. Powers, 80 N.C. App. 355, 343 S.E.2d 195 (1986).

The legislature in 1933 did not intend for courts to further whittle down the portions of roads referred to in this section to the bare necessary access routes between dwellings and state roads. Jarvis v. Powers, 80 N.C. App. 355, 343 S.E.2d 195 (1986).

**History of Section.** — The first statutory definition of neighborhood public road was enacted in 1933. The "private use" exclusion was added by amendment in 1941. And the remainder of the proviso, beginning after the phrase "essentially private use," was added in 1949. Jarvis v. Powers, 80 N.C. App. 355, 343 S.E.2d 195 (1986).

**Easements in Abandoned Roads Retained for Use by Public.** — By this section, the easements theretofore owned by the State in and to segments of abandoned road are retained and reserved by the State for use by the public, not as public highways but as neighborhood public roads. Every segment of public road which has been abandoned as a part of the State road system coming within the terms of the statute is thus, by legislative enactment, established as a neighborhood public road. Woody v. Barnett, 235 N.C. 73, 68 S.E.2d 810 (1952).

**Date of Determination of Roadway's Status.** — The declaratory language used by the legislature in this section indicates the legislature's intention for the status of roadways to be determined as of the enactment dates of the applicable statutory definitions and exceptions. Jarvis v. Powers, 80 N.C. App. 355, 343 S.E.2d 195 (1986).

**This section declares three distinct types of roads to be neighborhood public roads.** The first portion of the section concerns only those roads which were once a part of the "public road system." The second type of road declared by this section to be a neighborhood public road was all those roads that had been laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Public Welfare (now the Department of Human Resources). The third type declared by this section to be a neighborhood public road (after the 1941 and 1949 revisions) was all those roads outside the boundaries of municipal corporations which served a public use and as a means of ingress and egress for one or more families. Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56, cert. denied, 281 N.C. 515, 189 S.E.2d 35 (1972); West v. Slick, 313 N.C. 33, 326 S.E.2d 601 (1985).

**Provisos Distinguished.** — The proviso that no road serving an "essentially private use" could be declared a neighborhood public road should be distinguished from the requirement under the third definition that a road must have served a public use. The proviso allows for some public use, but requires a determination of whether the road was "essentially" a private or a public roadway. Jarvis v. Powers, 80 N.C. App. 355, 343 S.E.2d 195 (1986).

**Applicability of Section to Roads Constituting "Necessary" Access to Dwelling.** — The first part of this section, relating to roads which were once a part of the public road system, applies only to a road or roads which constitute a "necessary" access to a dwelling house. West v. Slick, 313 N.C. 33, 326 S.E.2d 601 (1985).

**Under third part of this section, the elements required to be shown to establish a neighborhood public road** are: (1) the road or street or portions thereof are outside the boundaries of any incorporated city or town, (2) serve a public use, and (3) serve as a means of ingress or egress, (4) for one or more families. This third part refers to traveled ways which were established easements or roads or streets in a legal sense at the time of the 1941 amendment to this section. West v. Slick, 313 N.C. 33, 326 S.E.2d 601 (1985).

**Section Applies Only to Established Easements and Roads.** — This section refers to traveled ways which were at the time of the adoption of Session Laws 1941, c. 183, established easements or roads or streets in a legal sense, and it cannot be construed to include ways of ingress and egress existing by consent of the landowner as a courtesy to a neighbor, nor to those adversely used for a time insufficient to create an easement. Speight v. Anderson, 226 N.C. 492, 39 S.E.2d 371 (1946); Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56, cert. denied, 281 N.C. 515, 189 S.E.2d 35 (1972).

**The position of the "private use" proviso** at the end of the entire, unified definitional part of this section indicates the probable intent of the legislature that the proviso be applied to each definition. Jarvis v. Powers, 80 N.C. App. 355, 343 S.E.2d 195 (1986), remanding for a determination of whether roadway served "an essentially private purpose" in 1941.

**No road serving an essentially private use is embraced in the definition** of neighborhood public road. Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56, cert. denied, 281 N.C. 515, 189 S.E.2d 35 (1972).

The proviso at the end of the first paragraph of this section makes clear the legislative intent that no road serving an essentially "private use" is embraced in the definition of neighborhood public road. Watkins v. Smith, 40 N.C. App. 506, 253 S.E.2d 354 (1979).

**Road Serving Only Landowners, Their Guests and Invitees.** — A road which served only as a driveway for the defendants and, until it was obstructed, as a driveway for the plaintiffs, their guests and invitees, is not a neighborhood public road within the meaning of this section. Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56, cert. denied, 281 N.C. 515, 189 S.E.2d 35 (1972).

Where roadway was used by defendants and their guests and invitees and by plaintiffs and their guests and invitees, such a road or driveway was not a neighborhood public road within the meaning of this section. Watkins v. Smith, 40 N.C. App. 506, 253 S.E.2d 354 (1979).

**Road Maintained for Convenience of Landowner's Tenants.** — Where all the evidence tended to show that the road in question was laid out and maintained primarily as a convenience for those who resided on defendants' tracts, no continuous use for a public purpose was disclosed within the meaning of this section. Speight v. Anderson, 226 N.C. 492, 39 S.E.2d 371 (1946).

**Treatment of Roadway as Single Unit.** — The fact that part of a roadway which petitioners sought to establish as a "neighborhood public road" grew in with trees and other plants in the late 1940's or that a portion was claimed under a deed was immaterial under this section, and the court did not err in treating it as a single unit. Jarvis v. Powers, 80 N.C. App. 355, 343 S.E.2d 195 (1986).

**A jury finding that a road was constructed with unemployment relief funds is not, standing alone, sufficient** to sustain a judgment that a cartway was a neighborhood public road in the absence of a finding that it serves a public rather than a private use. Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56, cert. denied, 281 N.C. 515, 189 S.E.2d 35 (1972).

Where it was controverted whether the road in question was used permissively as a way to a private cemetery or whether it was used by the public under claim of right to a community cemetery, petitioners were not entitled to have it adjudicated a neighborhood public road solely upon a finding by the jury that it was constructed or reconstructed with employment relief funds under the supervision of the Department of Public Welfare (now Department of Human Resources). Raynor v. Ottoway, 231 N.C. 99, 56 S.E.2d 28 (1949).

Testimony that relief funds were used under authorization of the Department of Public Welfare (now Department of Human Resources) on a cemetery project and that the supervisor in charge of the work, upon suggestion of an interested worker, had the workers improve the road to the cemetery, was held insufficient to establish that the reconstruction of the road was authorized or directed by the Department of Public Welfare (now Department of Human Resources) within the meaning of this section. Raynor v. Ottoway, 231 N.C. 99, 56 S.E.2d 28 (1949).

**Abutting Landowners Have Easement over Abandoned Highway.** — Abutting landowners have an easement over a public highway abandoned by the State Highway Commission (now Department of Transportation). Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56, cert. denied, 281 N.C. 515, 189 S.E.2d 35 (1972).

**But Their Right Is the Same as That of Public Generally.** — This section merely fixes the status of roads abandoned by the State Highway Commission (now Department of Transportation) as public roads and does not invest any private easement in owners of property abutting the abandoned road, their right to the continued use of such road being the same as that of the public generally. Mosteller v. Southern Ry., 220 N.C. 275, 17 S.E.2d 133 (1941).

**Relocation of Short Section to Cut Out Dangerous Curves or Inadequate Underpass.** — Where the State Highway Commission (now Department of Transportation), in the interest of public safety, builds an overpass and relocates a short section of the road in order to cut out dangerous curves and an inadequate underpass, and thereafter tears up the section of old road lying on one side of the underpass, the short section of old road is not a highway abandoned by the Commission (now Department) which remains open and in general use by the public within the purview of this section and does not become a public road. Mosteller v. Southern Ry., 220 N.C. 275, 17 S.E.2d 133 (1941).

**Elimination of Dangerous Grade Intersection Underpass or Overpass.** — Every segment of a public road which has been abandoned as a part of the State road system coming within the terms of this section is, by legislative enactment, established as a neighborhood public road; however, the elimination by the Highway Commission (now Department of Transportation) of a section of a road so as to exclude a dangerous grade intersection underpass or overpass is not a segment of an abandoned road "which remain(s) open and in general use" by the public so as to qualify it as a neighborhood road which must be kept open. Snow v. North Carolina State Hwy. Comm'n, 262 N.C. 169, 136 S.E.2d 678 (1964).

**No Right to Install Sewer Line.** — Where the scope of the easement vested in defendants by this section was only the right of ingress and egress, defendants did not have the right to install a sewer line on the property. Moore v. Leveris, 128 N.C. App. 276, 495 S.E.2d 153 (1998).

**The foreshore is reserved for the use of the public.** West v. Slick, 313 N.C. 33, 326 S.E.2d 601 (1985).

**Applied** in State Hwy. Comm'n v. Phillips, 267 N.C. 369, 148 S.E.2d 282 (1966); Whitehead Community Club v. Hoppers, 43 N.C. App. 671, 260 S.E.2d 94 (1979); Dotson v. Payne, 71 N.C. App. 691, 323 S.E.2d 362 (1984).

**Cited** in Woody v. Barnett, 243 N.C. 782, 92 S.E.2d 178 (1956); Pritchard v. Scott, 254 N.C. 277, 118 S.E.2d 890 (1961); Walton v. Meir, 10 N.C. App. 598, 179 S.E.2d 834 (1971); In re Easement of Right of Way, 90 N.C. App. 303, 368 S.E.2d 639 (1988).

## II. PRACTICE AND PROCEDURE.

**Procedure for Establishment or Discontinuance of Neighborhood Road.** — The procedure for the establishment of a neighborhood public road, as well as the procedure to establish discontinuance thereof, is by special proceeding before the clerk, and although an interlocutory injunction in connection with the proceeding under the statute may be issued only by the judge, the superior court does not have original jurisdiction of the proceeding. Edwards v. Hunter, 246 N.C. 46, 97 S.E.2d 463 (1957).

The question of the discontinuance of a road which is a neighborhood public road, within the meaning of this section, must be determined by a special proceeding instituted before the clerk; and where the question has been presented by petition to the board of county commissioners, the judgment of the superior court on appeal dismissing the petition is correct, but that part of the judgment providing that the road shall remain open is erroneous and will be stricken out on further appeal. In re Edwards, 206 N.C. 549, 174 S.E. 505 (1934).

**Who May Maintain Proceeding.** — Persons living along a highway which had been taken over by the State Highway Commission (now Department of Transportation), and subsequently abandoned by it, are "interested citizens" within the meaning of this section, and may maintain a proceeding to have the road established as a "neighborhood public road." Grady v. Grady, 209 N.C. 749, 184 S.E. 512 (1936).

Where plaintiff's allegations and evidence tended to show that the alleged public way to an old wharf had been abandoned by the Highway Commission (now Department of Transportation) when it took over the county roads, and that plaintiffs did not reside along the alleged public road, and that it was not necessary to them as a way of egress and ingress to their homes, but that they used same in getting to the old wharf to their boats for hunting and fishing parties, they failed to establish their right to the use of the passway as a neighborhood public road. Cahoon v. Roughton, 215 N.C. 116, 1 S.E.2d 362 (1939).

**Complaint Must Allege Road Is Neighborhood Public Road or Refer to This Article.** — An action seeking to enjoin defendants from obstructing an alleged public road, in which the complaint does not allege that the road in controversy is a neighborhood public road nor refer to this Article, is not one to establish a neighborhood public road under this Chapter. Gragg v. Burns, 9 N.C. App. 240, 175 S.E.2d 774 (1970).

**Cartway's Effect on Prescriptive Easement.** — Where the establishment of a cartway by petitioners' predecessor in title interrupted continuity of use, the petitioners failed to present evidence of the existence of a prescriptive easement and to make out a prima facie case that the road to their house, which the respondents had threatened to block off, was a public road. Roten v. Critcher, 135 N.C. App. 469, 521 S.E.2d 140, 1999 N.C. App. LEXIS 1156 (1999).

**Use of Word "Declare" in Petition.** — Where the petitioners seek to obtain a judicial declaration of the existence of those facts which are necessary to bring the road in question within the definition contained in this section, so as to procure the establishment thereof as a neighborhood public road as a matter of public record, they do not invoke the provisions of the Declaratory Judgment Act by the use of the word "declare," and the clerk of the superior court has jurisdiction over the proceeding. Woody v. Barnett, 235 N.C. 73, 68 S.E.2d 810 (1952).

**Allegations Insufficient to Bring Road in Question Within Definition of This Section.** — See Clinard v. Lambeth, 234 N.C. 410, 67 S.E.2d 452 (1951); Edwards v. Hunter, 246 N.C. 46, 97 S.E.2d 463 (1957).

**Sufficiency of Evidence.** — Evidence that prior to 1929 a road existed across certain lands from a river to another highway, that such way was used by the public at large, at its convenience, in going to fishing camps located on the river, but that the road was not taken over for maintenance by the State Highway Commission (now Department of Transportation), is sufficient to be submitted to the jury as to whether such road remained a neighborhood public road. Smith v. Moore, 254 N.C. 186, 118 S.E.2d 436 (1961).

Evidence was insufficient to support a finding that a road was a public road, but was sufficient to support a finding that it was a neighborhood public road within the meaning of this section. Wetherington v. Smith, 259 N.C. 493, 131 S.E.2d 33 (1963).

**Findings Supporting Dismissal of Action.** — Where an action to have a portion of abandoned highway adjudged to be a neighborhood public road under this section was submitted to the court under agreement of the parties, findings of fact by the court, supported by evidence, to the effect that the abandoned road was not necessary for ingress or egress to any dwelling, there having been byroads constructed giving access to the dwelling in question and connecting the schools involved, and that the abandoned road had not remained open and in general use by the public, were held to support judgment dismissing the action. Woody v. Barnett, 239 N.C. 420, 79 S.E.2d 789 (1954).

## § 136-68. Special proceeding for establishment, alteration or discontinuance of cartways, etc.; petition; appeal.

The establishment, alteration, or discontinuance of any cartway, church road, mill road, or like easement, for the benefit of any person, firm, association, or corporation, over the lands of another, shall be determined by a special proceeding instituted before the clerk of the superior court in the county where the property affected is situated. Such special proceeding shall be commenced by a petition filed with said clerk and the service of a copy thereof on the person or persons whose property will be affected thereby. From any final order or judgment in said special proceeding, any interested party may appeal to the superior court for a jury trial de novo on all issues including the right to relief, the location of a cartway, tramway or railway, and the assessment of damages. The procedure established under Chapter 40A, entitled "Eminent Domain," shall be followed in the conduct of such special proceeding insofar as the same is applicable and in harmony with the provisions of this section. (1879, c. 82, s. 9; Code, s. 2023; Rev., s. 2683; C.S., s. 3835; 1931, c. 448; 1995, c. 513, s. 1.)

**Local Modification.** — Burke, Caldwell and Catawba: Pub. Loc. 1931, c. 313; Graham: Pub. Loc. 1935, c. 224; Lincoln: Pub. Loc. 1931, c. 313.

**Editor's Note.** — Session Laws 1995, c. 513, s. 4 provides in part: "This act applies to actions to establish cartways filed on or after the effective date, but before July 1, 1997."

**Legal Periodicals.** — For an article on statutory easements by necessity or cartways, see 75 N.C.L. Rev. 1943 (1997).

### CASE NOTES

**This Section and § 136-69 to Be Strictly Construed.** — This section and G.S. 136-69, relating to the establishment of cartways for ingress and egress to a highway over intervening lands, are in derogation of common law and must be strictly construed. Brown v. Glass, 229 N.C. 657, 50 S.E.2d 912 (1948); Pritchard v. Scott, 254 N.C. 277, 118 S.E.2d 890 (1961).

This section and G.S. 136-69 are in derogation of the free and unrestricted use and enjoyment of realty by the owner of the land over which it is sought to establish a cartway, and must be strictly construed. Candler v. Sluder, 259 N.C. 62, 130 S.E.2d 1 (1963); Turlington v. McLeod, 79 N.C. App. 299, 339 S.E.2d 44 (1986).

This section and G.S. 136-69 are in derogation of the rights of private property and must be strictly construed. Taylor v. West Virginia Pulp & Paper Co., 262 N.C. 452, 137 S.E.2d 833 (1964).

**"Way of Necessity" and "Cartway" Distinguished.** — Material differences between a way of necessity under the general law and a cartway condemned in accordance with this section and G.S. 136-69 include the following: If entitled to a "way of necessity" under the general law, a person is entitled thereto to as a matter of right. No payment of compensation therefor is required. On the other hand, the "peculiar way of necessity" is obtained by condemnation and payment of compensation for a specific cartway in those instances where petitioner has no reasonable access to a public road as a matter of legal right or by permission. Pritchard v. Scott, 254 N.C. 277, 118 S.E.2d 890 (1961).

**Establishment of a cartway is a special proceeding under G.S. 136-68, and under G.S. 1-393, the Rules of Civil Procedure are applicable to special proceedings;** thus, summary judgment is available in a trial de novo in the superior court of a proceeding under G.S. 136-68. Petitioners were properly granted partial summary judgment on the issue of whether they were entitled to a cartway to access their land for timber, but a jury verdict was required to determine the placement of the cartway and the damages to be awarded respondent, over whose land the cartway would be built. Greene v. Garner, 163 N.C. App. 142, 592 S.E.2d 589, 2004 N.C. App. LEXIS 294 (2004).

**A petitioner is not entitled to condemn a cartway if he presently has access** to a public road. The fact that such permission may be temporary in nature, and may be withdrawn at some future time, is not relevant. Turlington v. McLeod, 79 N.C. App. 299, 339 S.E.2d 44 (1986).

A petition for a cartway will be denied if the petitioner has other reasonable access through a permissive right of way. Turlington v. McLeod, 79 N.C. App. 299, 339 S.E.2d 44 (1986).

**Filing Exceptions to Commissioner's Report Is Prerequisite to Appeal.** — Filing exceptions to a commissioner's report that establishes a statutory cartway and determines the compensation to be paid to the affected property owners is a prerequisite to appeal. Hancock v. Tenery, 131 N.C. App. 149, 505 S.E.2d 315 (1998).

**Jurisdiction of Clerk.** — The legislature has vested in the clerks of the superior courts of the State jurisdiction over proceedings relating to the establishment, maintenance, alteration, discontinuance, or abandonment of neighborhood public roads, church roads, and cartways. Proceedings under this Article ordinarily involve questions of fact rather than issues of fact. An expeditious method of entertaining and disposing of such proceedings, without unnecessarily cluttering the civil issue docket of the superior court, was desired. To this end jurisdiction was vested in the clerk. Woody v. Barnett, 235 N.C. 73, 68 S.E.2d 810 (1952).

**Same — Does Not Extend to Establishing Alley Within Incorporated Town.** — The law relating to cartways was not intended to withdraw from cities and towns any part of their exclusive control over their streets and other public ways and confers no jurisdiction on the clerk of the superior court to establish an alley within an incorporated town. Parsons v. Wright, 223 N.C. 520, 27 S.E.2d 534 (1943).

**Jurisdiction of Board of County Commissioners Under Local Law.** — Under Pub. Loc. Laws 1923, c. 119, s. 12, a proceeding in Haywood County to establish cartways over the lands of others should have been instituted before the board of county commissioners, and not before the clerk, and the clerk of the superior court of that county had no jurisdiction of a proceeding for this relief instituted before him. Rogers v. Davis, 212 N.C. 35, 192 S.E. 872 (1937).

**An action to obtain a judicial declaration of plaintiff's right to an easement appurtenant** and by necessity over the lands of defendants is authorized by Chapter 1, Article 26, and the superior court has jurisdiction, it not being a special proceeding to establish a cartway, which must be instituted before the clerk. Carver v. Leatherwood, 230 N.C. 96, 52 S.E.2d 1 (1949).

**Directed Verdict and Judgment Not Withstanding Verdict Unwarranted.** — Because: (1) the Court of Appeals of North Carolina declined to add a fourth element to the landowners' burden of proof in the first part of the cartway proceeding; (2) the jury instruction on the element of the landowners' claim to establish the right to a cartway, requiring them to show that their land was being used for one of the purposes enumerated in the statute, conformed with the pattern jury instructions without the addition of the language suggested by the adjoining landowners and fairly and accurately stated the landowners' element of proof as to the use of their property; and (3) the instruction requested by the adjoining landowners gave undue emphasis to their claim the landowners' intended to use the land for future residential development, which, while not enumerated under the statute, did not defeat the landowners' right to a cartway, the trial court's orders denying both a directed verdict and a judgment notwithstanding the verdict were upheld on appeal. Jones v. Robbins, 190 N.C. App. 405, 660 S.E.2d 118, 2008 N.C. App. LEXIS 901 (2008).

**Dismissal by Clerk Is Final Order.** — The order of the clerk of superior court that petitioners' action be dismissed was certainly a "final order" within the meaning of this section. Taylor v. Askew, 11 N.C. App. 386, 181 S.E.2d 192 (1971).

**Order of Clerk May Be Appealed.** — An order of a clerk or superior court adjudging the right to a cartway is a final judgment and an appeal lies therefrom. Candler v. Sluder, 259 N.C. 62, 130 S.E.2d 1 (1963).

**When Appeal May Be Taken.** — A defendant is not required to wait until a roadway is laid off before availing himself of the right to appeal, though he may, if he so elects, except to the order and defer his appeal until after the cartway has been located. Candler v. Sluder, 259 N.C. 62, 130 S.E.2d 1 (1963).

Where the only issue to be tried has been determined adversely to the petitioners by the clerk of superior court, they have a right to have that determination reviewed by the judge of superior court, without further delay. Taylor v. Askew, 11 N.C. App. 386, 181 S.E.2d 192 (1971).

An order of a clerk of superior court adjudging the right to a cartway is a final judgment and an appeal lies, but there is one limitation to the right to immediately appeal an order granting the right to a cartway. Where the jury of view has been appointed and has filed a written report of its findings, a party must wait until the clerk enters an order confirming, modifying, or rejecting the jury of view's proposed location of the cartway before appealing. Greene v. Garner, 163 N.C. App. 142, 592 S.E.2d 589, 2004 N.C. App. LEXIS 294 (2004).

**When Appeal May Not Be Taken.** — Where the Clerk of Court had not entered any order either confirming, amending or rejecting the report of the jury of view dated June 19, 1997, no "final order or judgment" had been entered pursuant to which an appeal might lie under this section and the trial court should have dismissed appeal as premature. Jones v.

Winckelmann, 134 N.C. App. 143, 516 S.E.2d 876 (1999).

**The dismissal of the respondents' interlocutory appeal was appropriate** where dismissal would not ultimately preclude respondents from addressing the issue of whether petitioners are "landowners" and, therefore have a right to relief within the context of this section and G.S. 136-69; this section gives the respondent the option of appealing any final order or judgment in a special proceeding to establish a cartway to the superior court for a jury trial de novo on all issues. Onuska v. Barnwell, 140 N.C. App. 590, 537 S.E.2d 840, 2000 N.C. App. LEXIS 1244 (2000).

**Possession and Use of Land Pending Appeal.** — The provision in former G.S. 40-19, which gives the court the authority to give possession and use of land to the condemnor while pending appeal, is not applicable to proceedings to establish a cartway brought under this section. Lowe v. Rhodes, 9 N.C. App. 111, 175 S.E.2d 721 (1970).

**Superior Court Acquires Full Jurisdiction of Appeal from Clerk's Order.** — Upon the docketing of an appeal of a clerk's final order on the civil issue docket the superior court acquires full jurisdiction thereof. Taylor v. Askew, 11 N.C. App. 386, 181 S.E.2d 192 (1971).

**Bringing in Additional Parties.** — If the judge feels that additional parties respondent are necessary before a determination of the appeal, he should enter such orders as necessary to bring them in, but it is not proper to remand the matter to the clerk of superior court without first passing upon the merits of petitioners' appeal. Taylor v. Askew, 11 N.C. App. 386, 181 S.E.2d 192 (1971).

**Upon appeal from the clerk, the trial in superior court is de novo.** Candler v. Sluder, 259 N.C. 62, 130 S.E.2d 1 (1963).

When a case involving a cartway is appealed from the clerk to the superior court, trial in superior court is de novo. Lowe v. Rhodes, 9 N.C. App. 111, 175 S.E.2d 721 (1970).

**And it is the duty of the court to determine the issues of fact and questions of law** involved. Taylor v. Askew, 11 N.C. App. 386, 181 S.E.2d 192 (1971).

**The issue to be tried in superior court** is the same as before the clerk — whether petitioners are entitled to a cartway over some lands. It involves only the elements set out in G.S. 136-69. Candler v. Sluder, 259 N.C. 62, 130 S.E.2d 1 (1963); Lowe v. Rhodes, 9 N.C. App. 111, 175 S.E.2d 721 (1970).

The issue to be tried in superior court is the same as before the clerk. It does not involve the actual location of the road, or, as between defendants, whose lands shall be burdened thereby. These matters are for the jury of view, and it is error for the court to undertake to dispose of them. Candler v. Sluder, 259 N.C. 62, 130 S.E.2d 1 (1963).

If the issue to be determined by the judge on appeal is whether petitioners are entitled to a cartway over some lands, it does not involve the actual location of the road or whose land shall be burdened thereby, these being questions to be initially determined by the jury of view. Taylor v. Askew, 11 N.C. App. 386, 181 S.E.2d 192 (1971).

**Procedure Where Petitioners Are Entitled to Cartway.** — If the judge determines that the petitioners are entitled to a cartway, he should so order and remand the matter to the clerk of superior court for the appointment of a jury of view and for further proceedings as prescribed by this section. Taylor v. Askew, 11 N.C. App. 386, 181 S.E.2d 192 (1971).

**Procedure Where Petitioners Are Not Entitled to Cartway.** — If the clerk of superior court's ruling that the petitioners are not entitled to a cartway is upheld by the judge of superior court, the proceeding should be dismissed. Taylor v. Askew, 11 N.C. App. 386, 181 S.E.2d 192 (1971).

**Where it does not appear that a road is a neighborhood public road** there is no necessity for any action or proceeding under this section to discontinue its use. Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56, cert. denied, 281 N.C. 515, 189 S.E.2d 35 (1972).

**Review of the Law Regarding Appeals in Cartway Proceedings Prior to 1931.** — See Lowe v. Rhodes, 9 N.C. App. 111, 175 S.E.2d 721 (1970).

**Applied** in Garris v. Byrd, 229 N.C. 343, 49 S.E.2d 625 (1948); Wetherington v. Smith, 259 N.C. 493, 131 S.E.2d 33 (1963); Yount v. Lowe, 288 N.C. 90, 215 S.E.2d 563 (1975).

**Cited** in Waldroup v. Ferguson, 213 N.C. 198, 195 S.E. 615 (1938); Edwards v. Hunter, 246 N.C. 46, 97 S.E.2d 463 (1957); Andrews v. Lovejoy, 247 N.C. 554, 101 S.E.2d 395 (1958); Potter v. Potter, 251 N.C. 760, 112 S.E.2d 569 (1960); Taylor v. Askew, 17 N.C. App. 620, 195 S.E.2d 316 (1973); Turlington v. McLeod, 323 N.C. 591, 374 S.E.2d 394 (1988).

## OPINIONS OF ATTORNEY GENERAL

**Section does not provide for the establishment of a cartway for a home.** See opinion of Attorney General to Bessie J. Cherry, Clerk of Superior Court, Beaufort County, 46 N.C.A.G. 222 (1977).

## § 136-69. Cartways, tramways, etc., laid out; procedure.

(a) If any person, firm, association, or corporation shall be engaged in the cultivation of any land or the cutting and removing of any standing timber, or the working of any quarries, mines, or minerals, or the operating of any industrial or manufacturing plants, or public or private cemetery, or taking action preparatory to the operation of any such enterprises, to which there is leading no public road or other adequate means of transportation, other than a navigable waterway, affording necessary and proper means of ingress thereto and egress therefrom, such person, firm, association, or corporation may institute a special proceeding as set out in the preceding section (G.S. 136-68), and if it shall be made to appear to the court necessary, reasonable and just that such person shall have a private way to a public road or watercourse or railroad over the lands of other persons, the court shall appoint a jury of view of three disinterested freeholders to view the premises and lay off a cartway, tramway, or railway of not less than 18 feet in width, or cableways, chutes, and flumes, and assess the damages the owner or owners of the land crossed may sustain thereby, and make report of their findings in writing to the clerk of the superior court. Exceptions to said report may be filed by any interested party and such exceptions shall be heard and determined by the clerk of the superior court. The clerk of the superior court may affirm or modify said report, or set the same aside and order a new jury of view. All damages assessed by a judgment of the clerk, together with the cost of the proceeding, shall be paid into the clerk's office before the petitioners shall acquire any rights under said proceeding.

(b) **(See editor's note)** Compensation to the landowner for the establishment of a cartway over the property of another shall be as provided in Chapter 40A Article 4 of the North Carolina General Statutes.

(c) Where a tract of land lies partly in one county and partly in an adjoining county, or where a tract of land lies wholly within one county and the public road nearest or from which the most practical roadway to said land would run, lies in an adjoining county and the practical way for a cartway to said land would lead over lands in an adjoining county, then and in that event the proceeding for the laying out and establishing of a cartway may be commenced in either the county in which the land is located or the adjoining county through which said cartway would extend to the public road, and upon the filing of such petition in either county the clerk of the court shall have jurisdiction to proceed for the appointment of a jury from the county in which the petition is filed and proceed for the laying out and establishing of a cartway as if the tract of land to be reached by the cartway and the entire length of the cartway are all located within the bounds of said county in which the petition may be filed. (1798, c. 508, s. 1, P.R.; 1822, c. 1139, s. 1, P.R.; R.C., c. 101, s. 37; 1879, c. 258; Code, s. 2056; 1887, c. 46; 1903, c. 102; Rev., s. 2686; 1909, c. 364, s. 1; 1917, c. 187, s. 1; c. 282, s. 1; C.S., s. 3836; 1921, c. 135; Ex. Sess., 1921, c. 73; 1929, c. 197, s. 1; 1931, c. 448; 1951, c. 1125, s. 1; 1961, c. 71; 1965, c. 414, s. 1; 1981, c. 826, s. 1; 1995, c. 513, ss. 2, 3a.)

**Editor's Note.** — Session Laws 1995, c. 513, s. 4 provides: "This act is effective upon ratification but sections 2 and 3 expire on July 1, 1997. This act applies to actions to establish cartways filed on or after the effective date, but before July 1, 1997."

Session Laws 1995, c. 513, s. 3a, was codified as subsection (b) of this section at the direction of the Revisor of Statutes. The subsection (a) and (c) designations were assigned by the Revisor of Statutes.

**Legal Periodicals.** — For an article on statutory easements by necessity or cartways, see 75 N.C.L. Rev. 1943 (1997).

CASE NOTES

**Three elements must be satisfied before a cartway will be granted:** (1) the land in question is used for one of the purposes enumerated in the statute; (2) the land is without adequate access to a public road or other adequate means of transportation affording necessary and proper ingress and egress; and (3) the granting of a private way over the lands of other persons is necessary, reasonable and just. Greene v. Garner, 163 N.C. App. 142, 592 S.E.2d 589, 2004 N.C. App. LEXIS 294 (2004).

**Directed Verdict and Judgment Not Withstanding Verdict Unwarranted.** — Because: (1) the Court of Appeals of North Carolina declined to add a fourth element to the landowners' burden of proof in the first part of the cartway proceeding; (2) the jury instruction on the element of the landowners' claim to establish the right to a cartway, requiring them to show that their land was being used for one of the purposes enumerated in the statute, conformed with the pattern jury instructions without the addition of the language suggested by the adjoining landowners and fairly and accurately stated the landowners' element of proof as to the use of their property; and (3) the instruction requested by the adjoining landowners gave undue emphasis to their claim the landowners' intended to use the land for future residential development, which, while not enumerated under the statute, did not defeat the landowners' right to a cartway, the trial court's orders denying both a directed verdict and a judgment notwithstanding the verdict were upheld on appeal. Jones v. Robbins, 190 N.C. App. 405, 660 S.E.2d 118, 2008 N.C. App. LEXIS 901 (2008).

**The dismissal of the respondents' interlocutory appeal was appropriate** where dismissal would not ultimately preclude respondents from addressing the issue of whether petitioners are "landowners" and, therefore have a right to relief within the context of G.S. 136-68 and this section; G.S. 136-68 gives the respondent the option of appealing any final order or judgment in a special proceeding to establish a cartway to the superior court for a jury trial de novo on all issues. Onuska v. Barnwell, 140 N.C. App. 590, 537 S.E.2d 840, 2000 N.C. App. LEXIS 1244 (2000).

**Cited** in Jones v. Winckelmann, 134 N.C. App. 143, 516 S.E.2d 876 (1999).

## § 136-70. Alteration or abandonment of cartways, etc., in same manner.

Cartways or other ways established under this Article or heretofore established, may be altered, changed, or abandoned in like manner as herein provided for their establishment upon petition instituted by any interested party: Provided, that all cartways, tramways, or railways established for the removal of timber shall automatically terminate at the end of a period of five years, unless a greater time is set forth in the petition and the judgment establishing the same. (1798, c. 508, ss. 1, 2, 3, P.R.; 1834, c. 16, s. 1; R.C., c. 101, s. 38; Code, s. 2057; 1887, c. 46, s. 2; c. 266; Rev., s. 2694; C.S., s. 3837; 1931, c. 448; 1995, c. 513, s. 3.)

**Cross References.** — See Local Modification under G.S. 136-68.

**Editor's Note.** — Session Laws 1995, c. 513, s. 4 provides: "This act is effective upon ratification but sections 2 and 3 expire on July 1, 1997. This act applies to actions to establish cartways filed on or after the effective date, but before July 1, 1997."

**Legal Periodicals.** — For an article on statutory easements by necessity or cartways, see 75 N.C.L. Rev. 1943 (1997).

CASE NOTES

**When Petitioner Acquires Servient Tract.** — A petitioner who has acquired a right by order of the court, to have a cartway over the land of another, and who has afterwards obtained title to the servient tenement, has a right to obstruct and discontinue such cartway. Jacocks v. Newby, 49 N.C. 266 (1857).

**Applied** in Greene v. Garner, 163 N.C. App. 142, 592 S.E.2d 589, 2004 N.C. App. LEXIS 294 (2004).

**Cited** in Waldroup v. Ferguson, 213 N.C. 198, 195 S.E. 615 (1938); Woody v. Barnett, 235 N.C. 73, 68 S.E.2d 810 (1952).

## § 136-71. Church roads and easements of public utility lines laid out on petition; procedure.

Necessary roads or easements and right-of-ways for electric light lines, power lines, water lines, sewage lines, and telephone lines leading to any church or other place of public worship may be established in the same manner as set forth in the preceding sections of this Article upon petition of the duly constituted officials of such church. (1872-3, c. 189, ss. 1-3, 5; Code, ss. 2062, 2064; Rev., ss. 2687, 2689; C.S., s. 3838; 1931, c. 448; 1949, c. 382.)

### CASE NOTES

**Section Inapplicable.** — As sewer line that defendants installed serviced only their residence, the provisions of this section were not applicable. Moore v. Leveris, 128 N.C. App. 276, 495 S.E.2d 153 (1998).

**Cited** in Waldroup v. Ferguson, 213 N.C. 198, 195 S.E. 615 (1938).

**§§ 136-71.1 through 136-71.5:** Reserved for future codification purposes.

## ARTICLE 4A.

## *Bicycle and Bikeway Act of 1974.*

## § 136-71.6. How Article cited.

This Article may be cited as the North Carolina Bicycle and Bikeway Act of 1974. (1973, c. 1447, s. 1.)

## § 136-71.7. Definitions.

As used in this Article, except where the context clearly requires otherwise, the words and expressions defined in this section shall be held to have the meanings here given to them:

(1) Bicycle: A nonmotorized vehicle with two or three wheels tandem, a steering handle, one or two saddle seats, and pedals by which the vehicle is propelled.
(2) Bikeway: A thoroughfare suitable for bicycles, and which may either exist within the right-of-way of other modes of transportation, such as highways, or along a separate and independent corridor.
(3) Department: North Carolina Department of Transportation.
(4) Program: North Carolina Bicycle and Bikeway Program.
(5) Secretary: The Secretary of the North Carolina Department of Transportation. (1973, c. 1447, s. 2; 1975, c. 716, s. 7; 1977, c. 1021, s. 1.)

## § 136-71.8. Findings.

The General Assembly hereby finds that it is in the public interest, health, safety, and welfare for the State to encourage and provide for the efficient and safe use of the bicycle; and that to coordinate plans for bikeways most effectively with those of the State and local governments as they affect roads, streets, schools, parks and other publicly owned lands, abandoned roadbeds and conservation areas, while maximizing the benefits from the use of tax dollars, a single State agency, eligible to receive federal matching funds, should be designated to establish and maintain a statewide bikeways program. The General Assembly also finds that bikeways are a bona fide highway purpose, subject to the same rights and responsibilities, and eligible for the same considerations as other highway purposes and functions. (1973, c. 1447, s. 3; 1977, c. 1021, s. 1.)

## § 136-71.9. Program development.

The Department is designated as such State agency, responsible for developing and coordinating the program. (1973, c. 1447, s. 4.)

## § 136-71.10. Duties.

The Department will:

(1) Assist and cooperate with local governments and other agencies in the development and construction of local and regional bikeway projects;

(2) Develop and publish policies, procedures, and standards for planning, designing, constructing, maintaining, marking, and operating bikeways in the State; for the registration and security of bicycles; and for the safety of bicyclists, motorists and the public;

(3) Develop bikeway demonstration projects and safety training programs;

(4) Develop and construct a State bikeway system. (1973, c. 1447, s. 5.)

## § 136-71.11. Designation of bikeways.

Bikeways may be designated along and upon the public roads. (1973, c. 1447, s. 5.)

## § 136-71.12. Funds.

The General Assembly hereby authorizes the Department to include needed funds for the program in its annual budgets for fiscal years after June 30, 1975, subject to the approval of the General Assembly.

The Department is authorized to spend any federal, State, local or private funds available to the Department and designated for the accomplishment of this Article. Cities, towns, and counties may use any funds available. (1973, c. 1447, s. 6; 2003-256, s. 1.)

**Local Modification.** — Durham: 1998-89.

## § 136-71.13. North Carolina Bicycle Committee; composition, meetings, and duties.

(a) There is hereby created a North Carolina Bicycle Committee within the Department of Transportation. The Bicycle Committee shall consist of seven members appointed by the Secretary. Members of the Committee shall receive per diem and necessary travel and subsistence expense in accordance with the provisions of G.S. 138-5. Initially, three members shall be appointed for two years, and four members for four years; thereafter each appointment shall be for four years. Upon the resignation of a member in midterm, the replacement shall be appointed for the remainder of the unexpired term. The Secretary shall make appointments to the Committee with a view to providing representation to each of the State's geographical regions and to the various types of bicycle users and interests.

(b) The Bicycle Committee shall meet in various sections of the State, not less than once in any three months, and at such other times as may be necessary to fulfill its duties. A majority of the members of the Committee shall constitute a quorum for the transaction of business. The staff of the bicycle and bikeway program shall serve the Committee, maintain the minutes of tee [the] meetings, research questions of bicycle transportation importance, and undertake such other activities for the Committee as may be consistent with the program's role within the Department.

(c) The Bicycle Committee shall have the following duties:

(1) To represent the interests of bicyclists in advising the Secretary on all matters directly or indirectly pertaining to bicycles and bikeways, their use, extent, location, and the other objectives and purposes of this Article;

(2) To adopt bylaws for guiding its operation, as well as an outline for pursuing a safer environment for bicycling in North Carolina;

(3) To assist the bicycle and bikeway program in the exercise of its duties within the Department; and

(4) To promote the best interests of the bicycling public, within the context of the total transportation system, to governing officials and the citizenry at large.

(d) The Secretary, with the advice of the Bicycle Committee, shall coordinate bicycle activities among the divisions of the Department, as well as between the Department of Transportation and the other departments. Further, he shall study bicycle and bikeway needs and potentials and report the findings of said studies, with the Committee's recommendations, to the appropriate policy or legislative bodies. The Secretary shall transmit an annual report to the Governor and General Assembly on bicycle and bikeway activities within the Department, including a progress report on the implementation of this Article. (1977, c. 1021, s. 1.)

## ARTICLE 5.

## *Bridges.*

### § 136-72. Load limits for bridges; penalty for violations.

The Department of Transportation shall have authority to determine the safe load-carrying capacity for any and all bridges on highways on the State highway system. It shall be unlawful for any person, firm, or corporation to drive, operate or tow on any bridge on the State highway system, any vehicle or combination of vehicles with a gross weight exceeding the safe load-carrying capacity established by the Department of Transportation and posted at each end of the said bridge. Any person, firm, or corporation violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1931, c. 145, s. 16; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1975, c. 373, s. 1; 1977, c. 306; c. 464, s. 7.1; 1993, c. 539, s. 985; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 2008-107, s. 25.18, provides: "(a) Of funds available to the Department of Transportation, the Department, in cooperation with the Center for Transportation and the Environment at North Carolina State University, shall conduct a pilot study on 50 bridges, located throughout the State in various ecosystems, of the installation of various types of storm water detention, collection, and filtering systems during new bridge construction over waterways. The Department may also retrofit existing bridges as part of its pilot study. Treatments and methods used in the pilot study shall include but not be limited to those treatments found effective by other states and new treatments identified through investigation and research which may be effective. Construction or retrofitting shall be initiated on at least 25 of the 50 bridges by July 1, 2009. Construction or retrofitting shall be initiated on the remaining bridge projects by January 1, 2010.

"(b) An interim report shall be made to the Joint Legislative Transportation Oversight Committee no later than July 1, 2009, that includes information which quantifies stormwater runoff at structures as well as the types of pollutants, the various treatments which will be constructed and evaluated to target these pollutant types, and a measurement and collection plan to determine effectiveness of the evaluated treatments.

"(c) A final report shall be made to the Joint Legislative Transportation Oversight Committee no later than July 1, 2010. The final report shall include as a minimum, the effectiveness of the treatments included in the study, costs of each treatment, and the costs of implementing effective treatments on new bridge construction projects as well as existing bridge retrofit projects for all bridges over waterways in the State."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

### CASE NOTES

**A violation of this section constitutes negligence per se.** Byers v. Standard Concrete Prods. Co., 268 N.C. 518, 151 S.E.2d 38 (1966); Shephard v. North Carolina State Hwy. Comm'n, 2 N.C. App. 223, 162 S.E.2d 520 (1968).

**§§ 136-73 through 136-75:** Repealed by Session Laws 1979, c. 114, s. 1.

**§ 136-76:** Repealed by Session Laws 1965, c. 492.

## § 136-76.1. Bridge replacement program.

(a) The Department of Transportation is hereby directed to replace all bridges on the State highway system containing long through truss spans over 125 feet long with less than a 12 feet clear roadway width. The Department shall initiate a bridge replacement program as soon as possible and shall complete the replacement program of all such bridges by June 30, 1980. All such bridges now on the State highway system shall be replaced except those on roads where the traffic volume is low and the elimination of the bridge would be a minimum inconvenience to the public and the replacement cannot be justified. Such bridges not replaced shall be removed and taken off the State highway system. Provided, that the provisions of this subsection shall not apply to any bridge which has not been removed and replaced by June 30, 1980; these bridges shall continue to be included in the State Highway System, and shall be examined, repaired if necessary, updated and put into usable condition with weight limitations as safety may require.

(b) The Environment [Environmental] Policy Act contained in Article 1 of Chapter 113A shall not apply to the bridge replacement program provided for by this section. (1975, c. 889; 1977, c. 464, s. 7.1; 1981, c. 861.)

**§ 136-77:** Repealed by Session Laws 1979, c. 114, s. 1.

## § 136-78. Railroad companies to provide draws.

Railroad companies, erecting bridges across watercourses, shall attach and keep up good and sufficient draws, by which vessels may be allowed conveniently to pass. (1846, c. 51, ss. 1, 2; R.C., c. 101, s. 32; Code, s. 2051; Rev., s. 2701; C.S., s. 3800.)

**§ 136-79:** Repealed by Session Laws 1965, c. 491.

### § 136-80. Fastening vessels to bridges misdemeanor.

If any person shall fasten any decked vessel or steamer to any bridge that crosses a navigable stream, he shall be guilty of a Class 1 misdemeanor, and in the case of a bridge that crosses a county line, may be prosecuted in either county. (R.S., c. 104; R.C., c. 101, s. 31; 1858-9, c. 58, s. 1; Code, s. 2050; 1887, c. 93, s. 3; Rev., s. 3774; C.S., s. 3804; 1993, c. 539, s. 986; 1994, Ex. Sess., c. 24, s. 14(c).)

### § 136-81. Department of Transportation may maintain footways.

The Department of Transportation shall have the power to erect and maintain adequate footways over swamps, waters, chasms, gorges, gaps, or in any other places whatsoever, whenever said Department of Transportation shall find that such footways are necessary, in connection with the use of the highways, for the safety and convenience of the public. (1817, c. 940, ss. 1, 2, P.R.; R.C., c. 101, s. 17; Code, s. 2029; Rev., s. 2695; C.S., s. 3785; 1921, c. 2; 1931, c. 145; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

## Article 6.

## *Ferries, etc., and Toll Bridges.*

### § 136-82. Department of Transportation to establish and maintain ferries.

The Department of Transportation is vested with authority to provide for the establishment and maintenance of ferries connecting the parts of the State highway system, whenever in its discretion the public good may so require, and to prescribe and collect such tolls therefor as may, in the discretion of the Department of Transportation, be expedient.

To accomplish the purpose of this section said Department of Transportation is authorized to acquire, own, lease, charter or otherwise control all necessary vessels, boats, terminals or other facilities required for the proper operation of such ferries or to enter into contracts with persons, firms or corporations for the operation thereof and to pay therefor such reasonable sums as may in the opinion of said Department of Transportation represent the fair value of the public service rendered.

The Department of Transportation, notwithstanding any other provision of law, may operate, or contract for the operation of, concessions on the ferries and at ferry facilities to provide to passengers on the ferries food, drink, and other refreshments, personal comfort items, and souvenirs publicizing the ferry system. (1927, c. 223; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1989, c. 752, s. 101; 1995, c. 211, s. 1.)

#### CASE NOTES

**Establishment or Maintenance of Ferry Deemed Construction of Highway for Purposes of Claims Adjustment.** — A contract for the establishment of a ferry, which the Commission (now Department) may undertake by this section, is equivalent to the "construction of a highway." Repair or reconditioning, i.e., "maintenance", which the Commission (now Department) may undertake by this section, as a means of reestablishing ferry service, is a lesser act and is deemed to be included within "construction" for the G.S. 136-29 adjustment of claims. Wilmington Shipyard, Inc. v. North Carolina State Hwy. Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

### OPINIONS OF ATTORNEY GENERAL

**This section must be read in conjunction with the clearly expressed public policy** that prohibits government agencies from competing with private industries in business. See opinion of Attorney General to E.H. McEntire, P.E., State Highway Chief Engineer, 59 N.C.A.G. 53 (1989).

**The term "personal comfort items"** in this section should be given its ordinary meaning in the context of the status as a passenger on the ferry, i.e., such items that passengers on a ferry would usually or normally expect to be available to ferry passengers for sale for their personal comfort. (Such items as handkerchiefs, fingernail clippers/files, combs, tums, aspirin, first aid items, such as band-aids, Merthiolate and sun burn lotion.) See opinion of Attorney General to E.H. McEntire, P.E., State Highway Chief Engineer, 59 N.C.A.G. 53 (1989).

**Sales Not Authorized by Section.** — This section, which provides for concessions on ferries to provide for refreshments and "personal comfort items" to the passengers, does not authorize the sale of shirts, jackets, hats, visors, ash trays, coffee cups, postcards, and key chains. See opinion of Attorney General to E.H. McEntire, P.E., State Highway Chief Engineer, 59 N.C.A.G. 53 (1989).

## § 136-82.1. Authority to insure vessels operated by Department of Transportation.

The Department of Transportation is vested with authority to purchase liability insurance, hull insurance, and protection insurance on all vessels and boats owned, leased, chartered or otherwise controlled and operated by the Department of Transportation. (1961, c. 486; 1973, c. 507, s. 5; 1977, c. 464, s. 27.)

## § 136-82.2. State toll bridges.

(a) Toll. — The Department of Transportation may charge a toll for the use of a bridge that is included in the Highway Trust Fund Intrastate System Projects, which are listed in G.S. 136-179, and is at least three and one-half miles in length. The toll may not exceed ten dollars ($10.00) for a round trip or five hundred dollars ($500.00) for an annual pass for a vehicle. The Department may set different rates of fees for passenger motor vehicles and for property-carrying vehicles. The Department may employ personnel to collect the toll and may construct and operate a toll plaza for collection of the toll. Toll revenue that exceeds the cost of collecting the toll shall be credited to the Highway Trust Fund.

(b) Report. — The Department of Transportation shall report annually to the Joint Legislative Transportation Oversight Committee on a toll imposed under this section. The report shall state the amount of toll revenue collected, the number of users paying the toll, the cost of collecting the toll, and any other information requested by the Committee. (1993 (Reg. Sess., 1994), c. 765, s. 1.)

## § 136-83: Repealed by Session Laws 1977, c. 464, s. 22.

## §§ 136-84 through 136-87: Repealed by Session Laws 1983, c. 684, s. 1.

## § 136-88. Authority of county commissioners with regard to ferries and toll bridges; rights and liabilities of owners of ferries or toll bridges not under supervision of Department of Transportation.

Subject to the provisions of G.S. 136-67, 136-99, and 153-198, the boards of commissioners of the several counties are vested, in regard to the establishment, operation, maintenance, and supervision of ferries and toll bridges on public roads not under the supervision and control of the Department of Transportation, with all the power and authority regarding ferries and toll bridges vested by law in county commissioners on the thirty-first day of March, 1931. And the owners or operators of ferries or toll bridges not under the supervision and control of the Department of Transportation shall be entitled to the same rights, powers, and privileges, and subject to the same duties, responsibilities and liabilities, to which owners or operators of ferries or toll bridges were entitled or were subject on the thirty-first day of March, 1931. (1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

**Editor's Note.** — Section 136-99, referred to in this section, was repealed by Session Laws 1971, c. 1106. Section 153-198, also referred to in this section, was repealed by Session Laws 1973, c. 822.

## § 136-89. Safety measures; guard chains or gates.

Each and every person, firm or corporation, owning or operating a public ferry upon any sound, bay, river, creek or other stream, shall have securely affixed and attached thereto, at each end of the same, a detachable steel or iron chain, or in lieu thereof a steel or iron gate, and so affixed and arranged that the same shall be closed or fastened across the opposite end from the approach, whenever any motor vehicle, buggy, cart, wagon, or other conveyance shall be driven upon or shall enter upon the same; and shall be securely fastened or closed at each end of the ferry after such motor vehicle, buggy, cart, wagon, or other conveyance shall have been driven or shall have entered upon the same. And the said gates or chains shall remain closed or fastened, at each end, until the voyage across the stream upon which said ferry is operated shall have been completed. The Department of Transportation, as to ferries under its supervision, and the respective boards of county commissioners, as to other ferries, shall fix and determine a standard weight or size of chain, and a standard size, type, or character of gate, for use by said ferries, leaving optional with the said owner or operator the use of chains or gates.

Any person, firm or corporation violating any of the provisions of this section shall be guilty of a Class 1 misdemeanor. (1923, c. 133; C.S., ss. 3825(a), 3825(b), 3825(c); 1927, c. 223; 1931, c. 145, s. 38; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1993, c. 539, s. 987; 1994, Ex. Sess., c. 24, s. 14(c).)

### CASE NOTES

**Cited** in North Carolina State Hwy. Comm'n v. Asheville School, Inc., 5 N.C. App. 684, 169 S.E.2d 193 (1969).

## ARTICLE 6A.

## *Carolina-Virginia Turnpike Authority.*

**§§ 136-89.1 through 136-89.11H:** Repealed by Session Laws 1959, c. 25, s. 1.

## ARTICLE 6B.

## *Turnpikes.*

**§§ 136-89.12 through 136-89.30:** Repealed by Session Laws 1959, c. 25, s. 2.

## ARTICLE 6C.

## *State Toll Bridges and Revenue Bonds.*

**§§ 136-89.31 through 136-89.47:** Repealed by Session Laws 1977, c. 464, s. 22.

## ARTICLE 6D.

## *Controlled-Access Facilities.*

### § 136-89.48. Declaration of policy.

The General Assembly hereby finds, determines, and declares that this Article is necessary for the immediate preservation of the public peace, health and safety, the promotion of the general welfare, the improvement and development of transportation facilities in the State, the elimination of hazards at grade intersections, and other related purposes. (1957, c. 993, s. 1.)

#### CASE NOTES

**Designating Highway as "Controlled-Access" Is Exercise of Police Power.** — When the State Highway Commission (now Department of Transportation) acts in the interest of public safety, convenience and general welfare, in designating highways as controlled-access highways, its action is the exercise of the police power of the State. Wofford v. North Carolina State Hwy. Comm'n, 263 N.C. 677, 140 S.E.2d 376, cert. denied, 382 U.S. 822, 86 S. Ct. 50, 15 L. Ed. 2d 67 (1965).

**Impairing Property Value by Exercise of Police Power Gives No Right to Compensation.** — The impairment of the value of property by the exercise of police power, where property itself is not taken, does not entitle the owner to compensation. Wofford v. North Carolina State Hwy. Comm'n, 263 N.C. 677, 140 S.E.2d 376, cert. denied, 382 U.S. 822, 86 S. Ct. 50, 15 L. Ed. 2d 67 (1965).

**Applied** in Moses v. State Hwy. Comm'n, 261 N.C. 316, 134 S.E.2d 664 (1964).

**Cited** in Snow v. North Carolina State Hwy. Comm'n, 262 N.C. 169, 136 S.E.2d 678 (1964); Prestige Realty Co. v. State Hwy. Comm'n, 1 N.C. App. 82, 160 S.E.2d 83 (1968).

### § 136-89.49. Definitions.

When used in this Article:

(1) "Department" means the Department of Transportation.

(2) "Controlled-access facility" means a State highway, or section of State highway, especially designed for through traffic, and over, from or to which highway owners or occupants of abutting property, or others, shall have only a controlled right or easement of access.

(3) "Frontage road" means a way, road or street which is auxiliary to and located on the side of another highway, road or street for service to abutting property and adjacent areas and for the control of access to such other highway, road or street. (1957, c. 993, s. 2; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

### CASE NOTES

**A "controlled-access facility,"** as defined in this section, is a limited access highway where the State Highway Commission (now Department of Transportation) acquires the legal right to cut off entirely the abutting owner's right of direct access to and from the highway on which his property abuts. Barnes v. North Carolina State Hwy. Comm'n, 257 N.C. 507, 126 S.E.2d 732 (1962).

**"Frontage Road".** — A road constructed by the State Highway Commission (now Department of Transportation) to provide access to private property which would otherwise be landlocked by construction of a controlled-access highway is a "frontage road" within the meaning of this section and G.S. 136-89.52. North Carolina State Hwy. Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970).

An access road from old U.S. 29 to the property of a third party did not meet the statutory definition of a "frontage road" as that term is used in this Article, where the disputed access road, located as it was in an area remote from and not connecting to or entering at any point on U.S. 29, did not serve to facilitate access by the public or by the third party to U.S. 29, was not necessary to provide access because all other access had been denied, and was intended to serve a private and not public purpose. Pelham Realty Corp. v. Board of Transp., 50 N.C. App. 106, 272 S.E.2d 777 (1980), rev'd on other grounds, 303 N.C. 424, 279 S.E.2d 826 (1981).

**When Remedy for Denial of Access to Highway May Be Asserted.** — While the State has a right to cut adjacent landowners' access to highway off at any time, the State can only restrict such right of access when the highway is a controlled-access facility or is being converted to a controlled-access facility. It is at that point in time that the legislature has delegated a remedy to the deprived landowner of his abutter's right of access when it is denied and specified on a plat by the Department of Transportation. A non-controlled-access highway has no need for these types of remedies until the situation arises where it is necessary to effect measures for the safety of the public and in the public interest. Department of Transp. v. Craine, 89 N.C. App. 223, 365 S.E.2d 694, appeal dismissed, 322 N.C. 479, 370 S.E.2d 221 (1988), holding that evidence of right to deny access was improper in a condemnation proceeding by DOT to acquire a portion of defendants' property for a non-controlled-access highway project.

**Applied** in North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967); Ace-Hi, Inc. v. Department of Transp., 70 N.C. App. 214, 319 S.E.2d 294 (1984).

**Cited** in State Hwy. Comm'n v. Greensboro City Bd. of Educ., 265 N.C. 35, 143 S.E.2d 87 (1965); Kenco Petro. Marketers, Inc. v. State Hwy. Comm'n, 269 N.C. 411, 152 S.E.2d 508 (1967); Prestige Realty Co. v. State Hwy. Comm'n, 1 N.C. App. 82, 160 S.E.2d 83 (1968); North Carolina State Hwy. Comm'n v. Mills Mfg. Co., 24 N.C. App. 478, 211 S.E.2d 460 (1975).

## § 136-89.50. Authority to establish controlled-access facilities.

The Department of Transportation may designate, establish, abandon, improve, construct, maintain and regulate controlled-access facilities as a part of the State highway system, National System of Interstate Highways, and Federal Aid Primary System whenever the Department of Transportation determines that traffic conditions, present or future, justify such controlled-access facilities, or the abandonment thereof. (1957, c. 993, s. 3; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

CASE NOTES

**Equal protection clause of the U.S. Const., Amend. XIV** does not operate to prohibit the State Department of Transportation from establishing a controlled-access facility over one tract of land unless it also creates such facilities over every other tract which might be somewhat similarly situated. North Carolina State Hwy. Comm'n v. Mills Mfg. Co., 24 N.C. App. 478, 211 S.E.2d 460, appeal dismissed, 286 N.C. 722, 213 S.E.2d 722 (1975).

**State Department of Transportation must be accorded a wide latitude** in making a determination that traffic conditions, present or future, justify creating a controlled-access facility in one place and not in another. North Carolina State Hwy. Comm'n v. Mills Mfg. Co., 24 N.C. App. 478, 211 S.E.2d 460, appeal dismissed, 286 N.C. 722, 213 S.E.2d 722 (1975).

**Cited** in Prestige Realty Co. v. State Hwy. Comm'n, 1 N.C. App. 82, 160 S.E.2d 83 (1968).

## § 136-89.51. Design of controlled-access facility.

The Department of Transportation is authorized so to design any controlled-access facility and so to regulate, restrict, or prohibit access as best to serve the traffic for which such facility is intended. In this connection the Department of Transportation is authorized to divide and separate any controlled-access facility into separate roadways by the construction of raised curbings, central dividing sections, or other physical separations, or by designating such separate roadways by signs, markers, or stripes, and the proper lane for such traffic by appropriate signs, markers, stripes, and other devices. No person shall have any right of ingress or egress to, from or across controlled-access facilities to or from abutting lands, except at such designated points at which access may be permitted, upon such terms and conditions as may be specified from time to time by the Department of Transportation. (1957, c. 993, s. 4; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

CASE NOTES

**Department May Forbid Construction and Use of Driveway.** — There can be no doubt of the authority of the State Highway Commission (now Department of Transportation), upon its finding that the construction and use of a driveway, affording direct access from adjoining property onto a controlled-access highway, would be or is an obstruction to the free flow of traffic thereon, or a hazard to the safety of travelers upon the highway, to forbid the construction of the driveway or to prohibit its further use. Kenco Petro. Marketers, Inc. v. State Hwy. Comm'n, 269 N.C. 411, 152 S.E.2d 508 (1967).

**When Remedy for Denial of Access to Highway May Be Asserted.** — While the State has a right to cut adjacent landowners' access to highway off at any time, the State can only restrict such right of access when the highway is a controlled-access facility or is being converted to a controlled-access facility. It is at that point in time that the legislature has delegated a remedy to the deprived landowner of his abutter's right of access when it is denied and specified on a plat by the Department of Transportation. A non-controlled-access highway has no need for these types of remedies until the situation arises where it is necessary to effect measures for the safety of the public and in the public interest. Department of Transp. v. Craine, 89 N.C. App. 223, 365 S.E.2d 694, appeal dismissed, 322 N.C. 479, 370 S.E.2d 221 (1988), holding that evidence of right to deny access was improper in a condemnation proceeding by DOT to acquire a portion of defendants' property for a non-controlled-access highway project.

**Cited** in Prestige Realty Co. v. State Hwy. Comm'n, 1 N.C. App. 82, 160 S.E.2d 83 (1968).

## § 136-89.52. Acquisition of property and property rights.

For the purposes of this Article, the Department of Transportation may acquire private or public property and property rights for controlled-access facilities and service or frontage roads, including rights of access, air, view and light, by gift, devise, purchase, or condemnation in the same manner as now or hereafter authorized by law to acquire such property or property rights in connection with highways. The property rights acquired under the provisions of this Article may be in fee simple or an appropriate easement for right-of-way in perpetuity. In connection with the acquisition of property or property rights for any controlled-access facility or portion thereof, or frontage road in connection therewith, the Department of Transportation may, in its discretion, with the consent of the landowner, acquire an entire lot, parcel, or tract of land, if by so doing, the interests of the public will be best served, even though said entire lot, parcel, or tract is not immediately needed for the right-of-way proper.

Along new controlled-access highway locations, abutting property owners shall not be entitled to access to such new locations, and no abutter's easement of access to such new locations shall attach to said property. Where part of a tract of land is taken or acquired for the construction of a controlled-access facility on a new location, the nature of the facility constructed on the part taken, including the fact that there shall be no direct access thereto, shall be considered in determining the fair market value of the remaining property immediately after the taking. (1957, c. 993, s. 5; 1969, c. 946; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

**Legal Periodicals.** — For article on recent developments in North Carolina law of eminent domain, see 48 N.C.L. Rev. 767 (1970).

For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

## CASE NOTES

***Editor's Note.*** — *A number of cases cited in the note below construe this section prior to the 1969 amendment, which deleted the language "the denial of such rights of access shall be considered in determining general damages" in the rewritten former last sentence, which is now the first sentence of the second paragraph.*

**First Sentence of Section Does Not Create Right of View in Landowner.** — The first sentence of this section is a grant of authority to the Department of Transportation to acquire an easement over or title to property not actually needed for roadbed, but needed to prevent blind intersections of highways or other hazardous situations. This sentence of the statute does not create a right of view or sight distance in individual landowners to and from their land nor does it suggest that an individual landowner has a right of view or sight distance for which compensation must be paid. North Carolina State Hwy. Comm'n v. English, 20 N.C. App. 20, 200 S.E.2d 429 (1973).

**A landowner has no constitutional right to have anyone pass by his premises** at all. Highways are built and maintained for public necessity, convenience and safety in travel and not for the enhancement of property along the route. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**Department Is Vested with Broad Discretion.** — It is well-settled law in this State that the State Highway Commission (now Department of Transportation) is vested by statute with broad discretionary authority in the performance of its statutory duties, and the court cannot substitute its judgment for that of the State Highway Commission (now Department of Transportation), and control the discretion vested in the State Highway Commission (now Department of Transportation) to acquire by condemnation property sought to be acquired for "controlled-access facilities"; the exercise by it of such discretionary authority and powers is not subject to judicial review, unless its action is so clearly unreasonable as to amount to oppressive and manifest abuse. State Hwy. Comm'n v. Greensboro City Bd. of Educ., 265 N.C. 35, 143 S.E.2d 87 (1965).

**Department has authority to expropriate a school board's property** for the purpose of acquiring land for a controlled-access highway facility, even though the property sought to be condemned is devoted to a public use and even though the school board itself is vested with power of expropriation. State Hwy. Comm'n v. Greensboro City Bd. of Educ., 265 N.C. 35, 143 S.E.2d 87 (1965).

The General Assembly by virtue of the provisions of this section has granted to the State Highway Commission (now Department of Transportation) acting in behalf of the State of North Carolina and for its sovereign purposes in constructing, developing and maintaining "a statewide system of roads and highways mensurate with the needs of the State as a whole," express and explicit power and authority in plain and unmistakable words to acquire by condemnation property owned by a city board of education for "controlled-access facilities." State Hwy. Comm'n v. Greensboro City

Bd. of Educ., 265 N.C. 35, 143 S.E.2d 87 (1965).

**Provided Compensation Is Paid Therefor.** — There is nothing in the State Constitution inhibiting the legislature from granting express and explicit power and authority to the State Highway Commission (now Department of Transportation) to condemn for "controlled-access facilities" property owned by a city board of education and devoted to public use, except that the organic law provides that just compensation shall be paid for property so appropriated. State Hwy. Comm'n v. Greensboro City Bd. of Educ., 265 N.C. 35, 143 S.E.2d 87 (1965).

**Authority to Acquire Rights-of-Way by Purchase.** — The State Highway Commission (now Department of Transportation) has authority by virtue of G.S. 136-19 to acquire rights-of-way by purchase. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

**Consideration for Right-of-Way Agreement.** — The State Highway Commission (now Department of Transportation) not only can pay money as consideration for a right-of-way agreement, but can grant to the landowner a right of access at a particularly designated point. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

**Construing Right-of-Way Agreement.** — In construing a right-of-way agreement all of the language contained therein is to be considered, and a landowner can rely upon language creating easement rights and property rights greater than those of the general public. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

**Effect of Stipulation in Agreement as to Right to Access.** — Where the State Highway Commission (now Department of Transportation), by agreement for compensation for the taking of a part of a tract of land, stipulates the right of such owner to access to the highway, the right of access as to the owner and his grantees by mesne conveyance is governed by the stipulations. Kenco Petro. Marketers, Inc. v. State Hwy. Comm'n, 269 N.C. 411, 152 S.E.2d 508 (1967).

Where the agreement between the owner and the State Highway Commission (now Department of Transportation) for a taking of a part of land stipulated that the owner should have no right of access to the highway except at a designated survey station, the agreement, in order to have any meaning, must perforce contemplate direct access by the owner to the highway or to a ramp at or near the designated survey station, and the denial by the Commission (now Department) of such direct access constituted a taking, either of an easement appurtenant or of a right conferred by the agreement, entitling the owner or those claiming under him to compensation. Kenco Petro. Marketers, Inc. v. State Hwy. Comm'n, 269 N.C. 411, 152 S.E.2d 508 (1967).

**Refusing Access Retained Under Right-of-Way Agreement.** — Compensation must be paid where under a right-of-way agreement the owner retains the right of access at a particular point and is subsequently refused access at that point. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**Right-of-Way Agreement Made Before Enactment of Section.** — See Kenco Petro. Marketers, Inc. v. State Hwy. Comm'n, 269 N.C. 411, 152 S.E.2d 508 (1967).

**Owner of land abutting highway has a right beyond that which is enjoyed by the general public,** a special right of easement in the public road for access purposes, and this is a property right which cannot be damaged or taken from him without due compensation. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

At common law the owner of land abutting a highway, while not entitled to access at all points along the boundary between his land and the highway, has a special right of easement for access purposes, and substantial interference with this free and convenient access to the highway is a "taking" of a property right for which he may recover just compensation. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

It is generally recognized that the owner of land abutting a highway has a right beyond that which is enjoyed by the general public, a special right of easement in the public road for access purposes, and this is a property right which cannot be damaged or taken from him without due compensation. State Hwy. Comm'n v. North Carolina Realty Corp., 4 N.C. App. 215, 166 S.E.2d 469 (1969).

**A right of access to a public highway is an easement** appurtenant to the land. The State Highway Commission (now Department of Transportation) stands in the position of a servient owner with the right to locate an access route under the general rule that where an easement is granted or reserved in general terms, which do not fix a specific location, then the owner of the servient estate has the right in the first instance to designate the specific location of such easement, subject to the limitation that this right be exercised in a reasonable manner with due regard to the rights of the owner of the easement. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

The landowner has an easement consisting of the right of reasonable access to the particular highway on which his land abuts. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

The right of direct access from the plaintiff's land to the highway, whether it existed prior to the agreement or was created by it, was an easement appurtenant to the plaintiff's land and was a private property right in the plaintiff, over and above the plaintiff's right, as a member of the public, to use this ramp as a means of getting to the lanes of the highway. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

**And Is Subject to Condemnation.** — A right of access is an easement, a property right, and as such is subject to condemnation. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

**The fact that landowner's right of access arose out of an agreement and a deed** does not prevent its being a property right. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

**Denial of Access Equivalent to Taking.** — Since an abutting landowner has rights of access, a denial thereof is the equivalent of the taking thereof. State Hwy. Comm'n v. North Carolina Realty Corp., 4 N.C. App. 215, 166 S.E.2d 469 (1969).

**A landowner is entitled to compensation where there is a complete denial of access,** even if such access did not previously exist because the road in question is a newly constructed limited-access facility. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**But Not Where He Is Provided With Freely Accessible Service Road.** — A landowner is entitled to no compensation for the restriction of access where he is provided with a freely accessible service road connecting with the highway on which is property formerly abutted. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

The last sentence of the second paragraph of this section, when read in conjunction with the first sentence of said paragraph, contemplates a situation where the remaining property abuts the new controlled-access highway. Where defendants are not denied access to a highway or roadway which abuts their property, the trial judge need not instruct the jury in accordance with the second paragraph. North Carolina State Hwy. Comm'n v. English, 20 N.C. App. 20, 200 S.E.2d 429 (1973).

**Or Where He Is Merely Inconvenienced.** — When a road or street is closed or abandoned so as to leave the landowner's property on a cul-de-sac and increase the distance one must travel to reach points in one direction, such inconvenience is not compensable. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

An abutting landowner is not entitled to compensation because of circuity of travel to and from his property; such inconvenience is held to be no different in kind, but merely in degree, from that sustained by the general public, and is damnum absque injuria. This principle does not extend to a situation where the closing of a road, even though private in nature, cuts off the landowner's access to any public road. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**When access has been interfered with by the State the question involved is one of "degree."** If the interference is not substantial and if reasonable means of ingress and egress remains or is provided, there has been a legitimate exercise of the police power. If the interference is substantial and no reasonable means of ingress and egress remains or is provided, there has been a taking of a property right under the power of eminent domain. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**Cutting Off Access over Private Way or Neighborhood Road.** — To completely cut off one's access over a private way or neighborhood road to the nearest public road, without providing other reasonable access to a public road, may diminish the value of the land involved to the same extent as if access was denied to a public highway abutting the premises. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**Restriction of Access to Protect Those Using Highway.** — While a substantial or unreasonable interference with an abutting landowner's access constitutes the taking of a property right, the restriction of his right of entrance to reasonable and proper points so as to protect others who may be using the highway does not constitute a taking. Such reasonable restriction is within the police power of the sovereign and any resulting inconvenience is damnum absque injuria. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**Limiting Access to One Traffic Lane by Construction of Median Strip.** — The construction of a median strip so as to limit landowner's ingress and egress to lands for southbound travel when he formerly had direct access to both the north and southbound lanes has been held to be a valid traffic regulation adopted by the State Highway Commission (now Department of Transportation) in the exercise of the police power vested in it by statutes. Injury, if any, caused thereby is not compensable. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**Elimination of Hazardous Access Point.** — While the State Commission (now Department of Transportation) has the power to eliminate a hazardous access point, it cannot do so without paying the landowner for his property right. McNeill v. North Carolina State Hwy. Comm'n, 4 N.C. App. 354, 167 S.E.2d 58 (1969).

**When Remedy for Denial of Access to Highway May Be Asserted.** — While the State has a right to cut adjacent landowners' access to highway off at any time, the State can only restrict such right of access when the highway is a controlled-access facility or is being converted to a controlled-access facility. It is at that point in time that the legislature has delegated a remedy to the deprived landowner of his abutter's right of access when it is denied and specified on a plat by the Department of Transportation. A non-controlled-access highway has no need for these types of remedies until the situation arises where it is necessary to effect measures for the safety of the public and in the public interest. Department of Transp. v. Craine, 89 N.C. App. 223, 365 S.E.2d 694, appeal dismissed, 322 N.C. 479, 370 S.E.2d 221 (1988), holding that evidence of right to deny access was improper in a condemnation proceeding by DOT to acquire a portion of defendants' property for a non-controlled-access highway project.

**Denial of access is to be considered in determining the fair market value of land immediately after the taking,** and an instruction to the effect that the denial of access should not be taken into consideration is prejudicial error. North Carolina State Hwy. Comm'n v. Gasperson, 268 N.C. 453, 150 S.E.2d 860 (1966).

This section, by implication, requires the trial court to instruct the jury on the nature of the controlled-access facility, and that this denial of access should be considered in determining the fair market value of the remaining land. The failure to do so is error. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854, appeal dismissed, 293 N.C. 740, 241 S.E.2d 515 (1977), aff'd, 296 N.C. 250, 249 S.E.2d 803 (1978).

**Failure to Establish Facilities over Similar Tracts.** — When a controlled-access facility is created by the Department of Transportation, the fact that such a facility has been established over one tract of land, but like facilities have not been established over other tracts similarly situated, must be taken into account in arriving at just compensation. North Carolina State Hwy. Comm'n v. Mills Mfg. Co., 24 N.C. App. 478, 211 S.E.2d 460, appeal dismissed, 286 N.C. 722, 213 S.E.2d 722 (1975).

**Land May Be Condemned to Provide Access to Landlocked Private Property.** — Condemnation of land by the State Highway Commission (now Department of Transportation) to provide access to private property which otherwise would have been landlocked by the construction of a controlled-access interstate highway was for a public purpose and was authorized by this section and G.S. 136-19 and 136-89.49. North Carolina State Hwy. Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970).

A service road alleviating a landlocked condition caused by the construction of a freeway constituted a public use whether such road served one property owner or many. North Carolina State Hwy. Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970).

**Applied** in Board of Transp. v. Bryant, 59 N.C. App. 256, 296 S.E.2d 814 (1982).

**Cited** in French v. State Hwy. Comm'n, 273 N.C. 108, 159 S.E.2d 320 (1968).

## § 136-89.53. New and existing facilities; grade crossing eliminations.

The Department of Transportation may designate and establish controlled-access highways as new and additional facilities or may designate and establish an existing street or highway as included within a controlled-access facility. When an existing street or highway shall be designated as and included within a controlled-access facility the owners of land abutting such existing street or highway shall be entitled to compensation for the taking of or injury to their easements of access. The Department of Transportation shall have authority to provide for the elimination of intersections at grade of controlled-access facilities with existing State highways and county roads, and city and town streets, by grade separation or frontage road, or by closing off such roads and streets, or other public ways at the right-of-way boundary line of such controlled-access facility; and after the establishment of any controlled-access facility, no highway or street which is not part of said facility shall intersect the same at grade. No street or [of] any city or town and no State highway, county road, or other public way shall be opened into or connected with any such controlled-access facility without the consent and previous approval of the Department of Transportation. Such consent and approval shall be given only if the public interest shall be served thereby. (1957, c. 993, s. 6; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

**Legal Periodicals.** — For article on recent developments in North Carolina law of eminent domain, see 48 N.C.L. Rev. 767 (1970).

## CASE NOTES

**North Carolina recognizes the fundamental right to just compensation** as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of the law of the land within the meaning of N.C. Const., Art. I, § 19. The requirement that just compensation be paid for land taken for a public use is likewise guaranteed by U.S. Const., Amend. XIV. Department of Transp. v. Harkey, 308 N.C. 148, 301 S.E.2d 64 (1983).

Although North Carolina does not have an express constitutional provision against the taking of private property without just compensation, it is a prohibition firmly imbedded in State law. Department of Transp. v. Harkey, 308 N.C. 148, 301 S.E.2d 64 (1983).

**The second sentence of this section applies where an existing street or highway is designated a controlled-access facility,** thereby depriving a landowner of access from his property which he once had. North Carolina State Hwy. Comm'n v. English, 20 N.C. App. 20, 200 S.E.2d 429 (1973).

**Abutting Owner Has Right in Street Beyond That of General Public.** — The owner of property abutting a highway has a right in the street beyond that which is enjoyed by the general public since egress and ingress to his property is a necessity peculiar to himself. North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

An owner of land abutting a highway or street has the right of direct access from his property to the traffic lanes of the highway. This is a right in the street beyond that which is enjoyed by the general public, or by himself as a member of the public, and different in kind, since egress from or ingress to his own property is a necessity peculiar to himself. Department of Transp. v. Harkey, 308 N.C. 148, 301 S.E.2d 64 (1983).

**The elimination of direct access is a taking as a matter of law.** Department of Transp. v. Harkey, 308 N.C. 148, 301 S.E.2d 64 (1983).

**Access Cannot Be Taken Without Compensation.** — The right of a property owner to reasonable access to a public highway which abuts his land is a property right which cannot be taken without compensation. State Hwy. Comm'n v. Raleigh Farmers Mkt., Inc., 263 N.C. 622, 139 S.E.2d 904, reaff'd on rehearing, 264 N.C. 139, 141 S.E.2d 10 (1965); North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

The owner of land abutting a highway has a right beyond that which is enjoyed by the general public, a special right of easement in the highway for access purposes, an easement appurtenant which cannot be damaged or taken from him without compensation and which consists of the right of access to the particular highway upon which the land abuts. Dr. T.C. Smith Co. v. North Carolina State Hwy. Comm'n, 279 N.C. 328, 182 S.E.2d 383 (1971).

This right of direct access is an easement appurtenant which cannot be damaged or taken from him without compensation. Department of Transp. v. Harkey, 308 N.C. 148, 301 S.E.2d 64 (1983).

**If There Is Taking or Destruction of a Preexisting Property Right.** — When the State Highway Commission (now Department of Transportation), in the interest of the public safety, convenience and general welfare, without the taking or destruction of a property right, regulates the right to enter upon or to proceed along a controlled-access highway, the owner of land which is thereby diminished in value, such as by the diminution in volume of traffic upon the highway in front of it, is not entitled to compensation. Conversely, if such action by the Commission (now Department) is a taking or destruction of a preexisting property right, the owner of such right is entitled to compensation for its taking or destruction. In the latter event, the remedy of such property owner is by a proceeding under this Chapter. Kenco Petro. Marketers, Inc. v. State Hwy. Comm'n, 269 N.C. 411, 152 S.E.2d 508 (1967).

**But Requiring Circuity of Travel Does Not Give Right to Compensation.** — If the abutting owner is afforded reasonable access, he is not entitled to compensation merely because of circuity of travel to reach a particular destination. State Hwy. Comm'n v. Raleigh Farmers Mkt., Inc., 263 N.C. 622, 139 S.E.2d 904, reaff'd on rehearing, 264 N.C. 139, 141 S.E.2d 10 (1965).

If afforded reasonable access to the highway on which his property abuts, the owner is not entitled to compensation merely because of circuity of travel to reach a particular destination. Dr. T.C. Smith Co. v. North Carolina State Hwy. Comm'n, 279 N.C. 328, 182 S.E.2d 383 (1971).

**When Remedy for Denial of Access to**

**Highway May Be Asserted.** — While the State has a right to cut adjacent landowners' access to highway off at any time, the State can only restrict such right of access when the highway is a controlled-access facility or is being converted to a controlled-access facility. It is at that point in time that the legislature has delegated a remedy to the deprived landowner of his abutter's right of access when it is denied and specified on a plat by the Department of Transportation. A non-controlled-access highway has no need for these types of remedies until the situation arises where it is necessary to effect measures for the safety of the public and in the public interest. Department of Transp. v. Craine, 89 N.C. App. 223, 365 S.E.2d 694, appeal dismissed, 322 N.C. 479, 370 S.E.2d 221 (1988), holding that evidence of right to deny access was improper in a condemnation proceeding by DOT to acquire a portion of defendants' property for a non-controlled-access highway project.

**An abutting landowner is entitled to recover compensation for injury to his entire tract of land** by reason of the denial of his abutter's rights of access to an existing highway when the highway was made a part of a controlled-access facility, not just for injury to the portion of the tract directly abutting the highway. Dr. T.C. Smith Co. v. North Carolina State Hwy. Comm'n, 279 N.C. 328, 182 S.E.2d 383 (1971).

**Construction of Highway with Different Lanes for Different Kinds and Directions of Traffic.** — An abutting property owner is not entitled to compensation because of the construction of a highway with different lanes for different kinds and directions of traffic, if he be afforded direct access by local traffic lanes to points designated for access to through traffic. North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

**Construction of Median Strip and Dead-Ending of Abutting Streets.** — Where plaintiffs retained full right of access to and from all abutting streets and highways, the construction of a median strip on one of the abutting streets and the dead-ending of another abutting street were legitimate and proper exercises of the police power of the State not entitling the plaintiffs to damages under this section. Chrysler Realty Corp. v. North Carolina State Hwy. Comm'n, 15 N.C. App. 704, 190 S.E.2d 677 (1972).

**New and Existing Facilities; Grade Crossing Eliminations.** — Under G.S. 136-89.53, owners of land abutting street included within a controlled access highway are entitled to compensation from condemnation. DOT v. Roymac P'ship, 158 N.C. App. 403, 581 S.E.2d 770, 2003 N.C. App. LEXIS 1183 (2003), appeal dismissed, 358 N.C. 153, 592 S.E.2d 555 (2004).

**The law will not permit a condemnor or a condemnee to "pick and choose" segments of a tract** of land, logically to be considered as a unit, so as to include parts favorable to his claim or exclude parts unfavorable. Dr. T.C. Smith Co. v. North Carolina State Hwy. Comm'n, 279 N.C. 328, 182 S.E.2d 383 (1971).

**There is no single rule or principle established for determining the unity of lands** for the purpose of awarding damages or offsetting benefits in eminent domain cases. Dr. T.C. Smith Co. v. North Carolina State Hwy. Comm'n, 279 N.C. 328, 182 S.E.2d 383 (1971).

**Power to Regulate and Close Crossings.** — The Highway Commission (now Department of Transportation) is authorized to regulate, abandon, and close grade crossings and intersections. Snow v. North Carolina State Hwy. Comm'n, 262 N.C. 169, 136 S.E.2d 678 (1964).

**Applied** in Department of Transp. v. Harkey, 57 N.C. App. 172, 290 S.E.2d 773 (1982).

**Cited** in Wofford v. North Carolina State Hwy. Comm'n, 263 N.C. 677, 140 S.E.2d 376 (1965); Prestige Realty Co. v. State Hwy. Comm'n, 1 N.C. App. 82, 160 S.E.2d 83 (1968).

## § 136-89.54. Authority of local units to consent.

The Department of Transportation, as the highway authority of the State, and the governing body of any county, city or town are authorized, after a public hearing to be held in the county affected, to enter into agreements with each other, and the Department of Transportation is authorized to enter into agreements with the federal government, respecting the financing, planning, establishment, improvement, maintenance, use, regulations, or vacation of controlled-access facilities or other public ways in their respective jurisdictions, to facilitate the purposes of this Article. (1957, c. 993, s. 7; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

### CASE NOTES

**Cited** in Wofford v. North Carolina State Hwy. Comm'n, 263 N.C. 677, 140 S.E.2d 376 (1965).

## § 136-89.55. Local service roads.

In connection with the development of any controlled-access facility the Department of Transportation is authorized to plan, designate, establish, use, regulate, alter, improve, maintain, and vacate local service or frontage roads and streets or to designate as local service or frontage roads and streets any existing road or street, and to exercise jurisdiction over service or frontage roads in the same manner as is authorized over controlled-access facilities under the terms of this Article, if in its opinion such local service or frontage roads and streets are necessary or desirable; provided, however that after a local service or frontage road has been established, the same shall not be vacated or abandoned in such a manner as to reduce access to the facility without the consent of the abutting property owners or the payment of just compensation, so long as the controlled-access facility is maintained as such facility, and the Department of Transportation shall not have any authority to control or restrict the right of access of abutting property owners from their property to such local service or frontage roads or streets without the property owners' consent or the payment of just compensation, except such authority as the Department of Transportation has with respect to primary and secondary roads under the police power. Such local service or frontage roads or streets shall be of appropriate design, and shall be separated from the controlled-access facility proper by means of all devices designated as necessary or desirable. (1957, c. 993, s. 8; 1969, c. 795; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

### CASE NOTES

**Cited** in Pelham Realty Corp. v. Board of Transp., 303 N.C. 424, 279 S.E.2d 826 (1981).

## § 136-89.56. Commercial enterprises.

No commercial enterprises or activities shall be authorized or conducted by the Department of Transportation, or the governing body of any city or town, within or on the property acquired for or designated as a controlled-access facility, as defined in this Article, except for:

(1) Materials displayed at welcome centers which shall be directly related to travel, accommodations, tourist-related activities, tourist-related services, and attractions. The Department of Transportation shall issue rules regulating the display of these materials. These materials may contain advertisements for real estate; and

(2) Vending machines permitted by the Department of Transportation and placed by the Division of Services for the Blind, Department of Health and Human Services, as the State licensing agency designated pursuant to Section 2(a)(5) of the Randolph-Sheppard Act (20 USC 107a(a)(5)). The Department of Transportation shall regulate the placing of the vending machines in highway rest areas and shall regulate the articles to be dispensed. In order to permit the establishment of adequate fuel and other service facilities by private owners or their lessees for the users of a controlled-access facility, the Department of Transportation shall permit access to service or frontage roads within the publicly owned right-of-way of any controlled-access facility established or designated as provided in this Article, at points which, in the opinion of the Department of Transportation, will best serve the public interest. The location of such fuel and other service facilities may be indicated to the users of the controlled-access facilities by appropriate signs, the size, style, and specifications of which shall be determined by the Department of Transportation.

The location of fuel, gas, food, lodging, camping, and attraction facilities may be indicated to the users of the controlled-access facilities by appropriate logos placed on signs owned, controlled, and erected by the Department of Transportation. The owners, operators or lessees of fuel, gas, food, lodging, camping, and attraction facilities who wish to place a logo identifying their business or service on a sign shall furnish a logo meeting the size, style and specifications determined by the Department of Transportation and shall pay the Department for the costs of initial installation and subsequent maintenance. The fees for logo sign installation and maintenance shall be set by the Board of Transportation based on cost. (1957, c. 993, s. 9; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1981, c. 481, s. 1; 1983, c. 604, s. 1; 1985, c. 456; c. 718, ss. 2, 3, 6; 1987, c. 417, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 19.10(b); 1997-443, s. 11A.118(a); 2003-184, s. 2.)

### CASE NOTES

**Outdoor Advertising**. — Outdoor advertising companies who were appealing the revocations of their permits for certain outdoor advertising signs did not show that they would be required to violate certain state statutes, such as G.S. 136-89.56, prohibiting commercial enterprises on certain highways, or G.S. 136.89.58, prohibiting standing vehicles on the right-of-way of certain highways, to measure the height of those signs, nor was this argument raised before the trial court, as required by N.C. R. App. P. 10(b)(1). Capital Outdoor, Inc. v. Tolson, 159 N.C. App. 55, 582 S.E.2d 717, 2003 N.C. App. LEXIS 1417 (2003), cert. denied, 357 N.C. 504, 587 S.E.2d 662 (2003).

## § 136-89.57: Repealed by Session Laws 1965, c. 474, s. 1.

## § 136-89.58. Unlawful use of National System of Interstate and Defense Highways and other controlled-access facilities.

On those sections of highways which are or become a part of the National System of Interstate and Defense Highways and other controlled-access facilities it shall be unlawful for any person:

(1) To drive a vehicle over, upon or across any curb, central dividing section or other separation or dividing line on said highways.

(2) To make a left turn or a semicircular or U-turn except through an opening provided for that purpose in the dividing curb section, separation, or line on said highways.

(3) To drive any vehicle except in the proper lane provided for that purpose and in the proper direction and to the right of the central dividing curb, separation section, or line on said highways.

(4) To drive any vehicle into the main travel lanes or lanes of connecting ramps or interchanges except through an opening or connection provided for that purpose by the Department of Transportation.

(5) To stop, park, or leave standing any vehicle, whether attended or unattended, on any part or portion of the right-of-way of said highways, except in the case of an emergency or as directed by a peace officer, or as designated parking areas.

(6) To willfully damage, remove, climb, cross or breach any fence erected within the rights-of-way of said highways.

(7) Repealed by Session Laws 1999-330, s. 6, effective December 1, 1999.

Any person who violates any of the provisions of this section shall be guilty of a Class 2 misdemeanor. (1959, c. 647; 1965, c. 474, s. 2; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; c. 731, s. 2; 1993, c. 539, s. 988; 1994, Ex. Sess., c. 24, s. 14(c); 1999-330, s. 6.)

**Cross References.** — For similar section, see G.S. 20-140.3.

CASE NOTES

**Permit to erect and maintain advertising signs was not subject to revocation** pursuant to a regulation providing for revocation for "unlawful violation of control of access on interstate . . . facilities," where employees of the permit holder had parked their truck on the shoulder of the interstate and were servicing a sign, but had not crossed any access control fence or other barrier in order to do so. Ace-Hi, Inc. v. Department of Transp., 70 N.C. App. 214, 319 S.E.2d 294 (1984).

**Outdoor Advertising**. — Outdoor advertising companies who were appealing the revocations of their permits for certain outdoor advertising signs did not show that they would be required to violate certain state statutes, such as G.S. 136-89.56, prohibiting commercial enterprises on certain highways, or G.S. 136.89.58, prohibiting standing vehicles on the right-of-way of certain highways, to measure the height of those signs, nor was this argument raised before the trial court, as required by Rule 10(b)(1). Capital Outdoor, Inc. v. Tolson, 159 N.C. App. 55, 582 S.E.2d 717, 2003 N.C. App. LEXIS 1417 (2003), cert. denied, 357 N.C. 504, 587 S.E.2d 662 (2003).

**Cited** in North Carolina State Hwy. Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970).

## § 136-89.59. Highway rest area refreshments.

All civic, nonprofit, or charitable corporations and organizations are authorized to serve nonalcoholic refreshments to motorists at rest areas and welcome centers located on control-access facilities in accordance with the following conditions:

(1) Thirty-day permits shall be issued without cost by the Highway Division Engineer. Permits shall be subject to revocation by the State Highway Administrator for violations of this section. The applicant must be a nonprofit organization showing a record of concern for automotive, highway, or driver safety.

(2) The activity must be carried on solely within the safety rest area free from any ramp or other service used for the movement of vehicles.

(3) The activity must be conducted for the express purpose of improving the safety of highway travel and the advertisement of any product by any organization shall not be permitted.

(4) The refreshment and any other service offered must be free of charge to the motorist.

(5) Signs shall be displayed by the corporation or organization, and the Department of Transportation is hereby authorized to promulgate rules and regulations governing the size, content and location of such signs. (1973, c. 1346; 1977, c. 464, s. 7.1; 1981, c. 545, ss. 1, 2.)

**Editor's Note.** — The section originally codified as G.S. 136-89.59 was repealed by Session Laws 1971, c. 882, s. 4.

## § 136-89.59A. Promotion of North Carolina farm products at rest areas and welcome centers.

Subject to the approval of the Department, the Department of Agriculture and Consumer Services may distribute promotional materials and free samples of North Carolina farm products at rest areas and welcome centers located on controlled-access facilities and operated by the State for the purpose of promoting North Carolina farm products. (2001-424, s. 17.1.)

## ARTICLE 6E.

## *North Carolina Turnpike Authority.*

### §§ 136-89.60 through 136-89.76: Repealed by Session Laws 1971, c. 882, s. 4.

### § 136-89.77: Repealed by Session Laws 1965, c. 1077.

### §§ 136-89.78 through 136-89.158: Reserved for future codification purposes.

## ARTICLE 6F.

## *North Carolina Bridge Authority.*

### §§ 136-89.159 through 136-89.170: Repealed by Session Laws 2006-228, s. 1, effective August 10, 2006.

**Editor's Note.** — G.S. 136-89.168 through 136-89.170 were reserved sections.

## ARTICLE 6G.

## *Private Pilot Toll Project.*

### §§ 136-89.171 through 136-89.179: Repealed by Session Laws 2006-228, s. 2, effective August 10, 2006.

**Editor's Note.** — Repealed G.S. 136-89.173 through 136-89.179 were reserved sections.

## ARTICLE 6H.

## *Public Toll Roads and Bridges.*

## Part 1. Turnpike Authority and Toll Projects.

### § 136-89.180. Legislative findings.

The General Assembly finds that the existing State road system is becoming increasingly congested and overburdened with traffic in many areas of the State; that the sharp surge of vehicle miles traveled is overwhelming the State's ability to build and pay for adequate road improvements; and that an adequate answer to this challenge will require the State to be innovative and utilize several new approaches to transportation improvements in North Carolina.

Toll funding of highway and bridge construction is feasible in North Carolina and can contribute to addressing the critical transportation needs of the State. A toll program can speed the implementation of needed transportation improvements by funding some projects with tolls. (2002-133, s. 1.)

**Editor's Note.** — Session Laws 2002-133, s. 9, provides that the North Carolina Turnpike Authority shall evaluate the feasibility of encouraging mass transit and ridesharing in its proposed toll road facilities.

Session Laws 2008-225, s. 1, added the Part 1 heading, and designated G.S. 136-89.180 through 136-89.198 as Part 1 of Article 6H, effective August 17, 2008.

## § 136-89.181. Definitions.

The following definitions apply to this Article:

(1) Department. — The North Carolina Department of Transportation.
(2) Turnpike Authority. — The public agency created by this Article.
(3) Authority Board. — The governing board of the Turnpike Authority.
(4) Turnpike project. — Either of the following:
  a. A road, bridge, or tunnel project planned, or planned and constructed, in accordance with the provisions of this Article.
  b. A segment of the State highway system the Authority Board converts to a tolled highway pursuant to the authorization in G.S. 136-89.187.
(5) Turnpike system. — All Turnpike projects. (2002-133, s. 1; 2008-225, s. 3.)

**Effect of Amendments.** — Session Laws 2008-225, s. 3, effective August 17, 2008, rewrote the section.

## § 136-89.182. North Carolina Turnpike Authority.

(a) Creation. — There is created a body politic and corporate to be known as the "North Carolina Turnpike Authority". The Authority is constituted as a public agency, and the exercise by the Authority of the powers conferred by this Article in the construction, operation, and maintenance of toll roads and bridges shall be deemed and held to be the performance of an essential governmental function.

(b) Administrative Placement. — The Authority shall be located within the Department of Transportation and shall be subject to and under the direct supervision of the Secretary of Transportation.

(c) Authority Board. — The North Carolina Turnpike Authority shall be governed by a nine-member Authority Board consisting of two members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121, two members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121, four members appointed by the Governor, and the Secretary of Transportation. Each appointing authority shall appoint members who reside in diverse regions of the State. The Chair of the Authority shall be selected by the Authority Board.

(d) Board of Transportation Members. — Members of the North Carolina Board of Transportation may serve as members of the Authority Board.

(e) Staggered Terms. — One of the initial appointments to the Authority Board by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, one of the initial appointments to the Authority Board by the General Assembly upon the recommendation of the Speaker of the House of Representatives, and three of the initial appointments of the Governor shall be appointed to terms ending January 14, 2007. One of the initial appointments to the Authority Board by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, one of the initial appointments to the Authority Board by the General Assembly upon the recommendation of the Speaker of the House of Representatives, and one of the initial appointments of the Governor shall be appointed to terms ending January 14, 2005. The Secretary of Transportation shall serve as an ex officio voting member of the Board. Thereafter, at the expiration of each stipulated term of office, all appointments shall be to a term of four years from the date of the expiration of the term.

(f) Vacancies. — All members of the Authority Board shall remain in office until their successors are appointed and qualified. The original appointing authority may appoint a member to serve out the unexpired term of any member.

(g) Removal of Board Members. — Each member of the Authority Board, notwithstanding subsection (e) of this section, shall serve at the pleasure of the appointing authority. The Chair of the Authority serves at the pleasure of the Authority Board.

(h) Conflicts of Interest, Ethics. — Members of the Authority Board shall be subject to the provisions of G.S. 136-13, 136-13.1, and 136-14.

(i) Compensation. — The appointed members of the Authority Board shall receive no salary for their services but shall be entitled to receive per diem and travel allowances in accordance with the provisions of G.S. 138-5 and G.S. 138-6 as appropriate.

(j) Bylaws. — The Authority Board shall adopt, change, or amend bylaws with respect to the calling of meetings, quorums, voting procedures, the keeping of records, and other organizational, staffing, and administrative matters as the Authority Board may determine. Any bylaws, or subsequent changes or amendments to the bylaws, shall be submitted to the Board of Transportation and the Joint Legislative Transportation Oversight Committee for review and comment at least 45 days prior to adoption by the Authority Board.

(k) Executive Director and Administrative Employees. — The Authority Board shall appoint an Executive Director, whose salary shall be fixed by the Authority, to serve at its pleasure. The Executive Director shall be the Authority's chief administrative officer and shall be responsible for the daily administration of the toll roads and bridges constructed, maintained, or operated pursuant to this Article. The Executive Director or his designee shall appoint, employ, dismiss, and, within the limits approved by the Authority Board, fix the compensation of administrative employees as the Executive Director deems necessary to carry out this Article. The Authority shall report the hiring of all administrative employees to the Joint Legislative Transportation Oversight Committee within 30 days of the date of employment.

(*l*) Office. — The offices of the Authority may be housed in one or more facilities of the Department of Transportation. (2002-133, s. 1; 2009-343, ss. 1, 2.)

**Cross References.** — Control of vehicles on Turnpike System by erection of traffic control devices to collect tolls, see G.S. 20-158.2.

**Editor's Note.** — Session Laws 2009-343, s. 3, provides: "The transfer under this act of the North Carolina Turnpike Authority to the Department of Transportation has all the elements of a Type I transfer under G.S. 143A-6."

**Effect of Amendments.** — Session Laws 2009-343, ss. 1 and 2, effective July 27, 2009, in subsection (b), substituted "shall be subject to and under the direct supervision of the Secretary of Transportation" for "for administrative purposes but shall exercise all of its powers independently of the Department of Transportation except as otherwise specified in this Article" at the end, and in subsection (d), deleted "No more than two" from the beginning.

## § 136-89.183. Powers of the Authority.

(a) The Authority shall have all of the powers necessary to execute the provisions of this Article, including the following:

(1) The powers of a corporate body, including the power to sue and be sued, to make contracts, to adopt and use a common seal, and to alter the adopted seal as needed.

(2) To study, plan, develop, and undertake preliminary design work on up to nine Turnpike Projects. At the conclusion of these activities, the Turnpike Authority is authorized to design, establish, purchase, construct, operate, and maintain the following projects:

a. Triangle Expressway, including segments also known as N.C. 540, Triangle Parkway, and Western Wake Freeway in Wake and Durham Counties.

b. Gaston East-West Connector, also known as the Garden Parkway.

c. Monroe Connector/Bypass.

d. Cape Fear Skyway.

e. A bridge of more than two miles in length going from the mainland to a peninsula bordering the State of Virginia, pursuant to G.S. 136-89.183A.

f. Repealed by Session Laws 2008-225, s. 4, effective August 17, 2008.

Any other project proposed by the Authority in addition to the projects listed in this subdivision must be approved by the General Assembly prior to construction.

A Turnpike Project selected for construction by the Turnpike Authority shall be included in any applicable locally adopted comprehensive transportation plans and shall be shown in the current State Transportation Improvement Plan prior to the letting of a contract for the Turnpike Project.

(3) Repealed by Session Laws 2005-275, s. 2, effective August 12, 2005.

(4) To rent, lease, purchase, acquire, own, encumber, dispose of, or mortgage real or personal property, including the power to acquire property by eminent domain pursuant to G.S. 136-89.184.

(5) To fix, revise, charge, and collect tolls and fees for the use of the Turnpike Projects. Prior to the effective date of any toll or fee for use of a Turnpike Facility, the Authority shall submit a description of the proposed toll or fee to the Board of Transportation, the Joint Legislative Transportation Oversight Committee and the Joint Legislative Commission on Governmental Operations for review.

(6) To issue bonds or notes of the Authority as provided in this Article.

(6a) To invest the proceeds of bonds or notes of the Authority that are pending disbursement or other idle funds of the Authority in any investment authorized by G.S. 159-30.

(7) To establish, construct, purchase, maintain, equip, and operate any structure or facilities associated with the Turnpike System.

(8) To pay all necessary costs and expenses in the formation, organization, administration, and operation of the Authority.

(9) To apply for, accept, and administer loans and grants of money or real or personal property from any federal agency, the State or its political subdivisions, local governments, or any other public or private sources available.

(10) To adopt, alter, or repeal its own bylaws or rules implementing the provisions of this Article, in accordance with the review and comment requirements of G.S. 136-89.182(j).

(11) To utilize employees of the Department; to contract for the services of consulting engineers, architects, attorneys, real estate counselors, appraisers, and other consultants; to employ administrative staff as may be required in the judgment of the Authority; and to fix and pay fees or compensation to the Department, contractors, and administrative employees from funds available to the Authority.

(12) To receive and use appropriations from the State and federal government.

(13) To adopt procedures to govern its procurement of services and delivery of Turnpike Projects.

(14) To perform or procure any portion of services required by the Authority.

(15) To use officers, employees, agents, and facilities of the Department for the purposes and upon the terms as may be mutually agreeable.

(16) To contract for the construction, maintenance, and operation of a Turnpike Project.

(17) To enter into partnership agreements with the Department of Transportation, agreements with political subdivisions of the State, and agreements with private entities, and to expend such funds as it deems necessary, pursuant to such agreements, for the purpose of financing the cost of acquiring, constructing, equipping, operating, or maintaining any Turnpike Project. An agreement entered under this subdivision requires the concurrence of the Board of Transportation if the Department of Transportation is a party to the agreement.

(18) To utilize incentives in any contract for development or construction of a Turnpike Project, in order to promote expedited delivery of the project.

(b) To execute the powers provided in subsection (a) of this section, the Authority shall determine its policies by majority vote of the members of the Authority Board present and voting, a quorum having been established. Once a policy is established, the Authority Board shall communicate it to the Executive Director or the Executive Director's designee, who shall have the sole and exclusive authority to execute the policy of the Authority. No member of the Authority Board shall have the responsibility or authority to give operational directives to any employee of the Authority other than the Executive Director or the Director's designee. (2002-133, s. 1; 2005-275, s. 2; 2006-228, s. 5; 2006-230, s. 1(b); 2008-225, s. 4.)

**Editor's Note.** — Session Laws 2002-133, s. 9, provides that the North Carolina Turnpike Authority shall evaluate the feasibility of encouraging mass transit and ridesharing in its proposed toll road facilities.

**Effect of Amendments.** — Session Laws 2008-225, s. 4, effective August 17, 2008, rewrote subdivision (a)(2)a; added "also known as the Garden Parkway" at the end of subdivision (a)(2)b; added "/Bypass" at the end of subdivision (a)(2)c; added "pursuant to G.S. 136-89.183A" at the end of subdivision (a)(2)e; deleted subdivision (a)(2)f which read: "I-540 in Wake and Durham Counties"; and added subdivision (a)(6a).

## § 136-89.183A. Accelerated Pilot Toll Bridge Project.

(a) Findings. — The General Assembly finds that there is a need for a bridge connecting the Currituck County mainland to the Currituck County Outer Banks; that the bridge should be implemented as a toll bridge; that the bridge should be implemented in a manner that protects the natural environment and quality of life on the Outer Banks; and that the character of the existing road system in Currituck County and Dare County Outer Banks should be preserved.

(b) Contract to Construct Accelerated Pilot Toll Bridge Project. — The Authority shall contract with a single private firm to design, obtain all necessary permits for, and construct the toll bridge described in G.S. 136-89.183(a)(2), known as the Mid-Currituck Bridge, in order to provide accelerated, efficient, and cost-effective completion of the project.

(c) Preconstruction Participation. — In addition to the authority granted by G.S. 136-89.191, the Department shall participate in the cost of preconstruction activities related to the project described in this section, if requested by the Authority.

(d) Environmental Protection. — The Authority shall ensure that the Mid-Currituck Bridge is implemented in a manner that accomplishes all of the following:

(1) Ensures the preservation of water quality in Currituck Sound.
(2) Mitigates the environmental impact of the bridge on the Currituck County mainland and the Outer Banks.
(3) Reduces traffic congestion and vehicle miles traveled, and preserves the character of the existing road system, in Dare County and Currituck County on the Outer Banks.

(e) Report on Project. — The Authority shall report to the Joint Legislative Transportation Oversight Committee on December 1, 2005, and each December 1 thereafter until completion, on the progress of the accelerated pilot toll bridge project described in this section. (2005-275, s. 3; 2008-225, s. 11.)

**Effect of Amendments.** — Session Laws 2008-225, s. 11, effective August 17, 2008, added subsections (a) and (d); redesignated former subsections (a) and (b) as subsections (b) and (c); and in subsection (b), substituted "known as the Mid-Currituck Bridge" for "a bridge of more than two miles in length going from the mainland to a peninsula bordering the State of Virginia."

## § 136-89.183B. Accelerated Herbert C. Bonner Bridge Replacement Project.

(a) Contract for Accelerated Construction of the Herbert C. Bonner Replacement Bridge Project. — The Department of Transportation shall implement all reasonable measures to expedite completion of environmental reviews required by the National Environmental Policy Act. Within 90 days of receiving an approved Record of Decision from the Federal Highway Administration, the Department shall contract with a single private firm to design and build a replacement bridge for the Herbert C. Bonner Bridge at Oregon Inlet, in accordance with G.S. 136-28.11, in order to expedite and accelerate the efficient, cost effective completion of the project.

(b) Replacement Bridge; Termini. — The General Assembly recommends that the replacement bridge constructed pursuant to this section shall be located with north and south termini located in general proximity to the termini of the existing Herbert C. Bonner Bridge. It is recognized, however, that the preferred alternative for the bridge location cannot be determined prior to compliance with all federal and State laws and regulations.

(c) Department to Report on Project. — The Department shall report to the Joint Legislative Transportation Oversight Committee on December 1, 2005, and each December 1 thereafter until completion, on the progress of the accelerated bridge project described in this section. (2005-275, s. 6(b); 2005-382, s. 3.)

**Editor's Note.** — Session Laws 2005-275, s. 6(a), effective August 12, 2005, provides: "The General Assembly finds that:

"(1) The existing Herbert C. Bonner Bridge spanning Oregon Inlet, an essential link in the State's transportation network, is in imminent danger of failure and possible collapse due to its low stability rating and substandard condition.

"(2) The Herbert C. Bonner Bridge, which was opened to traffic in 1963, has extended beyond its original projected life span, and that Department of Transportation engineering reports indicated in 1993 that the bridge had only six years of safe usage left.

"(3) The condition of the Herbert C. Bonner Bridge poses significant imminent threats to public health and safety to thousands of residents and visitors at all times, and jeopardizes emergency management operations and evacuations during times of natural disasters.

"(4) The condition of the Herbert C. Bonner Bridge also threatens the economic stability of the tourist economy of the region, tourism being the region's main industry, and also threatens the viability of Oregon Inlet as the region's main transportation corridor for commercial and recreational fishing industries.

"(5) The replacement of the Herbert C. Bonner Bridge has been studied for over a decade, during which time the condition of the bridge has continued to deteriorate at an alarming rate.

"(6) Failure or collapse of the Herbert C. Bonner Bridge will result in catastrophic harm to public health, safety, and welfare, the potential harm to and loss of lives, and loss of access to the Pea Island National Wildlife Refuge, which is one of our country's most important natural wildlife and wildfowl habitats.

"(7) Replacement of the Herbert C. Bonner Bridge is critical to protect public health, safety, and welfare, and maintain necessary transportation access for emergency management and economic purposes.

"(8) Replacement of the Herbert C. Bonner Bridge must occur as soon as is practicable, and authorization must be given to the Department of Transportation to pursue expedited permitting, design, and construction to ensure that the replacement bridge is open to the public before the existing bridge fails or collapses."

Session Laws 2005-382, s. 3, effective September 13, 2005, rewrote the section as enacted by Session Laws 2005-275, s. 6(b).

## § 136-89.183C. Accelerated Yadkin River Bridge Replacement Project.

(a) Contract for Accelerated Construction of the Yadkin River Bridge Replacement Bridge Project. — The Authority shall study, plan, develop, undertake preliminary design work, and analyze and list all necessary permits, in preparation for construction of a replacement bridge and approaches for the Yadkin River Bridge over the Yadkin River and between Rowan and Davidson Counties, in order to provide accelerated, efficient, and cost-effective completion of the project.

(b) Replacement Bridge; Termini. — The bridge constructed pursuant to this section shall be a replacement bridge, with north and south termini located in general proximity to the termini of the existing Yadkin River Bridge. (2007-299, s. 1.)

**Editor's Note.** — Session Laws 2007-299, s. 2, made this section effective July 28, 2007.

## § 136-89.184. Acquisition of real property.

(a) General. — The Authority may acquire public or private real property by purchase, negotiation, gift, or devise, or condemnation that it determines to be necessary and convenient for the construction, expansion, enlargement, extension, improvement, or operation of a Turnpike Project. When the Authority acquires real property owned by the State, the Secretary of the Department of Administration shall execute and deliver to the Authority a deed transferring fee simple title to the property to the Authority.

(b) Condemnation. — To exercise the power of eminent domain, the Authority shall commence a proceeding in its name and shall follow the procedure set forth in Article 9 of Chapter 136 of the General Statutes. (2002-133, s. 1.)

## § 136-89.185. Taxation of property of Authority.

Property owned by the Authority is exempt from taxation in accordance with Section 2 of Article V of the North Carolina Constitution. (2002-133, s. 1.)

## § 136-89.186. Audit.

The operations of the Authority shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. (2002-133, s. 1.)

## § 136-89.187. Conversion of free highways prohibited.

The Authority Board is prohibited from converting any segment of the nontolled State Highway System to a toll facility, except for a segment of N.C. 540 under construction as of July 1, 2006, located in Wake County and extending from the N.C. 54 exit on N.C. 540 to the N.C. 55 exit on N.C. 540. No segment may be converted to a toll route pursuant to this section unless first approved by the Metropolitan Planning Organization (MPO) or Rural Planning Organization (RPO) of the area in which that segment is located. (2002-133, s. 1; 2006-228, s. 3; 2008-225, s. 5.)

**Effect of Amendments.** — Session Laws 2008-225, s. 5, effective August 17, 2008, substituted "N.C. 540" for "Interstate 540," "County" for "and Durham Counties," and "the N.C. 54 exit on N.C. 540 to the N.C. 55 exit on N.C. 540" for "I-40 southwest to N.C. 55" in the first sentence.

## § 136-89.188. Use of revenues.

(a) Revenues derived from Turnpike Projects authorized under this Article shall be used only for Authority administration costs; Turnpike Project development, right-of-way acquisition, construction, operation, and maintenance; and debt service on the Authority's revenue bonds or related purposes such as the establishment of debt service reserve funds.

(b) The Authority may use up to one hundred percent (100%) of the revenue derived from a Turnpike Project for debt service on the Authority's revenue bonds or for a combination of debt service and operation and maintenance expenses of the Turnpike Projects.

(c) The Authority shall use not more than five percent (5%) of total revenue derived from all Turnpike Projects for Authority administration costs.

(d) Notwithstanding the provisions of subsections (a) and (b) of this section, toll revenues generated from a converted segment of the State highway system previously planned for operation as a nontoll facility shall only be used for the funding or financing of the right-of-way acquisition, construction, expansion, operations, maintenance, and Authority administration costs associated with the converted segment or a contiguous toll facility. (2002-133, s. 1; 2006-228, s. 4.)

## § 136-89.189. Turnpike Authority revenue bonds.

The Authority shall be a municipality for purposes of Article 5 of Chapter 159 of the General Statutes, the State and Local Government Revenue Bond Act, and may issue revenue bonds pursuant to that Act to pay all or a portion of the cost of a Turnpike Project or to refund any previously issued bonds. In connection with the issuance of revenue bonds, the Authority shall have all powers of a municipality under the State and Local Government Revenue Bond Act, and revenue bonds issued by the Authority shall be entitled to the protection of all provisions of the State and Local Government Revenue Bond Act.

Except as provided in this section, the provisions of Chapter 159 of the General Statutes, the Local Government Finance Act, apply to revenue bonds issued by the Turnpike Authority.

(1) The term of a lease between the Turnpike Authority and the Department for all or any part of a Turnpike Project may exceed 40 years, as agreed by the Authority and the Department.

(2) The maturity date of a refunding bond may extend to the earlier of the following:

  a. Forty years from the date of issuance of the refunding bond.

b. The date the Turnpike Authority determines is the maturity date required for the Turnpike Project funded with the refunding bonds to generate sufficient revenues to retire the refunding bonds and any other outstanding indebtedness issued for that Project. The Authority's determination of the appropriate maturity date is conclusive and binding. In making its determination, the Authority may take into account appropriate financing terms and conventions. (2002-133, s. 1; 2009-56, s. 2.)

**Effect of Amendments.** — Session Laws 2009-56, s. 2, effective June 5, 2009, added the last paragraph.

## § 136-89.190. Sale of Turnpike Authority revenue bonds.

Revenue bonds of the Authority issued pursuant to G.S. 136-89.189 and the State and Local Government Revenue Bond Act shall be sold in accordance with and pursuant to Article 7 of Chapter 159 of the General Statutes. (2002-133, s. 1.)

## § 136-89.191. Cost participation by Department of Transportation.

The Department of Transportation may participate in the cost of preconstruction activities, construction, maintenance, or operation of a Turnpike Project. (2002-133, s. 1.)

## § 136-89.192. Equity distribution formula.

Only those funds applied to a Turnpike Project from the State Highway Fund, State Highway Trust Fund, or federal-aid funds that might otherwise be used for other roadway projects within the State, and are otherwise already subject to the distribution formula under G.S. 136-17.2A, shall be included in the distribution formula.

Other revenue from the sale of the Authority's bonds or notes, project loans, or toll collections shall not be included in the distribution formula. (2002-133, s. 1.)

## § 136-89.193. Annual plan of work; annual and quarterly reports.

(a) Annual Plan of Work. — The Authority shall annually develop a plan of work for the fiscal year, describing the activities and projects to be undertaken, accompanied by a budget. This annual plan of work shall be subject to the concurrence of the Board of Transportation.

(b) Annual Reports. — The Authority shall, promptly following the close of each fiscal year, submit an annual report of its activities for the preceding year to the Governor, the General Assembly, and the Department of Transportation. Each report shall be accompanied by an audit of its books and accounts.

(c) Semiannual Reports. — The Authority shall submit semiannual reports to the Joint Legislative Transportation Oversight Committee, and more frequent reports if requested. The reports shall summarize the Authority's activities during the preceding six months, and shall contain any information about the Authority's activities that is requested by the Committee.

(d) Report Prior to Let of Contracts. — The Authority shall consult with and report to the Joint Legislative Transportation Oversight Committee and the

Joint Legislative Commission on Governmental Operations prior to the letting of any contract for Turnpike Project construction authorized under G.S. 136-183(a)(2).

(e) Report Prior to Study and Design. — The Authority shall consult with and report to the Joint Legislative Transportation Oversight Committee and the Joint Legislative Commission on Governmental Operations prior to the study, planning, development or design of any Turnpike Project authorized under G.S. 136-89.183(a)(3). (2002-133, s. 1.)

**Editor's Note.** — Session Laws 2002-133, s. 9, provides that the North Carolina Turnpike Authority shall evaluate the feasibility of encouraging mass transit and ridesharing in its proposed toll road facilities.

## § 136-89.194. Laws applicable to the Authority; exceptions.

(a) Motor Vehicle Laws. — The Turnpike System shall be considered a "highway" as defined in G.S. 20-4.01(13) and a "public vehicular area" as defined in G.S. 20-4.01(32). All law enforcement and emergency personnel, including the State Highway Patrol and the Division of Motor Vehicles, shall have the same powers and duties on the Turnpike System as on any other highway or public vehicular area.

(b) Applicable Contracting. — For the purposes of implementing this Article, the Authority shall solicit competitive proposals for the construction of Turnpike Projects in accordance with the provisions of Article 2 of this Chapter. Contracts for professional engineering services and other kinds of professional or specialized services necessary in connection with construction of Turnpike Projects shall be solicited in accordance with procedures utilized by the Department of Transportation. Cost estimates prepared for the purpose of comparing bids for a Turnpike project are confidential and may not be disclosed until after the opening of bids for the project.

(c) Alternative Contracting Methods. — Notwithstanding the provisions of subsection (b) of this section, the Authority may authorize the use of alternative contracting methods if:

(1) The authorization applies to an individual project;
(2) The Authority has concluded, and documented in writing, that the alternative contracting method is necessary because the project cannot be completed utilizing the procedures of Article 2 of this Chapter within the necessary time frame or available funding or for other reasons the Authority deems in the public interest;
(3) The Authority has provided, to the extent possible, for the solicitation of competitive proposals prior to awarding a contract; and
(4) The approved alternative contracting method provides for reasonable compliance with the disadvantaged business participation goals of G.S. 136-28.4.

(d) Entry for Surveys. — The Turnpike Authority and its employees and contractors shall have the same right of entry for surveys, borings, soundings, or examinations as granted the Department of Transportation in G.S. 136-120.

(e) Plans and Contract Documents. — The requirements for registering right-of-way plans set in G.S. 136-19.4 apply to right-of-way plans of the Turnpike Authority. In applying G.S. 136-19.4 to the Authority, references to the "Department" are considered references to the "Turnpike Authority" and references to the "Board" are considered references to the "Authority Board."

Diaries and analyses for contracts of the Turnpike Authority are subject to the same restrictions on disclosure that apply to diaries and analyses for contracts of the Department under G.S. 136-28.5.

(f) Construction Claims. — G.S. 136-29 applies to the adjustment and resolution of Turnpike project construction claims. In applying G.S. 136-29 to the Turnpike Authority, references to the "Department of Transportation," the "State Highway Administrator," and a "State highway" are considered references to the "Turnpike Authority," the "chief engineer of the Turnpike Authority," and a "Turnpike project."

(g) Contract Exemptions. — The following provisions concerning the purchase of goods and services by a State agency do not apply to the Turnpike Authority:

(1) Article 3 of Chapter 143 of the General Statutes. The Authority may use the services of the Department of Administration in procuring goods and services that are not specific to establishing and operating a toll revenue system.

(2) Article 3D of Chapter 147 of the General Statutes. The Authority may use the services of the Office of Information Technology Services in procuring goods and services that are not specific to establishing and operating a toll revenue system. All contract information for contracts for information technology are subject to disclosure in accordance with G.S. 147-33.95.

(h) APA. — Chapter 150B of the General Statutes does not apply to the Turnpike Authority, except as provided in this section and G.S. 136-89.218. (2002-133, s. 1; 2006-228, s. 6; 2008-225, s. 6.)

**Effect of Amendments.** — Session Laws 2008-225, s. 6, effective August 17, 2008, in subsection (b), inserted "Applicable" at the beginning and added the last sentence; and added subsections (e) through (h).

## § 136-89.195. Internet report of funds expended.

The Department shall publish and update annually on its Internet web site a record of all expenditures of the Authority for highway construction, maintenance, and administration. The record shall include a total expenditure amount by county. For each Turnpike Project, the record shall include a readily identifiable project name or location, the nature of the project, the amount of the project, the contractor for the project, the date of project letting, and the actual or expected project completion date. (2002-133, s. 1.)

## § 136-89.196. Removal of tolls.

The Authority shall, upon fulfillment of and subject to any restrictions included in the agreements entered into by the Authority in connection with the issuance of the Authority's revenue bonds, remove tolls from a Turnpike Project. (2002-133, s. 1.)

## § 136-89.197. Maintenance of nontoll routes.

The Department shall maintain an existing, alternate, comparable nontoll route corresponding to each Turnpike Project constructed pursuant to this Article. (2002-133, s. 1.)

## § 136-89.198. Authority to toll existing interstate highways.

(a) General. — Notwithstanding any other provision of this Article, the Authority may collect tolls on any existing interstate highway for which the United States Department of Transportation has granted permission by permit, or any other lawful means, to do so. The revenue generated from the collected tolls shall be used by the Authority to repair and maintain the interstate on which the tolls were collected. These revenues shall not be used to repair, maintain, or upgrade any State primary or secondary road adjacent to or connected with the interstate highways.

(b) Method. — The Authority shall establish toll locations on the permitted interstate highway in accordance with federal guidelines. Toll locations shall be erected at or near the borders of the State and at such other locations that are not impracticable, unfeasible, or that would result in an unsafe or hazardous condition.

(c) Severability. — If any provision of this section or its application is held invalid, the invalidity does not affect other provisions or applications of this section that can be given effect without the invalid provisions or application, and to this end the provisions of this section are severable. (2005-276, s. 28.21(b).)

**Editor's Note.** — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 28.21(a), provides: "The North Carolina Department of Transportation shall apply to the United States Department of Transportation for a permit to allow tolling on established interstate highways in North Carolina. The Department shall set Interstate 95 as the priority project when applying for any permits."

Session Laws 2005-276, s. 46.5 is a severability clause.

### §§ 136-89.199 through 136-89.209: Reserved for future codification purposes.

## Part 2. Collection of Tolls on Turnpike Projects.

### § 136-89.210. Definitions.

The definitions in G.S. 136-89.181 and the following definitions apply in this Article:

(1) Reserved.

(2) Open road toll. — A toll payable under an open road tolling system.

(3) Open road tolling system. — A system of collecting a toll for the use of a highway that does not provide a way to pay the toll in cash while traveling on the highway. (2008-225, s. 2.)

**Editor's Note.** — Session Laws 2008-225, s. 12, made this Part effective August 17, 2008.

The word "Reserved" in subdivision (1) was underlined in Session Laws 2008-225, s. 2.

### § 136-89.211. Tolls for use of Turnpike project.

In exercising its authority under G.S. 136-89.183 to set tolls for the use of a Turnpike project, the Authority may not do any of the following:

(1) Set open road tolls that vary for the same class of motor vehicle depending on the method by which the Authority identifies a motor vehicle that drives on the Turnpike project. This does not preclude the Authority from allowing a discount of up to thirty-five percent (35%) of the amount of a toll for a motor vehicle equipped with an electronic toll collection transponder.

(2) Exempt a motor vehicle that is not a law enforcement vehicle, an emergency fire or rescue vehicle, or an emergency medical services vehicle from the requirement of paying a toll for the use of a Turnpike project. (2008-225, s. 2.)

### § 136-89.212. Payment of toll required for use of Turnpike project.

A motor vehicle that is driven on a Turnpike project is subject to a toll imposed by the Authority for the use of the project. If the toll is an open road toll, the person who is the registered owner of the motor vehicle is liable for payment of the toll unless the registered owner establishes that the motor vehicle was in the care, custody, and control of another person when it was driven on the Turnpike project.

A person establishes that a motor vehicle was in the care, custody, and control of another person when it was driven on a Turnpike project by submitting to the Authority a sworn affidavit stating one of the following:

(1) The name and address of the person who had the care, custody, and control of the motor vehicle when it was driven. If the motor vehicle was leased or rented under a long-term lease or rental, as defined in G.S. 105-187.1, the affidavit must be supported by a copy of the lease or rental agreement or other written evidence of the agreement.

(2) The motor vehicle was stolen. The affidavit must be supported by an insurance or police report concerning the theft or other written evidence of the theft.

(3) The person transferred the motor vehicle to another person by sale or otherwise before it was driven on the Turnpike project. The affidavit must be supported by insurance information, a copy of the certificate of title, or other evidence of the transfer. (2008-225, s. 2.)

### § 136-89.213. Administration of tolls and requirements for open road tolls.

(a) Administration. — The Authority is responsible for collecting tolls on Turnpike projects. In exercising its authority under G.S. 136-89.183 to perform or procure services required by the Authority, the Authority may contract with one or more providers to perform part or all of the collection functions and may enter into agreements to exchange information that identifies motor vehicles and their owners with one or more of the following entities: the Division of Motor Vehicles of the Department of Transportation, another state, another toll operator, or a toll collection-related organization. Identifying information obtained by the Authority through an agreement is not a public record and is subject to the disclosure limitations in 18 U.S.C. § 2721, the federal Driver's Privacy Protection Act.

(b) Open Road Tolls. — If a Turnpike project uses an open road tolling system, the Authority must operate a facility that is in the immediate vicinity of the Turnpike project and that accepts cash payment of the toll and must place signs on the Turnpike project that give drivers the following information:

(1) Notice that the driver is approaching a highway for which a toll is required. Signs providing this information must be placed before the toll is incurred.

(2) The methods by which the toll may be paid.

(3) Directions to the nearby facility that accepts cash payment of the toll. (2008-225, s. 2.)

### § 136-89.214. Bill for unpaid open road toll.

(a) Bill. — If a motor vehicle travels on a Turnpike project that uses an open road tolling system and a toll for traveling on the project is not paid within 15 days after the travel occurs, the Authority must send a bill by first-class mail to the registered owner of the motor vehicle for the amount of the unpaid toll.

The Authority must send the bill within 90 days after the travel occurs. If a bill is not sent within the required time, the Authority waives collection of the toll. The Authority must establish a billing period for unpaid open road tolls that is no shorter than 15 days. A bill for a billing period must include all unpaid tolls incurred by the same person during the billing period.

(b) Information on Bill. — A bill sent under this section must include all of the following information:

(1) The name and address of the registered owner of the motor vehicle that traveled on the Turnpike project.
(2) The date the travel occurred, the approximate time the travel occurred, and each segment of the Turnpike project on which the travel occurred.
(3) An image of the registration plate of the motor vehicle, if the Authority captured an electronic image of the motor vehicle when it traveled on the Turnpike project.
(4) The amount of the toll due and an explanation of how payment may be made.
(5) The date by which the toll must be paid to avoid the imposition of a processing fee under G.S. 136-89.215 and the amount of the processing fee.
(6) A statement that a vehicle owner who has unpaid tolls is subject to a civil penalty and may not renew the vehicle's registration until the tolls and civil penalties are paid.
(7) A clear and concise explanation of how to contest liability for the toll. (2008-225, s. 2.)

## § 136-89.215. Required action upon receiving bill for open road toll and processing fee for unpaid toll.

(a) Action Required. — A person who receives a bill for an unpaid open road toll must take one of the following actions within 30 days after receiving the bill:

(1) Pay the bill.
(2) Send a written request to the Authority for a review of the toll.

(b) Fee. — If a person does not take one of the actions required under subsection (a) of this section within the required time, the Authority may add a processing fee to the amount the person owes. The processing fee may not exceed six dollars ($6.00). A person may not be charged more than forty-eight dollars ($48.00) in processing fees in a calendar year.

The Authority must set the processing fee at an amount that does not exceed the costs of identifying the owner of a motor vehicle that is subject to an unpaid toll and billing the owner for the unpaid toll. The fee is a receipt of the Authority and must be applied to these costs. (2008-225, s. 2.)

## § 136-89.216. Civil penalty for failure to pay open road toll.

(a) Penalty. — A person who receives one or more bills for unpaid open road tolls during the first or second six-month period in a year and who has not paid the amount due on those bills within 30 days after the end of the six-month period is subject to a civil penalty of twenty-five dollars ($25.00). The period from January 1 through June 30 of a year is the first six-month period in a year, and the period from July 1 through December 31 is the second six-month period in a year. Only one penalty may be assessed for a six-month period.

(b) Payment. — The Authority must send a notice by first-class mail to a person who is assessed a civil penalty under this section. A person who is assessed a civil penalty must pay the unpaid toll for which the civil penalty was imposed, the amount of any processing fee due, and the civil penalty within 30 days after receiving the notice.

(c) Penalty Proceeds. — A civil penalty imposed under this section is payable to the Authority or, if collected when a vehicle registration is renewed, to the Division of Motor Vehicles of the Department of Transportation. The clear proceeds of a civil penalty imposed under this section must be credited to the Civil Penalty and Forfeiture Fund established in G.S. 115C-457.1. The guidelines used by the Office of State Budget and Management to determine an agency's actual costs of collecting a civil penalty and the clear proceeds of the civil penalty apply to the determination of the clear proceeds of a civil penalty imposed under this section. (2008-225, s. 2.)

## § 136-89.217. Vehicle registration renewal blocked for unpaid open road toll.

(a) Registration Block. — Failure of a person to pay an open road toll billed to the person under G.S. 136-89.214, any processing fee added under G.S. 136-89.215, and any civil penalty imposed under G.S. 136-89.216 is grounds under G.S. 20-54 to withhold the registration renewal of a motor vehicle registered in that person's name. The Authority must notify the Commissioner of Motor Vehicles of a person who owes a toll, a processing fee, or a civil penalty. When notified, the Commissioner of Motor Vehicles must withhold the registration renewal of any motor vehicle registered in that person's name.

(b) Collection by DMV. — A person whose motor vehicle registration renewal is blocked under this section may pay to the Division of Motor Vehicles of the Department of Transportation the amount owed for unpaid tolls, processing fees, and civil penalties due under this Part when renewing the vehicle registration. The Division must remit to the Authority the amount of tolls, fees, and civil penalties collected. The Division's costs of collecting tolls, fees, and civil penalties are considered a necessary expense of the operation of the Authority, and the Authority must reimburse the Division for these costs. (2008-225, s. 2.)

## § 136-89.218. Procedures for contesting liability for unpaid open road toll.

(a) Informal Review. — A person who receives a bill for an unpaid open road toll and who disputes liability for the toll may contest the toll by sending to the Authority a request for review of the toll. The person may include a sworn affidavit described in G.S. 136-89.212 that establishes that someone else had the care, custody, and control of the motor vehicle subject to the toll when the toll was incurred. The person must send the request for review to the Authority within 30 days after receiving the bill for the toll. A person who does not send a request for review to the Authority within this time limit waives the right to a review. If a person sends a timely request for review to the Authority, the Authority may not collect the disputed toll and any processing fee added to the bill for the toll until the conclusion of the review process in this section.

(b) Administrative Hearing. — If the Authority conducts an informal review under subsection (a) of this section and determines that the person who requested the review is liable for the toll, the Authority must send the person a notice informing the person of the Authority's determination. The person may contest this determination by filing a petition for a contested case hearing at the Office of Administrative Hearings in accordance with Article 3 of Chapter 150B of the General Statutes.

(c) Judicial Review. — Article 4 of Chapter 150B of the General Statutes governs judicial review of a final decision made in a contested case authorized under subsection (b) of this section. (2008-225, s. 2.)

## ARTICLE 7.

## *Miscellaneous Provisions.*

### § 136-90. Obstructing highways and roads misdemeanor.

If any person shall willfully alter, change or obstruct any highway, cartway, mill road or road leading to and from any church or other place of public worship, whether the right-of-way thereto be secured in the manner provided for by law or by purchase, donation or otherwise, such person shall be guilty of a Class 1 misdemeanor. If any person shall hinder or in any manner interfere with the making of any road or cartway laid off according to law, he shall be guilty of a Class 1 misdemeanor. (1872-3, c. 189, s. 6; 1883, c. 383; Code, s. 2065; Rev., s. 3784; C.S., s. 3789; 1993, c. 539, s. 989; 1994, Ex. Sess., c. 24, s. 14(c).)

#### CASE NOTES

**Requisites for Indictment and Conviction.** — An indictment for obstructing a neighborhood road leading to a church, which follows the words of this section, will be sustained; still, to warrant a conviction, it is essential, in the absence of proof of an actual dedication, or of a laying out by public authority under G.S. 136-71, to show a user for 20 years, and it must have been worked and kept in order by public authority. State v. Lucas, 124 N.C. 804, 32 S.E. 553 (1899).

A special verdict, rendered on a trial for obstructing a road, is also defective in that it does not find that the user of the road by the public was as of right and adversary. State v. Stewart, 91 N.C. 566 (1884).

**Placing Nails in Highway.** — Placing nails in the highway in order to puncture automobile tires is an obstruction within this section. State v. Malpass, 189 N.C. 349, 127 S.E. 248 (1925).

**Preventing Construction of Drainage Ditch.** — Where a person obstructs an overseer in cutting a ditch across his land to drain a public road, he is not guilty of obstructing justice, there being no provision of law for taking private property for this purpose and the payment of just compensation therefor. State v. New, 130 N.C. 731, 41 S.E. 1033 (1902).

**Obstruction a Nuisance.** — Unlawful obstruction of a highway is a public nuisance. Brooks v. Henrietta Mills Co., 182 N.C. 719, 110 S.E. 96 (1921).

Intentionally obstructing the flow of traffic constitutes an indictable nuisance, a misdemeanor, punishable by fine, or imprisonment, or both. State v. Fox, 262 N.C. 193, 136 S.E.2d 761 (1964).

**Highway Unknowingly Obstructed.** — When a mill company gratuitously maintained a ball ground on its premises for its employees, without direction or supervision, it was manifest that the relation of licensor and licensee without pecuniary compensation existed between them, and it was not liable for an injury caused by obstruction of an adjoining highway by a rope intended to exclude spectators who did not pay for admission, there being no evidence that it had actual or implied knowledge thereof. Brooks v. Henrietta Mills Co., 182 N.C. 719, 110 S.E. 96 (1921).

**Damages Allowed.** — Damages are allowable for the obstruction of a highway. Tate v. Seaboard Air Line Ry., 168 N.C. 523, 84 S.E. 808 (1915).

**Obstruction of Permissive Cartway.** — A way over the lands of another as an outlet to and from the lands of the one claiming it cannot be established by permissive user, but by possession adverse to the true owner; and a way of this character which has not been established by the public authorities or used and kept up by the public for a sufficient length of time does not fall within the meaning of this section so as to make its obstruction punishable. State v. Norris, 174 N.C. 808, 93 S.E. 950 (1917).

**Private Easement.** — A reservation by deed to the grantor of a restricted easement across the lands conveyed, without defining or locating it, and which has not since been located, the grantor and his family going across the lands conveyed whenever they choose, is sufficient proof of a public road so as to sustain an indictment under this section. State v. Haynie, 169 N.C. 277, 84 S.E. 385 (1915).

**Private Roadway.** — In a prosecution for unlawfully and willfully obstructing a public cartway, in the absence of evidence of dedication to the public, or evidence of an adverse continuous user by the prosecuting witness for the period required by law to give him an easement, defendant could not be guilty where the obstruction was on the part of the road where it crossed his land. State v. Lance, 175 N.C. 773, 94 S.E. 721 (1917).

**Maximum Penalty Held Constitutional.** — Where a defendant is convicted of obstructing a highway and of wanton injury to personal property by the same act, it is not in violation of the Constitution nor otherwise improper to sentence him to the maximum penalty for each offense. State v. Malpass, 189 N.C. 349, 127 S.E. 248 (1925).

**Public-Local Law Shortening Statute of Limitations Held Invalid.** — A public-local law which shortened the period for the running of the statute of limitations to a time already expired, depriving the owner of lands of his right to stop the public user of a private right-of-way thereover, and declaring the right-of-way a public one, was unconstitutional in taking the property of the owner without due process of law and in denying him the equal protection of the laws. State v. Haynie, 169 N.C. 277, 84 S.E. 385 (1915).

**Cited** in State v. Graham, 32 N.C. App. 601, 233 S.E.2d 615 (1977); Town of Winterville v. King, 60 N.C. App. 730, 299 S.E.2d 838 (1983).

## § 136-91. Placing glass, etc., or injurious obstructions in road.

(a) No person shall throw, place, or deposit any glass or other sharp or cutting substance or any injurious obstruction in or upon any highway or public vehicular area.

(b) As used in this section:

(1) "Highway" shall be defined as it is in G.S. 20-4.01; and

(2) "Public vehicular area" shall be defined as it is in G.S. 20-4.01.

(c) Any person violating the provisions of this section shall be guilty of a Class 3 misdemeanor. (1917, c. 140, ss. 18, 21; C.S., ss. 2599, 2619; 1971, c. 200; 1993, c. 539, s. 990; 1994, Ex. Sess., c. 24, s. 14(c); 2001-441, s. 3.)

### CASE NOTES

**Liability for Failure to Remove Glass, etc., Accidentally Deposited on Highway.** — Assuming that a deposit of glass on the highway by defendants was purely accidental, defendants nevertheless owed other motorists the common-law duty of due care to remove the glass and debris from the highway and to give reasonable warning of the peril until it was removed. Chandler v. Forsyth Royal Crown Bottling Co., 257 N.C. 245, 125 S.E.2d 584 (1962).

Readily removable objects carelessly left in the highway may render the person who left them there liable for negligence to the drivers of ordinary vehicles moving at a reasonable rate of speed. Chandler v. Forsyth Royal Crown Bottling Co., 257 N.C. 245, 125 S.E.2d 584 (1962).

## § 136-92. Obstructing highway drains prohibited.

It is unlawful to obstruct a drain along or leading from any public road in the State. A person who violates this section is responsible for an infraction. (1917, c. 253; C.S., s. 3791; 1993, c. 539, s. 991; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 163, s. 15.)

## § 136-93. Openings, structures, pipes, trees, and issuance of permits.

No opening or other interference whatsoever shall be made in any State road or highway other than streets not maintained by the Department of Transportation in cities and towns, nor shall any structure be placed thereon, nor shall any structure which has been placed thereon be changed or removed except in accordance with a written permit from the Department of Transportation or its duly authorized officers, who shall exercise complete and permanent control over such roads and highways. No State road or State highway, other than streets not maintained by the Department of Transportation in cities and towns, shall be dug up for laying or placing pipes, conduits, sewers, wires, railways, or other objects, and no tree or shrub in or on any State road or State highway shall be planted, trimmed, or removed, and no obstruction placed thereon, without a written permit as hereinbefore provided for, and then only in accordance with the regulations of said Department of Transportation or its duly authorized officers or employees; and the work shall be under the supervision and to the satisfaction of the Department of Transportation or its officers or employees, and the entire expense of replacing the highway in as good condition as before shall be paid by the persons, firms, or corporations to whom the permit is given, or by whom the work is done. The Department of Transportation, or its duly authorized officers, may, in its discretion, before granting a permit under the provisions of this section, require the applicant to file a satisfactory bond, payable to the State of North Carolina, in such an amount as may be deemed sufficient by the Department of Transportation or its duly authorized officers, conditioned upon the proper compliance with the requirements of this section by the person, firm, or corporation granted such permit. Any person making any opening in a State road or State highway, or placing any structure thereon, or changing or removing any structure thereon without obtaining a written permit as herein provided, or not in compliance with the terms of such permit, or otherwise violating the provisions of this section, shall be guilty of a Class 1 misdemeanor: Provided, this section shall not apply to railroad crossings. The railroads shall keep up said crossings as now provided by law. (1921, c. 2, s. 13; 1923, c. 160, s. 2; C.S., s. 3846(u); 1933, c. 172, s. 17; 1943, c. 410; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1993, c. 539, s. 992; 1994, Ex. Sess., c. 24, s. 14(c).)

**Legal Periodicals.** — For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

## CASE NOTES

**Statutory Obligation Department.** — This section and G.S. 160-54 (now repealed) and 136-66.1 indicate that the Highway Commission (now Department of Transportation) is under a statutory obligation with reference to the construction, maintenance and repair of all city streets, including culverts which support city streets, which constitute a part of the State highway system. Milner Hotels, Inc. v. City of Raleigh, 271 N.C. 224, 155 S.E.2d 543 (1967).

**Municipality May Not Contract to Take over Departments Responsibilities.** — This section and G.S. 160-54 (now repealed) and 136-66.1 do not authorize a municipality, in the absence of specific legislative authority, to contract to take over the responsibilities of the Highway Commission (now Department of Transportation) with reference to the construction, maintenance and repair of city streets and supporting culverts which constitute a part of the State highway system. Milner Hotels, Inc. v. City of Raleigh, 271 N.C. 224, 155 S.E.2d 543 (1967).

**Issuance of Sewer Construction Permits.** — The State Highway Commission (now Department of Transportation) or its duly authorized officers may give in writing a permit to an individual firm or corporation authorizing the holder of such permit to construct or install a sewer line within the right-of-way along any highway under the control of the Commission (now Department) provided the installation of such sewer line is made under the supervision and to the satisfaction of the Commission (now Department) or its officers or employees. Van Leuven v. Akers Motor Lines, 261 N.C. 539, 135 S.E.2d 640 (1964).

**Limited Liability of City When Street Becomes Part of State System.** — When a city street becomes a part of the State highway system, the Board of Transportation is responsible for its maintenance thereafter which includes the control of all signs and structures within the right-of-way. Therefore, in the absence of any control over a State highway within its border, a municipality has no liability for injuries resulting from a dangerous condition of such street unless it created or increased such condition. Shapiro v. Toyota Motor Co., 38 N.C. App. 658, 248 S.E.2d 868 (1978).

**Cited** in Taylor v. Town of Hertford, 253 N.C. 541, 117 S.E.2d 469 (1960).

## § 136-93.1. Express permit review program.

(a) Program Created. — The Department shall develop a fee-supported express permit review program in each highway division. The program is voluntary for permit applicants and applies to permits, approvals, or certifications that allow for a connection to the State highway system through the use of a driveway, street, signal, drainage, or any other encroachment.

(b) Implementation. — An individual highway division may opt out of the express permit review program created under this section if the highway division routinely reviews and issues special commercial permits within an average of 45 days. Any express permit review program created under this section shall be supported by the fees established pursuant to subsection (e) of this section.

(c) Procedure. — In reviewing a permit application under the express permit review program, the Department shall undergo the following steps:

(1) The Department shall, within three business days of receipt, determine whether an express permit review application is complete. If the Department determines the express permit review application is not complete, the Department shall return the express permit review application and all fees to the permit applicant to allow for a complete express permit review application to be resubmitted to the Department.

(2) If the Department determines the express permit review application is complete, the Department shall, within 45 days, issue or deny the permit based upon its review of the application. Failure of the Department to issue or deny the permit within 45 days is a denial of the express permit review application.

(d) Staffing. — In order to implement the express permit review program, the Department may utilize either of the following or a combination thereof:

(1) Existing Department staff and resources.

(2) Contracted engineering firms supporting each highway division to provide express permit reviews, comments, and recommendations for issuing express permits. If the Department utilizes contracted engineering firms to provide work under this section, any fees received by the Department pursuant to subsection (e) of this section shall be credited towards the cost of the Department utilizing these contracted engineering firms. Any additional costs associated with engaging the contracted engineering firm shall be agreed to by the permit applicant prior to incurring the costs and shall be paid by the permit applicant.

(e) Fees. — The Department may determine the fees for an express application review under the express review program conducted by highway division staff. Unless a contracted engineering firm is utilized, the maximum permit application fee to be charged under this section for an express review of a project application requiring all of the permits listed under subsection (a) of this section shall not exceed four thousand dollars ($4,000). Notwithstanding Chapter 150B of the General Statutes, the Department shall establish the procedure by which the amount of the fees under this subsection are established and applied for an express review program permitted by this section. The fee schedule established by the Department shall be applicable to all divisions participating in an express permit review program.

(f) Use of Fees. — All fees collected under this section shall be used to fund the cost of administering and implementing express permit review programs created under this section. These costs include the salaries of the program's staff and costs of contracted engineering firms.

(g) Reports. — No later than March 1 of each year, the Department shall report to the Fiscal Research Division and the Joint Legislative Transportation Oversight Committee on the express permitting review program. The report shall include the cost of administering the program in each division, the number of express permits issued, the turnaround time for permits, the amount of fees collected per division, and the method that divisions use to implement the program. (2008-176, s. 1.)

**Editor's Note.** — Session Laws 2008-176, s. 3, made this section effective August 4, 2008.

## § 136-94. Gates projecting over rights-of-way forbidden.

It shall be unlawful for any person, firm or corporation to erect, maintain or operate upon his own land, or the land of another, any farm gate or other gate which, when opened, will project over the right-of-way of any State highway.

Any person violating the provisions of this section shall be guilty of a Class 3 misdemeanor. (1927, c. 130; 1993, c. 539, s. 993; 1994, Ex. Sess., c. 24, s. 14(c).)

## § 136-95. Water must be diverted from public road by ditch or drain.

When any ditch or drain is cut in such a way as to turn water into any public road, the person cutting the ditch or drain shall be compelled to cut another ditch or drain as may be necessary to take the water from said road. (Code, s. 2036; Rev., s. 2697; C.S., s. 3790.)

## § 136-96. Road or street not used within 15 years after dedication deemed abandoned; declaration of withdrawal recorded; joint tenants or tenants in common; defunct corporations.

Every strip, piece, or parcel of land which shall have been at any time dedicated to public use as a road, highway, street, avenue, or for any other purpose whatsoever, by a deed, grant, map, plat, or other means, which shall not have been actually opened and used by the public within 15 years from and after the dedication thereof, shall be thereby conclusively presumed to have been abandoned by the public for the purposes for which same shall have been dedicated; and no person shall have any right, or cause of action thereafter, to enforce any public or private easement therein, except where such dedication was made less than 20 years prior to April 28, 1953, such right may be asserted within one year from and after April 28, 1953; provided, that no abandonment of any such public or private right or easement shall be presumed until the dedicator or some one or more of those claiming under him shall file and cause to be recorded in the register's office of the county where such land lies a declaration withdrawing such strip, piece or parcel of land from the public or private use to which it shall have theretofore been dedicated in the manner aforesaid; provided further, that where the fee simple title is vested in tenants in common or joint tenants of any land embraced within the boundaries of any such road, highway, street, avenue or other land dedicated for public purpose whatsoever, as described in this section, any one or more of such tenants, on his own or their behalf and on the behalf of the others of such tenants, may execute and cause to be registered in the office of the register of deeds of the county where such land is situated the declaration of withdrawal provided for in this section, and, under Chapter 46 of the General Statutes of North Carolina, entitled "Partition," and Chapter 1, Article 29A of the General Statutes of North Carolina, known as the "Judicial Sales Act," and on petition of any one or more of such tenants such land thereafter may be partitioned by sale only as between or among such tenants, and irrespective of who may be in actual possession of such land, provided further, that in such partition proceedings any such tenants in common or joint tenants may object to such withdrawal certificate and the court shall thereupon order the same cancelled of record; that where any corporation has dedicated any strip, piece or parcel of land in the manner herein set out, and said dedicating corporation is not now in existence, it shall be conclusively presumed that the said corporation has no further right, title or interest in said strip, piece, or parcel of land, regardless of the provisions of conveyances from said corporation, or those holding under said corporation, retaining title and interest in said strip, piece, or parcel of land so dedicated; the right, title and interest in said strip, piece, or parcel of land shall be conclusively presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent thereto, subject to the provisions set out herein before in this section.

The provisions of this section shall have no application in any case where the continued use of any strip of land dedicated for street or highway purposes shall be necessary to afford convenient ingress or egress to any lot or parcel of land sold and conveyed by the dedicator of such street or highway. This section shall apply to dedications made after as well as before April 28, 1953.

The provisions of this section shall not apply when the public dedication is part of a future street shown on the street plan adopted pursuant to G.S. 136-66.2. Upon request, a city shall adopt a resolution indicating that the dedication described in the proposed declaration of withdrawal is or is not part of the street plan adopted under G.S. 136-66.2. This resolution shall be attached to the declaration of withdrawal and shall be registered in the office of the register of deeds of the county where the land is situated. (1921, c. 174; C.S., ss. 3846(rr), 3846(ss), 3846(tt); 1939, c. 406; 1953, c. 1091; 1957, c. 517; 1987, c. 428, s. 1.)

**Local Modification.** — Town of Fuquay-Varina: 1995 (Reg. Sess., 1996), c. 613, s. 1.

**Legal Periodicals.** — For a note discussing the disposition of property within the boundaries of dedicated streets when use of the street is discontinued, see 45 N.C.L. Rev. 564 (1967).

## CASE NOTES

**Constitutionality.** — The right of those purchasing lots in a subdivision with reference to a plat to assert easements in the streets shown by the plat is dependent upon the doctrine of equitable estoppel, and providing for the termination of their easements by revocation of the dedication when they have failed to assert same within two years from the effective date of the statute affords them a reasonable time in which to assert their rights, and therefore does not deprive them thereof without due process of law. Sheets v. Walsh, 217 N.C. 32, 6 S.E.2d 817 (1940).

**This section provides a means by which the owners may withdraw their offer of dedication,** and after withdrawal it protects the landowners against the right of the public to insist on the dedication. Osborne v. Town of N. Wilkesboro, 280 N.C. 696, 187 S.E.2d 102 (1972).

**Where Municipality Has Failed To Improve or Open Street to Public Use.** — If the municipality for a period of 15 years or more fails to improve and open to public use a street or alley shown on the developers' map, the owner may file and record a declaration withdrawing the street and alley from dedication. By failure to develop or use, the municipality's right to insist on the dedication is lost. Osborne v. Town of N. Wilkesboro, 280 N.C. 696, 187 S.E.2d 102 (1972).

Where land developers in 1900 registered a map of property in a municipality showing a street or alley on property now owned by plaintiffs, but the street and alley have never been opened or used in any way as a public street since the map was filed in 1900, plaintiffs had a right, as against the municipality, to withdraw the street and alley from dedication in 1969 under the provisions of this section so as to defeat the right of the municipality to thereafter open the street and alley to public use. Osborne v. Town of N. Wilkesboro, 280 N.C. 696, 187 S.E.2d 102 (1972).

**Who May File for Withdrawal.** — This section allows withdrawal of dedication of land if the property in question is not actually opened and used by the public within 15 years after the dedication. The filing of such withdrawal, however, must ordinarily be done by the dedicator or some one or more of those claiming under him, rather than the owner of property adjacent to the dedicated land. Town of Atlantic Beach v. Tradewinds Campground, Inc., 97 N.C. App. 655, 389 S.E.2d 276, cert. denied, 326 N.C. 805, 393 S.E.2d 906 (1990).

**Withdrawal of Street Accepted and Maintained by Municipality.** — Where a municipality opens, improves and maintains a street dedicated to the public by the registration of a map or plat showing such street, there is an acceptance of the dedication of the street by the municipality, and where the dedication of a street has become complete by the acceptance thereof by a municipality, and the street is opened and maintained by the municipality and used by the public, the right to revoke the dedication is gone, except with the consent of the municipality acting in behalf of the public and the consent of those persons, firms or corporations having vested rights in the dedication. Steadman v. Town of Pinetops, 251 N.C. 509, 112 S.E.2d 102 (1960).

**Use by Public Prevents Withdrawal.** — The dedication of a street may not be withdrawn if the dedication has been accepted and the street or any part of it is actually opened and used by the public. Russell v. Coggin, 232 N.C. 674, 62 S.E.2d 70 (1950); Janicki v. Lorek, 255 N.C. 53, 120 S.E.2d 413 (1961).

Where a street in a subdivision is dedicated to the purchasers of lots and to the public by the sale of lots with reference to a plat of the subdivision showing the street, and the street is actually opened and used by the public even for a part of the width shown by the plat, such use precludes the owner from revoking the dedication under this section, even as to the portion of the width of the street not used and maintained by the municipality. Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach, 216 N.C. 778, 7 S.E.2d 13 (1940); Food Town Stores, Inc. v. City of Salisbury, 300 N.C. 21, 265 S.E.2d 123 (1980).

Assuming, arguendo, that this section was applicable, defendant could not withdraw areas designated by subdivision plat as "Park Property" under this section where there was evidence to support the court's finding that the subject area had been used for recreational purposes within 15 years from its dedication and thus had not been abandoned for purposes of the statute. Stines v. Willyng, Inc., 81 N.C. App. 98, 344 S.E.2d 546 (1986).

**Rights of Purchasers of Lots Sold by Reference to Map or Plat.** — Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to the public use, and the purchaser of a lot or lots acquires the right to have all and each of the streets kept open; and it makes no difference whether the streets be in fact opened or accepted by the governing boards of towns or cities if they lie within municipal corporations. There is a dedication, and if they are not actually opened at the time of the sale they must be at all times free to be opened as occasion may require. Steadman v. Town of Pinetops, 251 N.C. 509, 112 S.E.2d 102 (1960); Janicki v. Lorek, 255 N.C. 53, 120 S.E.2d 413 (1961).

Where lots are sold and conveyed by reference to a map or plat, it makes no difference whether the streets shown on the map or plat be in fact opened or accepted by the public. Janicki v. Lorek, 255 N.C. 53, 120 S.E.2d 413 (1961).

**Section Not Applicable Where Road Is Way of Necessity.** — Where the jury found that continued use of the street was necessary to afford convenient ingress, egress and regress to the lot owned by plaintiffs, the provisions of this section that a street not used within 20 years after dedication shall be deemed abandoned were not applicable. Evans v. Horne, 226 N.C. 581, 39 S.E.2d 612 (1946); Steadman v. Town of Pinetops, 251 N.C. 509, 112 S.E.2d 102 (1960).

Where land was dedicated for street and highway purposes and such street or highway is necessary to afford convenient ingress and egress to any parcel of land sold and conveyed by the dedicator of such street or highway prior to March 8, 1921, the dedication may not be withdrawn under the provisions of this section. Russell v. Coggin, 232 N.C. 674, 62 S.E.2d 70 (1950).

If a street is necessary to afford convenient access to a portion of a park not conveniently reached by other public streets, or the other public streets, due to their width, the amount of traffic or some like consideration, do not provide convenient access to the park, then the street may not be withdrawn from public use. Andrews v. Country Club Hills, Inc., 18 N.C. App. 6, 195 S.E.2d 584 (1973).

When it is established that a lot in a subdivision abuts the street sought to be withdrawn, it will be conclusively presumed that the street is necessary to afford convenient ingress or egress to or from the lot, and, in the absence of consent by the lot owner to the withdrawal, G.S. 136-96 has no application and the dedication may not be withdrawn irrespective of lapse of time or whether or not the street has been opened and used. Stephens v. Dortch, 147 N.C. App. 429, 556 S.E.2d 14, 2001 N.C. App. LEXIS 1186 (2001).

**"Continued Use of" Construed.** — The words "continued use of" in the statutory exception to the application of this section have been construed to mean the continued right to use. Andrews v. Country Club Hills, Inc., 18 N.C. App. 6, 195 S.E.2d 584 (1973).

**Continued Right to Use Not Contingent on Prior Use.** — The continued right to use in the statutory exception to the application of this section is not contingent on some prior use but is merely a continuance of a right that existed at the time of dedication. Andrews v. Country Club Hills, Inc., 18 N.C. App. 6, 195 S.E.2d 584 (1973).

**But Must Be Necessary to Afford Convenient Ingress or Egress.** — The operation of the statutory exception to the application of this section is predicated upon a determination of whether the continued right to use the dedicated street "shall" be necessary to afford convenient ingress or egress to any lot or parcel of land conveyed by the dedicator. Andrews v. Country Club Hills, Inc., 18 N.C. App. 6, 195 S.E.2d 584 (1973).

**Question Is Whether Street Is Reasonably Necessary.** — Under certain circumstances a seller-dedicator or other lot owners may abandon and close a street or a portion of a street. As to a purchaser, opposing such closing, the question is whether the street is reasonably necessary for the use of his lot. Wofford v. North Carolina State Hwy. Comm'n, 263 N.C. 677, 140 S.E.2d 376, cert. denied, 382 U.S. 822, 86 S. Ct. 50, 15 L. Ed. 2d 67 (1965).

**Owners Are Only Parties Entitled to Withdraw Streets From Dedication.** — Where individual owners of lands subdivide and sell same by block and lot number with reference to a plat showing streets therein, they retain the fee in the streets subject to the easement thus dedicated to the public in general and to the private owners of adjacent lots in particular, and are the only parties entitled to withdraw the streets from dedication when the streets have not been used for 20 years subsequent to such dedication and are not necessary for ingress and egress to any of the lots sold. Russell v. Coggin, 232 N.C. 674, 62 S.E.2d 70 (1950).

It was error to find that landowners owned an unused part of a public street because, inter alia, the dedication of that part of the street was not effectively withdrawn, pursuant to G.S. 136-96, by the purported owner of that part of the street because (1) that part of the street was not subject to withdrawal since that part of the street was but an unopened part of a public street which was otherwise opened and used by the public, and, (2) when the purported owner filed a document purporting to withdraw that part of the street from dedication, the purported owner had previously transferred that property to the landowners by quitclaim deed, so the purported owner no longer had any authority to withdraw that part of the street from dedication. Town of Oriental v. Henry, — N.C. App. —, 678 S.E.2d 703, 2009 N.C. App. LEXIS 1057 (July 7, 2009).

**Except Where Street Was Dedicated by Corporation Which Has Become Nonexistent.** — The only instance in which the adjacent owners of lots in a subdivision may be deemed to own any right, title or interest in a dedicated street, except an easement therein, is where the street was dedicated by a corporation which has become nonexistent. Russell v. Coggin, 232 N.C. 674, 62 S.E.2d 70 (1950); Owens v. Taylor, 2 N.C. App. 178, 162 S.E.2d 576 (1968).

Where a corporation, which had dedicated streets to the public by the registration of a map showing such streets, ceases to exist, the right to revoke such dedication is vested in the owner of the land abutting the streets, and such right is not affected by the fact that a receivership of the corporation is still extant. Steadman v. Town of Pinetops, 251 N.C. 509, 112 S.E.2d 102 (1960).

The streets in question were dedicated to the public more than 20 years prior to the institution of this action by the sale of lots in a subdivision with reference to a plat showing the streets. The streets were never actually opened or used at any time, and no person asserted any public or private easement therein within two years from the passage of this Article, or at any other time. The streets in question are not necessary to afford convenient ingress or egress to any other lots in the subdivision. The corporation making the dedication no longer exists. Plaintiffs, claimants under dedicator, filed and recorded a declaration withdrawing said streets from the dedication. It was held that the revocation of the dedication terminated the easement of the public and of the purchasers of lots in the subdivision, and therefore plaintiffs own the fee in the said land and can convey same free of the easements. Sheets v. Walsh, 217 N.C. 32, 6 S.E.2d 817 (1940).

Where predecessors in title filed a declaration of withdrawal, they lost whatever sole rights to a twenty foot strip of land they may have had and became joint owners with plaintiff. Rawls v. Williford, 121 N.C. App. 762, 468 S.E.2d 460 (1996).

**Adjacent Lot Owner Lacks Standing to Withdraw Dedication.** — Where the original developer of a subdivision (an individual rather than a corporation) dedicated the property in question for public use when he recorded plats of the area, only he or one claiming an interest in the streets through him had standing to withdraw dedication. An adjacent lot owner lacked such standing, and the trial court properly declared his attempted withdrawal of dedication void. Town of Atlantic Beach v. Tradewinds Campground, Inc., 97 N.C. App. 655, 389 S.E.2d 276 (1990).

**Effect of Withdrawal.** — The prospective dedication of streets, parks, etc., in the sale of a development of lands is not binding upon a city until acceptance, and neither the city nor the general public can acquire any rights thereunder against the owner of the land or purchasers from him where the offer of dedication has been withdrawn before acceptance, under the provisions of this section. Irwin v. City of Charlotte, 193 N.C. 109, 136 S.E. 368 (1927); Steadman v. Town of Pinetops, 251 N.C. 509, 112 S.E.2d 102 (1960).

Where an easement was granted both to the public and to the owners of specified property, extinguishing the public easement due to the failure to open the easement for public use, did not extinguish the easement granted to the specified property owners. Stephens v. Dortch, 148 N.C. App. 509, 558 S.E.2d 889, 2002 N.C. App. LEXIS 29 (2002), cert. denied, 355 N.C. 353, 562 S.E.2d 430 (2002).

Where the owners asserted that the street was not part of a dedication of a public road into which the street branched, the appellate court agreed; to the extent any document may have constituted an offer or proposal for dedication of the street as part of the public road, that offer or proposal was withdrawn under G.S. 136-96, as the withdrawal of street dedication submitted by the family members of those who dedicated the public road and who previously owned the owners' property stated that the street was a 60-foot private right-of-way. Wright v. Town of Matthews, 177 N.C. App. 1, 627 S.E.2d 650, 2006 N.C. App. LEXIS 702 (2006).

**Withdrawal in Conformity with Section Terminates Easement.** — Where land impliedly dedicated has not been actually opened or used for 20 years, and no person has asserted public or private easement thereon within the period fixed by this section or at any other time, and the land is not necessary for ingress, egress or regress to lots sold, effect is given by this section to the filing of a declaration of withdrawal of the land from dedication on the part of those holding under the original owner, and the dedication of the land is conclusively presumed to have been abandoned, and no claim of easement public or private may thereafter be enforced. Foster v. Atwater, 226 N.C. 472, 38 S.E.2d 316 (1946).

Where revocation of a dedication is made in the manner provided in this section, streets and alleys theretofore dedicated become private property and are not subject to any easement by reason of the dedication except insofar as their use may be necessary to afford convenient ingress to and egress from any lot previously sold and conveyed by the dedicator. Hine v. Blumenthal, 239 N.C. 537, 80 S.E.2d 458 (1954).

**When Dedication Becomes Irrevocable.** — As long as a landowner has notice of the plat through his deed, the plat does not have to be recorded in order to effect a right of way dedication; once a right of way dedication has taken place and becomes open to the public and at least part of the area is maintained, the period of use becomes immaterial and the dedication becomes irrevocable. DOT v. Haggerty, 127 N.C.App. 499, 492 S.E.2d 770 (1997).

**Declaration of Withdrawal Must Be Filed.** — When certain streets and alleys have been dedicated to the public by the registration of a plat, it is necessary to a withdrawal of the dedication under this section, among other requirements, that the declaration of such withdrawal should be recorded; and when the facts agreed in an action involving the validity of an alleged withdrawal fail to disclose whether the declaration of the withdrawal had been recorded and to show plaintiffs to be claimants of title under dedicators who filed the plats, they are insufficient to enable the court to determine the question. Sheets v. Walsh, 215 N.C. 711, 2 S.E.2d 861 (1939).

Land may not be withdrawn from dedication until the fee owners record in the register's office a declaration withdrawing such land from the use to which it has been dedicated. Food Town Stores, Inc. v. City of Salisbury, 300 N.C. 21, 265 S.E.2d 123 (1980).

**Admissibility of Record of Withdrawal in Evidence.** — In an action for damages for trespass and to enjoin further trespass upon an easement claimed by plaintiffs by dedication, the burden is on plaintiffs to establish the property right asserted, and defendants are entitled to introduce the record of withdrawal of dedication executed pursuant to this section as a release or extinguishment by estoppel of record from sources to which plaintiffs were a privy, notwithstanding the absence of allegation in their answer of such withdrawal from dedication. Pritchard v. Fields, 228 N.C. 441, 45 S.E.2d 575 (1947).

**Before an abandonment can occur under this section** the dedicator, or someone claiming under him, (unless the dedicator was a corporation that has ceased to exist), must file and cause to be recorded a declaration withdrawing such strip or parcel of land. Rudisill v. Icenhour, 92 N.C. App. 741, 375 S.E.2d 682 (1989).

**Cited** in Lee v. Walker, 234 N.C. 687, 68 S.E.2d 664 (1951); Todd v. White, 246 N.C. 59, 97 S.E.2d 439 (1957); City of Salisbury v. Barnhardt, 249 N.C. 549, 107 S.E.2d 297

(1959); Emanuelson v. Gibbs, 49 N.C. App. 417, 271 S.E.2d 557 (1980); Beechridge Dev. Co. v. Dahners, 132 N.C. App. 181, 511 S.E.2d 18 (1999); DOT v. Blue, 147 N.C. App. 596, 556 S.E.2d 609, 2001 N.C. App. LEXIS 1235 (2001); Nelms v. Davis, 179 N.C. App. 206, 632 S.E.2d 823, 2006 N.C. App. LEXIS 1826 (2006).

## § 136-96.1. Special proceeding to declare a right-of-way dedicated to public use.

(a) A special proceeding under Article 3, Chapter 1 of the General Statutes may be brought to declare a right-of-way dedicated to public use if:

(1) The landowners of tracts constituting two-thirds of the road frontage of the land abutting the right-of-way in question join in the action;
(2) The right-of-way is depicted on an unrecorded map, plat, or survey;
(3) The right-of-way has been actually open and used by the public; and
(4) Recorded deeds for at least three separate parcels abutting the right-of-way recite the existence of the right-of-way as a named street or road.

(b) In a special proceeding brought pursuant to this section, the clerk of court shall issue an order declaring the right-of-way to be dedicated to public use upon finding that the provisions of subsection (a) of this section have been proven.

(c) Any right-of-way found to be dedicated to public use pursuant to this section that is proposed for addition to the State highway system shall meet the requirements of G.S. 136-102.6.

(d) This section shall not apply to any right-of-way established by adverse possession or by cartway proceeding. (2001-501, s. 1.)

## § 136-97. Responsibility of counties for upkeep, etc., terminated.

(a) The board of county commissioners or other road-governing bodies of the various counties in the State are hereby relieved of all responsibility or liability for the upkeep or maintenance of any of the roads or bridges thereon constituting the State highway system, after the same shall have been taken over, and the control thereof assumed by the Department of Transportation.

(b) The Department of Transportation, as part of maintaining the highways, bridges, and watercourses of this State, may haul all debris removed from on, under, or around a bridge to an appropriate disposal site for solid waste, where the debris shall be disposed of in accordance with law. (1921, c. 2, s. 50; C.S., s. 3846(dd); 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, ss. 5, 20; 1977, c. 464, s. 7.1; 1989, c. 752, s. 102; 1989 (Reg. Sess., 1990), c. 1066, s. 139; 1991, c. 689, s. 209.)

### CASE NOTES

**Liability for Failure to Remove Obstruction After Notice.** — In an action to recover for injuries sustained when the car in which plaintiffs were riding struck a limb lying on a dirt highway, it was shown that defendant was a divisional engineer of the State Highway Commission (now Department of Transportation), that the highway in question was embraced within his division, that defendant was given notice that the limb was lying across the highway and that the accident occurred some six hours after such notice. It was held that defendant's motion to nonsuit was properly allowed, since, if defendant's failure to remove the limb was a breach of an official or governmental duty involving the exercise of discretion, there was neither allegation nor evidence of corruption or malice, and if such duty was a ministerial duty it was of a public nature imposed entirely for the public benefit, and there was neither allegation nor proof that this section provided for personal liability. Wilkins v. Burton, 220 N.C. 13, 16 S.E.2d 406 (1941).

## § 136-98. Counties authorized to participate in costs of road construction and maintenance, participation is voluntary.

(a) Repealed by Session Laws 2007-428, s. 4, effective August 23, 2007.

(b) Nothing in this Article prohibits counties from establishing service districts for road maintenance under Part 1, Article 16 of Chapter 153A of the General Statutes.

(c) A county is authorized to participate in the cost of rights-of-way, construction, reconstruction, improvement, or maintenance of a road on the State highway system under agreement with the Department of Transportation. County participation in improvements to the State highway system is voluntary. The Department shall not transfer any of its responsibilities to counties without specific statutory authority. (1931, c. 145, s. 35; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1995, c. 434, s. 2; 2007-428, s. 4; 2008-180, s. 7.)

**Editor's Note.** — Part 1, Article 16 of Chapter 153A, referred to in the section above, is codified as 153A-274 et seq.

**Effect of Amendments.** — Session Laws 2008-180, s. 7, effective August 4, 2008, added "participation is voluntary" in the section heading; and added the last two sentences in subsection (c).

## §§ 136-99 through 136-101: Repealed by Session Laws 1971, c. 1106.

## § 136-102. Billboard obstructing view at entrance to school, church or public institution on public highway.

(a) It shall be unlawful for any person, firm, or corporation to construct or maintain outside the limits of any city or town in this State any billboard larger than six square feet at or nearer than 200 feet to the point where any walk or drive from any school, church, or public institution located along any highway enters such highway except under the following conditions:

(1) Such billboard is attached to the side of a building or buildings which are or may be erected within 200 feet of any such walk or drive and the attachment thereto causes no additional obstruction of view.

(2) A building or other structure is located so as to obstruct the view between such walk or drive and such billboard.

(3) Such billboard is located on the opposite side of the highway from the entrance to said walk or drive.

(b) Any person, firm, or corporation convicted of violating the provisions of this section shall be guilty of a Class 3 misdemeanor and punished only by a fine of ten dollars ($10.00), and each day that such violation continues shall be considered a separate offense. (1947, c. 304, ss. 1, 2; 1993, c. 539, s. 994; 1994, Ex. Sess., c. 24, s. 14(c).)

## § 136-102.1. Blue Star Memorial and American Ex-Prisoners of War Highway.

All of the United States Highway #70, wherever located in North Carolina shall be known and designated as the "Blue Star Memorial and American Ex-Prisoners of War Highway." The designation shall pay tribute to the many North Carolinians killed during World War II and to all North Carolina's ex-prisoners of war. (1963, c. 140; 2001-196, s. 1.)

**Editor's Note.** — The preamble to Session Laws 2001-196, s. 1, reads as follows: "Whereas, many patriotic North Carolina citizens have served meritoriously in the armed forces of the United States of America in conflicts necessary to preserve the liberty and independence of this nation and to promote and project the democratic, freedom-loving values championed by this country; and

"Whereas, some of these North Carolina soldiers suffered wounds, often with imminent danger to their lives and with grievous pain, while engaged in combat with and being held prisoner by the enemy; and

"Whereas, in many cases, these soldiers continued heroic determination and effectiveness, while ignoring their intense physical pain and the constant threat to their lives; they staunchly refused to divulge information to aid the enemy; and

"Whereas, the United States of America reserves a special combat decoration for these held prisoners of war, The Prisoner of War Medal; and

"Whereas, many ex-prisoners of war have been awarded The Prisoner of War Medal for their sacrifice in service to America, their fellow citizens, their combat unit and their comrades, and in recognition of their personal suffering and their fierce determination never to capitulate; and

"Whereas, North Carolina ex-prisoners of war should be remembered across this great State for their personal endurance without food, without heat, without the essentials of health, and without communication; and

"Whereas, these courageous soldiers, who suffered great stress and hardship to their minds and bodies while rendering heroic service to their country, should also be specially honored for their patriotic valor in combat; and

"Whereas, other states along United States Highway 70 have designated the highway within their borders as the 'American Ex-Prisoners of War Highway'; and

"Whereas, currently, United States Highway 70 within the borders of North Carolina is designated as the 'Blue Star Memorial Highway' which pays tribute to those killed during World War II; and

"Whereas, it is appropriate that this legislative body also recognize with the most profound gratitude the heroic, patriotic service of all North Carolina ex-prisoners of war across this great State; Now, therefore,"

Session Laws 2001-196, s. 2, provides: "The Department of Transportation shall, with the assistance of the Division of Veterans Affairs, design and place appropriate signage consistent with State and federal regulations near U.S. Highway 70 within the borders of North Carolina implementing Section 1 of this act."

## § 136-102.2. Authorization required for test drilling or boring upon right-of-way; filing record of results with Department of Transportation.

No person, firm or corporation shall make any test drilling or boring upon the right-of-way of any transportation system, under the jurisdiction of the Department of Transportation, until written authorization has been obtained from the owner or the person in charge of the land on which the highway easement is located. A complete record showing the results of the test drilling or boring shall be filed forthwith with the chairman [Secretary] of the Department of Transportation and shall be a public record. This section shall not apply to the Department of Transportation making test drilling or boring for highway purposes only. (1967, c. 923, s. 1; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 2009-266, s. 25.)

**Effect of Amendments.** — Session Laws 2009-266, s. 25, effective August 1, 2009, substituted "transportation system" for "road or highway" in the first sentence.

## § 136-102.3. Filing record of results of test drilling or boring with Secretary of Administration and Secretary of Environment and Natural Resources.

Any person, firm or corporation making any test drilling or boring upon any public land, owned or controlled by the State of North Carolina[,] shall, forthwith after completion, file a complete record of the results of the test drilling or boring with the Secretary of Administration and with the Secretary of Environment and Natural Resources, of each test hole bored or drilled. Such records filed shall become a matter of public record. Provided, that after exploratory drilling and boring has been completed, and a lease or contract has been executed for operation, production or development of the area, the results of test drillings or borings made incidental to the operation, production or development of the area under lease or contract shall not be subject to the provisions of G.S. 136-102.2 to 136-102.4 unless otherwise provided in such lease or contract. (1967, c. 923, s. 2; 1973, c. 1262, s. 86; 1975, c. 879, s. 46; 1977, c. 771, s. 4; 1989, c. 727, s. 218(90); 1997-443, s. 11A.119(a).)

## § 136-102.4. Penalty for violation of §§ 136-102.2 and 136-102.3.

Violation of G.S. 136-102.2 and 136-102.3 shall be a Class 1 misdemeanor. (1967, c. 923, s. 3; 1993, c. 539, s. 995; 1994, Ex. Sess., c. 24, s. 14(c).)

## § 136-102.5. Signs on fishing bridges.

When requested to do so by any county or municipality that has enacted an ordinance under G.S. 153-9(66) and 160-200(47) regulating or prohibiting fishing on any bridge of the North Carolina State highway system, the Department of Transportation shall erect signs on such bridges indicating the prohibition or regulation of the ordinance enacted under G.S. 153-9(66) and 160-200(47). (1971, c. 690, s. 5; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

**Editor's Note.** — Section 153-9(66), referred to in this section, was repealed by Session Laws 1973, c. 822. Section 160-200, also referred to in this section, was repealed by Session Laws 1971, c. 698, s. 2. For present statutory provisions regulating fishing from bridges, see G.S. 153A-242 and 160A-302.1.

## § 136-102.6. Compliance of subdivision streets with minimum standards of the Board of Transportation required of developers.

(a) The owner of a tract or parcel of land which is subdivided from and after October 1, 1975, into two or more lots, building sites, or other divisions for sale or building development for residential purposes, where such subdivision includes a new street or the changing of an existing street, shall record a map or plat of the subdivision with the register of deeds of the county in which the land is located. The map or plat shall be recorded prior to any conveyance of a portion of said land, by reference to said map or plat.

(b) The right-of-way of any new street or change in an existing street shall be delineated upon the map or plat with particularity and such streets shall be designated to be either public or private. Any street designated on the plat or map as public shall be conclusively presumed to be an offer of dedication to the public of such street.

(c) The right-of-way and design of streets designated as public shall be in accordance with the minimum right-of-way and construction standards established by the Board of Transportation for acceptance on the State highway system. If a municipal or county subdivision control ordinance is in effect in the area proposed for subdivision, the map or plat required by this section shall not be recorded by the register of deeds until after it has received final plat approval by the municipality or county, and until after it has received a certificate of approval by the Division of Highways as herein provided as to those streets regulated in subsection (g). The certificate of approval may be issued by a district engineer of the Division of Highways of the Department of Transportation.

(d) The right-of-way and construction plans for such public streets in residential subdivisions, including plans for street drainage, shall be submitted to the Division of Highways for review and approval, prior to the recording of the subdivision plat in the office of the register of deeds. The plat or map required by this section shall not be recorded by the register of deeds without a certification pursuant to G.S. 47-30.2 and, if determined to be necessary by the Review Officer, a certificate of approval by the Division of Highways of the plans for the public street as being in accordance with the minimum standards of the Board of Transportation for acceptance of the subdivision street on the State highway system for maintenance. The Review Officer shall not certify a map or plat subject to this section unless the new streets or changes in existing streets are designated either public or private. The certificate of approval shall not be deemed an acceptance of the dedication of the streets on the subdivision plat or map. Final acceptance by the Division of Highways of the public streets and placing them on the State highway system for maintenance shall be conclusive proof that the streets have been constructed according to the minimum standards of the Board of Transportation.

(e) No person or firm shall place or erect any utility in, over, or upon the existing or proposed right-of-way of any street in a subdivision to which this section applies, except in accordance with the Division of Highway's policies and procedures for accommodating utilities on highway rights-of-way, until the Division of Highways has given written approval of the location of such utilities. Written approval may be in the form of exchange of correspondence until such times as it is requested to add the street or streets to the State system, at which time an encroachment agreement furnished by the Division of Highways must be executed between the owner of the utility and the Division of Highways. The right of any utility placed or located on a proposed or existing subdivision public street right-of-way shall be subordinate to the street right-of-way, and the utility shall be subject to regulation by the Department of Transportation. Utilities are defined as electric power, telephone, television, telegraph, water, sewage, gas, oil, petroleum products, steam, chemicals, drainage, irrigation, and similar lines. Any utility installed in a subdivision street not in accordance with the Division of Highways accommodation policy, and without prior approval by the Division of Highways, shall be removed or relocated at no expense to the Division of Highways.

(f) Prior to entering any agreement or any conveyance with any prospective buyer, the developer and seller shall prepare and sign, and the buyer of the subject real estate shall receive and sign an acknowledgment of receipt of a separate instrument known as the subdivision streets disclosure statement (hereinafter referred to as disclosure statement). Said disclosure statement shall fully and completely disclose the status (whether public or private) of the street upon which the house or lot fronts. If the street is designated by the developer and seller as a public street, the developer and seller shall certify that the right-of-way and design of the street has been approved by the Division of Highways, and that the street has been or will be constructed by the developer and seller in accordance with the standards for subdivision streets adopted by the Board of Transportation for acceptance on the highway system. If the street is designated by the developer and seller as a private street, the developer and seller shall include in the disclosure statement an explanation of the consequences and responsibility as to maintenance of a private street, and shall fully and accurately disclose the party or parties upon whom responsibility for construction and maintenance of such street or streets shall rest, and shall further disclose that the street or streets will not be constructed to minimum standards, sufficient to allow their inclusion on the State highway system for maintenance. The disclosure statement shall contain a duplicate original which shall be given to the buyer. Written acknowledgment of receipt of the disclosure statement by the buyer shall be conclusive proof of the delivery thereof.

(g) The provisions of this section shall apply to all subdivisions located outside municipal corporate limits. As to subdivisions inside municipalities, this section shall apply to all proposed streets or changes in existing streets on the State highway system as shown on the comprehensive plan for the future development of the street system made pursuant to G.S. 136-66.2, and in effect at the date of approval of the map or plat.

(h) The provisions of this section shall not apply to any subdivision that consists only of lots located on Lakes Hickory, Norman, Mountain Island and Wylie which are lakes formed by the Catawba River which lots are leased upon October 1, 1975. No roads in any such subdivision shall be added to the State maintained road system without first having been brought up to standards established by the Board of Transportation for inclusion of roads in the system, without expense to the State. Prior to entering any agreement or any conveyance with any prospective buyer of a lot in any such subdivision, the seller shall prepare and sign, and the buyer shall receive and sign an acknowledgment of receipt of a statement fully and completely disclosing the status of and the responsibility for construction and maintenance of the road upon which such lot is located.

(i) The purpose of this section is to insure that new subdivision streets described herein to be dedicated to the public will comply with the State standards for placing subdivision streets on the State highway system for maintenance, or that full and accurate disclosure of the responsibility for construction and maintenance of private streets be made. This section shall be construed and applied in a manner which shall not inhibit the ability of public utilities to satisfy service requirements of subdivisions to which this section applies.

(j) The Division of Highways and district engineers of the Division of Highways of the Department of Transportation shall issue a certificate of approval for any subdivision affected by a transportation corridor official map established by the Board of Transportation only if the subdivision conforms to Article 2E of this Chapter or conforms to any variance issued in accordance with that Article.

(k) A willful violation of any of the provisions of this section shall be a Class 1 misdemeanor. (1975, c. 488, s. 1; 1977, c. 464, ss. 7.1, 8; 1987, c. 747, s. 21; 1993, c. 539, s. 996; 1994, Ex. Sess., c. 24, s. 14(c); 1997-309, s. 4; 1998-184, s. 3.)

**Cross References.** — As to subdivision regulation in counties, see G.S. 153A-330 et seq. As to subdivision regulation in cities, see G.S. 160A-371.

**Editor's Note.** — Session Laws 1987, c. 747, which amended this section, provided in s. 25 that as used in the act, the word "municipality" means a "city" as defined by G.S. 160A-1.

Session Laws 2007-440, s. 1, provides: "Notwithstanding the provisions of G.S. 136-102.6(c), (d), and (i), with respect to a subdivision plat for land located within the extraterritorial planning jurisdiction of any municipality having a population of at least 500,000, if said plat includes one or more streets approved for construction by the municipality as meeting the public street standards of the municipality prior to June 1, 2007, and said plat has not received a certificate of approval from the Division of Highways:

"(1) The right-of-way and design of any street designated as public on said plat and approved for construction by the municipality prior to June 1, 2007, need not be in accordance with the minimum right-of-way and construction standards established by the Board of Transportation for acceptance on the State highway system.

"(2) Said subdivision plat shall be recorded by the register of deeds without a certificate of approval by the Division of Highways if the final plat has been approved by the municipality.

"(3) If and to the extent that any street designated as public on said plat meets the applicable public street standards of such municipality, said street shall be exempt from any ordinance requirement that the street also meet the standards of the North Carolina Department of Transportation and may be given final plat approval by the municipality."

Session Laws 2007-440, s. 2, provides: "To the extent that any plats are recorded pursuant to this act, the disclosure statement required by G.S. 136-102.6(f) shall fully and completely disclose that any street designated as public on said plats has not been approved by and will not be accepted for maintenance by the Division of Highways and shall inform the buyer that the municipality cannot and will not accept the street until it comes within the corporate limits of the municipality through annexation and shall also disclose the arrangements that have been made to ensure the maintenance of the street prior to acceptance by the municipality."

### CASE NOTES

**Cited** in DOT v. Haggerty, 127 N.C.App. 499, 492 S.E.2d 770 (1997).

### OPINIONS OF ATTORNEY GENERAL

**The section does not apply to subdivisions which were platted and recorded prior to October 1, 1975,** the effective date of the section. This section is not applicable to the sale of a one-acre building site as a separate transaction from a 100-acre farm tract unless it involves the laying out or the dedication of a new street or the changing of an existing street. Therefore, if the subdivision only contains private streets, the register of deeds may record the plat without any certification by the Department of Transportation. Opinion of Attorney General to Mr. Richard S. Jones, Jr., 19 November 1975.

## § 136-102.7. Hurricane evacuation standard.

Evacuation Standard. — The hurricane evacuation standard to be used for any bridge or highway construction project pursuant to this Chapter shall be no more than 18 hours, as recommended by the State Emergency Management officials. (2005-275, s. 5.)

## § 136-102.8. Subdivision streets; traffic calming devices.

The Department shall establish policies and procedures for the installation or utilization of traffic tables or traffic calming devices erected on State-maintained subdivision streets adopted by the Department, pursuant to G.S. 136-102.6, if all of the following requirements are met:

(1) A traffic engineering study has been approved by the Department detailing types and locations of traffic calming devices.

(2) Installation and utilization of traffic tables or traffic calming devices is within one of the following areas:
   a. A subdivision with a homeowners association.
   b. A neighborhood in which the property owners have established a contractual agreement outlining responsibility for traffic calming devices installed in the neighborhood.

(3) The traffic tables or traffic calming devices are paid for and maintained by the subdivision homeowners association, or its successor, or pursuant to a neighborhood agreement.

(4) The homeowners association has the written support, for the installation of each traffic table or traffic calming device approved by the Department pursuant to this section, of at least seventy percent (70%) of the member property owners, or the neighborhood agreement is signed by at least seventy percent (70%) of the neighborhood property owners.

(5) The homeowners association, or neighborhood pursuant to its agreement, posts a performance bond with the Department sufficient to fund maintenance or removal of the traffic tables or calming devices, if the homeowners association, or neighborhood pursuant to its agreement, fails to maintain them, or is dissolved. The bond shall remain in place for a period of three years from the date of installation. (2009-310, s. 1.)

**Editor's Note.** — Session Laws 2009-310, s. 2, made this section effective October 1, 2009, and applicable to traffic tables and traffic calming devices installed on or after that date.

## ARTICLE 8.

## *Citation to Highway Bond Acts.*

**§ 136-102.50:** Repealed by Session Laws 1998-98, s. 40.

## ARTICLE 9.

## *Condemnation.*

### § 136-103. Institution of action and deposit.

(a) In case condemnation shall become necessary the Department of Transportation shall institute a civil action by filing in the superior court of any county in which the land is located a complaint and a declaration of taking declaring that such land, easement, or interest therein is thereby taken for the use of the Department of Transportation.

(b) Said declaration shall contain or have attached thereto the following:

(1) A statement of the authority under which and the public use for which said land is taken.

(2) A description of the entire tract or tracts affected by said taking sufficient for the identification thereof.

(3) A statement of the estate or interest in said land taken for public use and a description of the area taken sufficient for the identification thereof.

(4) The names and addresses of those persons who the Department of Transportation is informed and believes may have or claim to have an interest in said lands, so far as the same can by reasonable diligence be ascertained and if any such persons are infants, non compos mentis, under any other disability, or their whereabouts or names unknown, it must be so stated.

(5) A statement of the sum of money estimated by said Department of Transportation to be just compensation for said taking.

(c) Said complaint shall contain or have attached thereto the following:

(1) A statement of the authority under which and the public use for which said land is taken.

(2) A description of the entire tract or tracts affected by said taking sufficient for the identification thereof.

(3) A statement of the estate or interest in said land taken for public use and a description of the area taken sufficient for the identification thereof.

(4) The names and addresses of those persons who the Department of Transportation is informed and believes may have or claim to have an

interest in said lands, so far as the same can by reasonable diligence be ascertained and if any such persons are infants, non compos mentis, under any other disability, or their whereabouts or names unknown, it must be so stated.

(5) A statement as to such liens or other encumbrances as the Department of Transportation is informed and believes are encumbrances upon said real estate and can by reasonable diligence be ascertained.

(6) A prayer that there be a determination of just compensation in accordance with the provisions of this Article.

(d) The filing of said complaint and said declaration of taking shall be accompanied by the deposit of the sum of money estimated by said Department of Transportation to be just compensation for said taking and upon the filing of said complaint and said declaration of taking and deposit of said sum, summons shall be issued and together with a copy of said complaint and said declaration of taking and notice of the deposit be served upon the person named therein in the manner now provided for the service of process in civil actions. The Department of Transportation may amend the complaint and declaration of taking and may increase the amount of its deposit with the court at any time while the proceeding is pending, and the owner shall have the same rights of withdrawal of this additional amount as set forth in G.S. 136-105 of this Chapter. (1959, c. 1025, s. 2; 1961, c. 1084, s. 1; 1963, c. 1156, s. 1; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1997-456, s. 27.)

**Local Modification.** — (As to Article 9) village of Grandfather: 1987, c. 419, s. 1; village of Pinehurst: 1985, c. 379, s. 2.

**Cross References.** — As to condemnation generally, see Chapter 40A. As to proration of the property tax liability of the owner of land taken by condemnation, see G.S. 40A-6.

**Editor's Note.** — The subsections of this section were numbered pursuant to Session Laws 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

**Legal Periodicals.** — For an article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

For note on expansion of definition of "taking" in eminent domain proceedings, see 47 N.C.L. Rev. 441 (1969).

For article on recent developments in North Carolina law of eminent domain, see 48 N.C.L. Rev. 767 (1970).

For note discussing constitutional challenges to "quick take" condemnation proceedings, see 8 N.C. Cent. L.J. 289 (1977).

## CASE NOTES

**Legislative Intent.** — Section 136-112 clarifies the legislative intent behind this section. State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247, cert. denied, 311 N.C. 307, 317 S.E.2d 904 (1984).

**The Highway Commission (now Department of Transportation) as a State agency or instrumentality possesses the sovereign power of eminent domain,** and by reason thereof can take private property for public use for highway purposes upon payment of just compensation. State Hwy. Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

**Section Inapplicable to Takings or Causes of Action Arising Before July 1, 1960.** — This section does not apply "to any takings or causes of actions arising prior to the effective date" thereof, to wit, July 1, 1960. Barnes v. North Carolina State Hwy. Comm'n, 257 N.C. 507, 126 S.E.2d 732 (1962).

By express provision of the enacting statute, this section applies only to proceedings begun subsequent to July 1, 1960. Wescott v. State Hwy. Comm'n, 262 N.C. 522, 138 S.E.2d 133 (1964).

**Prior to July 1, 1960, Procedure Prescribed by Former § 40-11 et seq. Applied.** — The procedure prescribed by former G.S. 40-11 et seq. was applicable to condemnation proceedings instituted by the State Highway Commission (now Department of Transportation) prior to July 1, 1960. City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

**Strict Construction.** — The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed. Greensboro-High Point Airport Auth. v. Irvin, 2 N.C. App. 341, 163 S.E.2d 118 (1968).

In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict rather than a liberal construction is the rule. State v. Core Banks Club Properties, 275 N.C. 328, 167 S.E.2d 385 (1969).

**Power of Eminent Domain Is Prerogative of Sovereign State.** — The right to take private property for public use, the power of eminent domain, is one of the prerogatives of a sovereign state. The right is inherent in sovereignty; it is not conferred by constitutions. Its exercise, however, is limited by the constitutional requirements of due process and payment of just compensation for property condemned. State v. Core Banks Club Properties, 275 N.C. 328, 167 S.E.2d 385 (1969).

**Only the legislative branch can authorize the exercise of the power of eminent domain** and prescribe the manner of its use. State v. Core Banks Club Properties, 275 N.C. 328, 167 S.E.2d 385 (1969).

**The right of eminent domain must be conferred by statute,** either in express words or by necessary implication. State v. Core Banks Club Properties, 275 N.C. 328, 167 S.E.2d 385 (1969).

The right of eminent domain lies dormant in the State until the legislature, by statute, confers the power and points out the occasion, mode, conditions and agencies for its exercise. State v. Core Banks Club Properties, 275 N.C. 328, 167 S.E.2d 385 (1969).

Hence, the executive branch of the government cannot, without the authority of some statute, proceed to condemn property for its own uses. Once authority is given to exercise the power of eminent domain, the matter ceases to be wholly legislative. The executive authorities may then decide whether the power will be invoked and to what extent, and the judiciary must decide whether the statute authorizing the taking violates any constitutional rights. State v. Core Banks Club Properties, 275 N.C. 328, 167 S.E.2d 385 (1969).

**Power of Eminent Domain Expressly Granted.** — The General Assembly has expressly granted to the State Highway Commission (now Department of Transportation), under prescribed conditions, the power of eminent domain and has set forth the procedure to be followed in the exercise of such power. This procedure must be followed and the conditions prescribed therein must be met before the State Highway Commission (now Department of Transportation) has the right to exercise the power of eminent domain. State Hwy. Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968).

**Section Sets Out Procedure and Necessary Allegations.** — The General Assembly, by the express provisions of this section, has set out the procedure required and the necessary allegations of a complaint. State Hwy. Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968).

**The procedures for acquisition to the time of condemnation** are governed by Article 6 of Chapter 146, while the condemnation, if required, is regulated by this Article. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

**Duty of Property Owners to Mitigate Their Damages.** — The duty of property owners to mitigate their damages includes the avoidance of conduct which would increase their damages. DOT v. Coleman, 127 N.C. App. 342, 489 S.E.2d 187 (1997).

**Evidence that property owners made renovations in bad faith and for the purpose of enhancing their damages** was relevant and competent evidence for a jury to consider in the determination of the value of the property at the time of the taking. DOT v. Coleman, 127 N.C. App. 342, 489 S.E.2d 187 (1997).

**Landowner Not Restricted to Procedures to Which City Not Restricted.** — Where a city is authorized, but not required, to proceed under this Article in condemning land for public purposes, failure to dismiss a landowner's inverse condemnation action is not error. A landowner is not restricted to procedures to which the city itself is not restricted. Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

**"Taking".** — "Taking" under the power of eminent domain may be defined generally as entering upon private property for more than a momentary period and, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof. Ledford v. North Carolina State Hwy. Comm'n, 279 N.C. 188, 181 S.E.2d 466 (1971).

**Taking Occurred When Further Use Prevented.** — A taking occurred when the State Highway Commission (now Department of Transportation) erected a fence severing the right-of-way and preventing its further use, and not at the time plaintiffs were first inconvenienced by it. Ledford v. North Carolina State Hwy. Comm'n, 279 N.C. 188, 181 S.E.2d 466 (1971).

**Under this Article a single condemnation proceeding may include more than one tract of land,** and the proceeding may be amended to include additional land provided that the additional land is described in the complaint and declaration of taking and in the land records of the county through a memorandum of action as required by G.S. 136-104, and further, that the deposit is increased if the sum estimated for just compensation is increased. The condemnation statutes do not require that multiple tracts be contiguous in a condemnation proceeding. Board of Transp. v. Royster, 40 N.C. App. 1, 251 S.E.2d 921 (1979).

The Board of Transportation may include in a condemnation proceeding against an opposing party owner multiple tracts of land which are not contiguous. Board of Transp. v. Royster, 40 N.C. App. 1, 251 S.E.2d 921 (1979).

**Amendment of Declaration to Properly Describe Lands.** — When the condemnor has made an appraisal of lands taken but the lands described in the condemnation proceedings do not conform to the lands appraised, the condemnor may amend the proceeding to properly describe the lands upon which the appraisal was made. Board of Transp. v. Royster, 40 N.C. App. 1, 251 S.E.2d 921 (1979).

**Inability to Agree on Price of Lands Need Not Be Alleged.** — It is not necessary in order for the court to obtain jurisdiction in a condemnation proceeding instituted by the Highway Commission (now Department of Transportation) pursuant to this Chapter that the Commission (now Department) allege in its complaint that the Commission (now Department) and the owners are unable to agree as to the price of the lands sought to be condemned. State Hwy. Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968).

**Nor Good Faith Attempts to Acquire Property by Negotiation.** — Since the effective date of this section an allegation of prior good faith attempts to acquire the property by negotiation is not required in a condemnation complaint filed by the State Highway Commission (now Department of Transportation) in order to show jurisdiction, but that absent such an allegation a complaint otherwise containing the express allegations required by this section would allege a defective statement of a good cause of action. City of Charlotte v. Robinson, 2 N.C. App. 429, 163 S.E.2d 289 (1968).

**Owner Entitled to Compensation When Deprived of Easement.** — An owner whose access to a public road is a right-of-way over adjoining property is entitled to just compensation when the State deprives him of this easement. Ledford v. North Carolina State Hwy. Comm'n, 279 N.C. 188, 181 S.E.2d 466 (1971).

**The fixing of compensation is wholly a judicial question.** State v. Core Banks Club Properties, 275 N.C. 328, 167 S.E.2d 385 (1969).

**Issue of Damages Considered De Novo on Appeal.** —An appeal to superior court from a condemnation proceeding puts the issue of compensation for damages resulting from the taking before the court de novo. Metropolitan Sewerage Dist. v. Trueblood, 64 N.C. App. 690, 308 S.E.2d 340 (1983), cert. denied, 311 N.C. 402, 319 S.E.2d 272 (1984).

**Failure to Use § 136-108 Mechanism.** — Where landowners failed to avail themselves of the mechanism for determining issues other than damages provided in G.S. 136-108 and, instead, specifically stipulated that only the matter of just compensation remained for resolution at trial, the landowners could not dispute the amount of property affected by the plaintiffs' taking nor the plaintiffs' listing thereof in the Declaration of Taking before the appellate court. DOT v. Tilley, 136 N.C. App. 370, 524 S.E.2d 83, 2000 N.C. App. LEXIS 16 (2000), cert. denied, 531 U.S. 878, 121 S. Ct. 186, 148 L. Ed. 2d 129 (2000) cert. denied, 351 N.C. 640, 543 S.E.2d 868 (2000).

**Use of Income Approach to Establish Value.** — The decision in City of Statesville v. Cloaninger, 415 S.E.2d 111, 106 N.C. App. 10 (1992), appears to use the income approach to establishing property value when there are no comparable sales data and the income upon which the opinion of value is based is directly attributable to the land. DOT v. Fleming, 112 N.C. App. 580, 436 S.E.2d 407 (1993).

**The General Assembly made inapplicable the provisions of former § 1-122** insofar as it related to complaints filed in eminent domain cases by the State Highway Commission (now Department of Transportation) arising after July 1, 1960. This is the distinguishing difference between cases brought under the provisions of Chapter 40 (see now Chapter 40A) and by the State Highway Commission (now Department of Transportation) under this Article. State Hwy. Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968).

**Compliance Shown.** — Court reviewed State filings required by this section and found that the Department of Administration properly acquired one-fifth of land held as tenant in common with corporation through the exercise of eminent domain. State v. Coastland Corp., 134 N.C. App. 269, 517 S.E.2d 655, 1999 N.C. App. LEXIS 749 (1999), cert. denied, 351 N.C. 111, 540 S.E.2d 371 (1999).

**Applied** in North Carolina State Hwy. Comm'n v. Gasperson, 268 N.C. 453, 150 S.E.2d 860 (1966); State Hwy. Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967); North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967); North Carolina State Hwy. Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970); State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972); North Carolina State Hwy. Comm'n v. Forest Lawn Cem., 15 N.C. App. 727, 190 S.E.2d 641 (1972); City of Durham v. Manson, 285 N.C. 741, 208 S.E.2d 662 (1974); City of Greensboro v. Irvin, 25 N.C. App. 661, 214 S.E.2d 196 (1975); City of Durham v. Lyckan Dev. Corp., 26 N.C. App. 210, 215 S.E.2d 814 (1975); Board of Transp. v. Bryant, 59 N.C. App. 256, 296 S.E.2d 814 (1982); City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983); DOT v. Bollinger, 121 N.C. App. 606, 468 S.E.2d 796 (1996).

**Cited** in State Hwy. Comm'n v. Kenan Oil Co., 260 N.C. 131, 131 S.E.2d 665 (1963); North Carolina State Hwy. Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964); North Carolina State Hwy. Comm'n v. Moore, 3 N.C. App. 207, 164 S.E.2d 385 (1968); State Hwy. Comm'n v. North Carolina Realty Corp., 4 N.C. App. 215, 166 S.E.2d 469 (1969); State Hwy. Comm'n v. Rowson, 5 N.C. App. 629, 169 S.E.2d 132 (1969); North Carolina State Hwy. Comm'n v. Asheville School, Inc., 5 N.C. App. 684, 169 S.E.2d 193 (1969); Board of Transp. v. Greene, 35 N.C. App. 187, 241 S.E.2d 152 (1978); Board of Transp. v. Revis, 40 N.C. App. 182, 252 S.E.2d 262 (1979); Pelham Realty Corp. v. Board of Transp., 303 N.C. 424, 279 S.E.2d 826 (1981); State v. Williams & Hessee, 53 N.C. App. 674, 281 S.E.2d 721 (1981); Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983); DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003); Wright v. Town of Matthews, 177 N.C. App. 1, 627 S.E.2d 650, 2006 N.C. App. LEXIS 702 (2006); City of Charlotte v. Hurlahe, 178 N.C. App. 144, 631 S.E.2d 28, 2006 N.C. App. LEXIS 1296 (2006); DOT v. M.M. Fowler, Inc., 361 N.C. 1, 637 S.E.2d 885, 2006 N.C. LEXIS 1299 (2006).

## § 136-103.1. Outside counsel.

The Attorney General is authorized to employ outside counsel as he deems necessary for the purpose of obtaining title abstracts and title certificates for transportation system rights-of-way and for assistance in the trial of condemnation cases involving the acquisition of rights-of-way and other interests in land for the purpose of transportation construction. Compensation, as approved by the Attorney General, shall be paid out of the appropriations from the Highway Fund. (1973, c. 507, s. 4; 2009-266, s. 26.)

**Effect of Amendments.** — Session Laws 2009-266, s. 26, effective August 1, 2009, substituted "transportation system rights-of-way" for "highway rights-of-way" and "transportation construction" for "highway construction" in the first sentence.

## § 136-104. Vesting of title and right of possession; recording memorandum or supplemental memorandum of action.

Upon the filing of the complaint and the declaration of taking and deposit in court, to the use of the person entitled thereto, of the amount of the estimated compensation stated in the declaration, title to said land or such other interest therein specified in the complaint and the declaration of taking, together with the right to immediate possession hereof shall vest in the Department of Transportation and the judge shall enter such orders in the cause as may be required to place the Department of Transportation in possession, and said land shall be deemed to be condemned and taken for the use of the Department of Transportation and the right to just compensation therefor shall vest in the person owning said property or any compensable interest therein at the time of the filing of the complaint and the declaration of taking and deposit of the money in court, and compensation shall be determined and awarded in said action and established by judgment therein.

Where there is a life estate and a remainder either vested or contingent, in lieu of the investment of the proceeds of the amount determined and awarded as just compensation to which the life tenant would be entitled to the use during the life estate, the court may in its discretion order the value of said life tenant's share during the probable life of such life tenant be ascertained as now provided by law and paid directly to the life tenant out of the final award as just compensation established by the judgment in the cause and the life tenant may have the relief provided for in G.S. 136-105.

On and after July 1, 1961, the Department of Transportation, at the time of the filing of the complaint and declaration of taking and deposit of estimated compensation, shall record a memorandum of action with the register of deeds in all counties in which the land involved therein is located and said memorandum shall be recorded among the land records of said county. Upon the amending of any complaint and declaration of taking affecting the property taken, the Department of Transportation shall record a supplemental memorandum of action. The memorandum of action shall contain

(1) The names of those persons who the Department of Transportation is informed and believes may have or claim to have an interest in said lands and who are parties to said action;
(2) A description of the entire tract or tracts affected by said taking sufficient for the identification thereof;
(3) A statement of the estate or interest in said land taken for public use;
(4) The date of institution of said action, the county in which said action is pending, and such other reference thereto as may be necessary for the identification of said action.

As to those actions instituted by the Department of Transportation under the provisions of this Article prior to July 1, 1961, the Department of Transportation shall, on or before October 1, 1961, record a memorandum of action with the register of deeds in all counties in which said land is located as hereinabove set forth; however, the failure of the Department of Transportation to record said memorandum shall not invalidate those actions instituted prior to July 1, 1961. (1959, c. 1025, s. 2; 1961, c. 1084, s. 2; 1963, c. 1156, s. 2; 1973, c. 507, s. 5; 1975, c. 522, s. 1; 1977, c. 464, s. 7.1.)

**Cross References.** — As to right of condemnor to take voluntary nonsuit, see G.S. 1-209.2 and note thereto.

**Legal Periodicals.** — For note discussing constitutional challenges to "quick take" condemnation proceedings, see 8 N.C. Cent. L.J. 289 (1977).

For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

## CASE NOTES

**The purpose of the first paragraph** is to vest title in the State upon the filing of the complaint, the declaration of taking, and the deposit in cash of the estimated compensation. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

**Under this Article a single condemnation proceeding may include more than one tract of land,** and the proceeding may be amended to include additional land provided that the additional land is described in the complaint and declaration of taking and in the land records of the county through a memorandum of action as required by G.S. 136-104, and further, that the deposit is increased if the sum estimated for just compensation is increased. The condemnation statutes do not require that multiple tracts be contiguous in a condemnation proceeding. Board of Transp. v. Royster, 40 N.C. App. 1, 251 S.E.2d 921 (1979).

The Department of Transportation may include in a condemnation proceeding against an opposing party owner multiple tracts of land which are not contiguous. Board of Transp. v. Royster, 40 N.C. App. 1, 251 S.E.2d 921 (1979).

**Amendment of Declaration to Properly Describe Lands.** — When the condemnor has made an appraisal of lands taken but the lands described in the condemnation proceedings do not conform to the lands appraised, the condemnor may amend the proceeding to properly describe the lands upon which the appraisal was made. Board of Transp. v. Royster, 40 N.C. App. 1, 251 S.E.2d 921 (1979).

**The provisions of § 136-108 apply to condemnation proceedings under § 136-111** as well as under this section. Berta v. North Carolina State Hwy. Comm'n, 36 N.C. App. 749, 245 S.E.2d 409 (1978).

**Purpose of the Third Paragraph.** — The manifest purpose of the third paragraph of this section is to assure public record of the change in ownership. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

The obvious intent of the second sentence of the third paragraph is to assure that any change in the complaint or declaration of taking that affects the property will be entered into the land records of the county. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971); Board of Transp. v. Royster, 40 N.C. App. 1, 251 S.E.2d 921 (1979).

**Supplemental Memoranda Not Required for All Amendments.** — The second sentence of the third paragraph does not mean that a supplemental memorandum of action must be filed as to all amendments, significant or insignificant, to the original complaint. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

Where the purpose of this section is to require notice of ownership, an amendment to the complaint which only adds additional parties defendant who may or may not share in the proceeds requires no supplemental notice to the public, and the same is true with respect to an amendment that only substitutes a more specific metes and bounds description for a description less exact, both descriptions covering the same property. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

**But Only Where Amendment and Declaration of Taking Affect Property Taken.** — A supplemental memorandum is required only where the amendment to the complaint and declaration of taking affect the property taken. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

**Formerly, the property owner's title was divested by decree** in a special proceeding under former G.S. 40-11, and then only when fair compensation had been ascertained and paid as directed by decree confirming the award. North Carolina State Hwy. Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

Prior to the enactment of this section, title was not divested until compensation was paid; and the person who owned the property when the award was confirmed was the person to be compensated. North Carolina State Hwy. Comm'n v. Hettiger, 271 N.C. 152, 155 S.E.2d 469 (1967).

**Since July 1, 1960, title is divested by a civil action.** North Carolina State Hwy. Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

**Upon the filing of the complaint and the declaration of a taking, together with the making of a deposit in court,** title and right to immediate possession of property condemned by the Highway Commission (now Department of Transportation) vests in the Commission (now Department). North Carolina State Hwy. Comm'n v. Myers, 270 N.C. 258, 154 S.E.2d 87 (1967).

**Filing Memorandum Has Same Effect as Conveyance.** — The Highway Commission (now Department of Transportation), when it files its complaint must file a memorandum of its action with the register of deeds where the land lies, and this has the same effect as a conveyance of the property. North Carolina State Hwy. Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964); City of King's Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

**Person Owning Land Immediately Prior to Filing Complaint Has Right to Compensation.** — The right to compensation rests in the person who owned the land immediately prior to the filing of the complaint and declaration of taking. North Carolina State Hwy. Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964); North Carolina State Hwy. Comm'n v. Hettiger, 271 N.C. 152, 155 S.E.2d 469 (1967); City of King's Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

The right to compensation for a taking of property by the power of eminent domain is in those who owned compensable interests in the property immediately prior to the filing of the complaint and declaration of taking. City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 178 S.E.2d 601 (1971).

**But such person has nothing he can sell** pending ascertainment of fair compensation. North Carolina State Hwy. Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964); City of King's Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973); State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247, cert. denied, 311 N.C. 307, 317 S.E.2d 904 (1984).

**"Compensable Interest" Is Interest in Property Condemned.** — The "compensable interest" referred to in this section is an interest in the property condemned, not in property conveyed away just prior to condemnation. North Carolina State Hwy. Comm'n v. Hettiger, 271 N.C. 152, 155 S.E.2d 469 (1967).

**Statutory Provisions Not Affected by Agreement Made in Anticipation of Condemnation.** — Defendants could not, by agreement made in anticipation of the condemnation of a portion of their property, change the statutory provisions relating to the time of, and basis for, the compensation to be paid when the State Highway Commission (now Department of Transportation) condemns the property for highway purposes. North Carolina State Hwy. Comm'n v. Hettiger, 271 N.C. 152, 155 S.E.2d 469 (1967).

**Former Owner Not Entitled to Compensation for Reduced Sale Price of Land Condemned.** — Where landowners were forced by business reverses to sell a part of their tract of land to third persons just prior to the time the State Highway Commission (now Department of Transportation) acquired title to a part of the remainder and they alleged that the price obtained for the tract sold was greatly reduced because of public knowledge of the location of the planned highway, they were not entitled to compensation for the reduced sale price of the land conveyed. North Carolina State Hwy. Comm'n v. Hettiger, 271 N.C. 152, 155 S.E.2d 469 (1967).

**Transfer in Condemnation Proceeding Does Not Destroy Estate by Entirety.** — Where title to land held by the entirety is transferred to the State Highway Commission (now Department of Transportation) upon the payment into court of a sum estimated by the Commission (now Department) to be just compensation, such involuntary transfer of title does not destroy the estate by the entirety, and the compensation paid by the Commission (now Department) has the status of real property owned by the husband and wife as tenants by the entirety. North Carolina State Hwy. Comm'n v. Myers, 270 N.C. 258, 154 S.E.2d 87 (1967).

**Declaration of Taking by Fee Simple Absolute Destroys Possibility of Reverter.** — Where the condemning authority, in its declaration of taking, asserted that it thereby acquired a fee simple absolute in the land described as taken, it therefore took by condemnation both the fee simple determinable estate and the possibility of reverter. These were taken simultaneously, and there was no interval following the taking of the fee simple determinable estate, for use for a purpose other than that stated in the deed, in which the reverter could have occurred. Thus, the condemnation destroyed the possibility of reverter. City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 178 S.E.2d 601 (1971).

**Taking Rendered Partition Suit Moot.** — Taking which was proper under this section rendered earlier suit for partition of property moot; State did not have to wait until partition proceedings had been completed to condemn petitioner's interest. Coastland Corp. v. North Carolina Wildlife Resources Comm'n, 134 N.C. App. 343, 517 S.E.2d 661 (1999).

**Applied** in City of Durham v. Manson, 285 N.C. 741, 208 S.E.2d 662 (1974).

**Cited** in Davis v. North Carolina State Hwy. Comm'n, 271 N.C. 405, 156 S.E.2d 685 (1967); City of Durham v. Bates, 273 N.C. 336, 160 S.E.2d 60 (1968); Pelham Realty Corp. v. Board of Transp., 303 N.C. 424, 279 S.E.2d 826 (1981); Department of Transp. v. Bragg, 59 N.C. App. 344, 296 S.E.2d 657 (1982); DOT v. M.M. Fowler, Inc., 361 N.C. 1, 637 S.E.2d 885, 2006 N.C. LEXIS 1299 (2006).

## § 136-105. Disbursement of deposit; serving copy of disbursing order on Department of Transportation.

The person named in the complaint and declaration of taking may apply to the court for disbursement of the money deposited in the court, or any part thereof, as full compensation, or as a credit against just compensation without prejudice to further proceedings in the cause to determine just compensation. Upon such application, the judge shall, unless there is a dispute as to title, order that the money deposited be paid forthwith to the person entitled thereto in accordance with the application. The judge shall have power to make such orders with respect to encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

No notice to the Department of Transportation of the hearing upon the application for disbursement of deposit shall be necessary, but a copy of the order disbursing the deposit shall be served upon the Secretary of Transportation, or such other process agents as may be designated by the Department of Transportation. (1959, c. 1025, s. 2; 1961, c. 1084, s. 3; 1965, c. 55, s. 14; 1969, c. 649; 1973, c. 507, s. 5; 1977, c. 464, ss. 7.1, 26.)

### CASE NOTES

**There Can Be No Disbursement Unless Specifically Authorized by Order of Court.** — There can be no disbursement of any portion of money deposited as a credit against just compensation for any purpose unless specifically authorized by order of the court entered after hearing pursuant to notice to all interested parties. North Carolina State Hwy. Comm'n v. Myers, 270 N.C. 258, 154 S.E.2d 87 (1967).

**A wife separated from her husband and seeking alimony pendente lite** has no present right to disbursement of money deposited by the State Highway Commission (now Department of Transportation) as a credit against just compensation for land owned by the wife and her husband as tenants by entirety. North Carolina State Hwy. Comm'n v. Myers, 270 N.C. 258, 154 S.E.2d 87 (1967).

**Title Dispute Held to Prohibit Disbursement of Funds.** — See Board of Transp. v. Greene, 35 N.C. App. 187, 241 S.E.2d 152 (1978).

**Applied** in Davis v. North Carolina State Hwy. Comm'n, 271 N.C. 405, 156 S.E.2d 685 (1967).

**Cited** in State Hwy. Comm'n v. Kenan Oil Co., 260 N.C. 131, 131 S.E.2d 665 (1963); City of Durham v. Bates, 273 N.C. 336, 160 S.E.2d 60 (1968); State Hwy. Comm'n v. Fry, 6 N.C. App. 370, 170 S.E.2d 91 (1969); City of Durham v. Manson, 21 N.C. App. 161, 204 S.E.2d 41 (1974); Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978); Pelham Realty Corp. v. Board of Transp., 303 N.C. 424, 279 S.E.2d 826 (1981); DOT v. M.M. Fowler, Inc., 361 N.C. 1, 637 S.E.2d 885, 2006 N.C. LEXIS 1299 (2006).

## § 136-106. Answer, reply and plat.

(a) Any person whose property has been taken by the Department of Transportation by the filing of a complaint and a declaration of taking, may within the time hereinafter set forth file an answer to the complaint only praying for a determination of just compensation. No answer shall be filed to the declaration of taking and notice of deposit. Said answer shall, in addition, contain the following:

(1) Such admissions or denials of the allegations of the complaint as are appropriate.

(2) The names and addresses of the persons filing said answer, together with a statement as to their interest in the property taken.

(3) Such affirmative defenses or matters as are pertinent to the action.

(b) A copy of the answer shall be served on the Department of Transportation, or such other process agents as may be designated by the Department of Transportation, in Raleigh, provided that failure to serve the answer shall not deprive the answer of its validity. The affirmative allegations of said answer shall be deemed denied. The Department of Transportation may, however, file a reply within 30 days from receipt of a copy of the answer.

(c) The Department of Transportation, within 90 days from the receipt of the answer shall file in the cause a plat of the land taken and such additional area as may be necessary to properly determine the damages, and a copy thereof shall be mailed to the parties or their attorney; provided, however, the Department of Transportation shall not be required to file a map or plat in less than six months from the date of the filing of the complaint. (1959, c. 1025, s. 2; 1961, c. 1084, s. 4; 1963, c. 1156, ss. 3, 4; 1965, c. 55, s. 15; 1973, c. 507, s. 5; 1977, c. 464, ss. 7.1, 28.)

### CASE NOTES

**An answer is "filed" when it is delivered for that purpose to the proper officer** and received by him. State Hwy. Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

**The word "only"** in the first sentence of this section modifies "complaint," not "praying for a determination of just compensation." That is, the defendants were authorized by the statutory procedure, established by the State, to file an answer denying that the proposed condemnation is for a public use, and were authorized to do so at any time within 12 months after the summons and complaint were served upon them. If this procedure puts the State Highway Commission (now Department of Transportation) at a disadvantage in constructing highways to meet the public need the remedy is in the legislature, not the courts. State Hwy. Comm'n v. Thornton, 271 N.C. 227, 156 S.E.2d 248 (1968), commented on in 46 N.C.L. Rev. 663.

**Presumption That Copy of Answer Mailed to Plaintiff or His Attorney.** — Upon admission that answer has been filed it will be presumed that a copy thereof for the use of plaintiff had likewise been filed and mailed to him or his attorney of record, as required by former G.S. 1-25 (see now G.S. 1A-1, Rule 12). State Hwy. Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

**Petition for Disbursement Under § 136-105 Cannot Be Construed as Answer.** — A petition under G.S. 136-105 to withdraw the amount deposited by the State Highway Commission (now Department of Transportation) as compensation cannot be construed as an answer within the meaning of G.S. 136-106 and 136-107. State Hwy. Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

**Applied** in Kaperonis v. North Carolina State Hwy. Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963); North Carolina State Hwy. Comm'n v. Myers, 270 N.C. 258, 154 S.E.2d 87 (1967); North Carolina State Hwy. Comm'n v. Hettiger, 271 N.C. 152, 155 S.E.2d 469 (1967).

**Cited** in North Carolina Dep't of Transp. v.

Kaplan, 343 N.C. App. 182, 343 S.E.2d 182 (1986); DOT v. M.M. Fowler, Inc., 361 N.C. 1, 637 S.E.2d 885, 2006 N.C. LEXIS 1299 (2006).

## § 136-107. Time for filing answer.

Any person named in and served with a complaint and declaration of taking shall have 12 months from the date of service thereof to file answer. Failure to answer within said time shall constitute an admission that the amount deposited is just compensation and shall be a waiver of any further proceeding to determine just compensation; in such event the judge shall enter final judgment in the amount deposited and order disbursement of the money deposited to the owner. Provided, however, at any time prior to the entry of the final judgment the judge may, for good cause shown and after notice to the plaintiff, extend the time for filing answer for 30 days. Provided that when the procedures of Article 9 of Chapter 136 are employed by the Department of Administration, any person named in or served with a complaint and declaration of taking shall have 120 days from the date of service thereof within which to file an answer. (1959, c. 1025, s. 2; 1973, c. 507, s. 5; 1975, c. 625; 1981, c. 245, s. 2.)

### CASE NOTES

**This section expresses a definite, sensible and mandatory meaning concerning procedure in condemnation proceedings** under this Chapter. State Hwy. Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

**Court Has No Discretionary Power to Allow Extension of Time for Filing Answer.** — This section, limiting the time for the filing of answer in condemnation proceedings instituted by the State Highway Commission (now Department of Transportation), must be construed as an exception to the general power of the court to extend the time for the filing of pleadings, so that the court has no discretionary power to allow the filing of an answer after the time limited in the condemnation statute. State Hwy. Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

The courts have no discretionary power to allow an extension of time for the filing of an answer under this section. Pelham Realty Corp. v. Board of Transp., 303 N.C. 424, 279 S.E.2d 826 (1981).

**But Parties May Make Reasonable Stipulations.** — A court has no authority to alter the requirements of this section but there is no reason why parties may not make reasonable stipulations concerning matters to which the section is addressed. Pelham Realty Corp. v. Board of Transp., 303 N.C. 424, 279 S.E.2d 826 (1981).

**Court did not abuse its discretion in permitting corporate landowner to file an answer** in a condemnation proceeding more than one year after the city served the summons and complaint on the Secretary of State, because the corporate landowner did not maintain a registered agent or office, where the city had constructive notice of the corporate landowner's stockholder and president as well as one other corporate fiduciary and after one year served the default motion on the corporate landowner's president, the fiduciary, and the incorporator. City of Charlotte v. Whippoorwill Lake, Inc., 150 N.C. App. 579, 563 S.E.2d 297, 2002 N.C. App. LEXIS 575 (2002).

**Applied** in North Carolina State Hwy. Comm'n v. Myers, 270 N.C. 258, 154 S.E.2d 87 (1967); City of Greensboro v. Irvin, 25 N.C. App. 661, 214 S.E.2d 196 (1975); City of Durham v. Lyckan Dev. Corp., 26 N.C. App. 210, 215 S.E.2d 814 (1975); Board of Transp. v. Williams, 31 N.C. App. 125, 229 S.E.2d 37 (1976).

**Cited** in State Hwy. Comm'n v. Thornton, 271 N.C. 227, 156 S.E.2d 248 (1968); DOT v. Combs, 71 N.C. App. 372, 322 S.E.2d 602 (1984).

## § 136-108. Determination of issues other than damages.

After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken. (1959, c. 1025, s. 2; 1963, c. 1156, s. 5; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

**Legal Periodicals.** — For note discussing constitutional challenges to "quick take" condemnation proceedings, see 8 N.C. Cent. L.J. 289 (1977).

## CASE NOTES

**The State's right to exercise the power of eminent domain is limited** by the constitutional requirements of due process and the payment of just compensation for property condemned. State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247, cert. denied, 311 N.C. 307, 317 S.E.2d 904 (1984).

**Recording Not Required for Interests in Land Acquired Prior to July 1, 1959.** — Section 47-27, which governs deeds for rights-of-way and easements, provides that the Department of Transportation (DOT) does not have to record such interests in land which were acquired prior to July 1, 1959. DOT v. Wolfe, 116 N.C. App. 655, 449 S.E.2d 11 (1994).

**One of the purposes of this section** was to eliminate from the jury trial any question as to what land the State Highway Commission (now Department of Transportation) is condemning and any question as to its title. North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

**Section Does Not Infringe Right to Trial by Jury.** — This section is constitutional and does not deprive the plaintiffs of their right to trial by jury as the same is guaranteed by the North Carolina and United States Constitutions. Kaperonis v. North Carolina State Hwy. Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963).

When the taking by the sovereign is conceded, questions preliminary to the determination of the amount to be paid are questions of fact to be determined by the court — not issues of fact which must be determined by a jury. This is the basis for the conclusion reached in Kaperonis v. North Carolina State Hwy. Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963), holding this section constitutional. Wescott v. State Hwy. Comm'n, 262 N.C. 522, 138 S.E.2d 133 (1964).

Where a matter was called for hearing pursuant to this section in a condemnation action with no jury, this hearing did not infringe upon the landowner's right to a jury trial as provided by the North Carolina and United States Constitutions. DOT v. Wolfe, 116 N.C. App. 655, 449 S.E.2d 11 (1994).

**The provisions of this section apply to condemnation proceedings under § 136-111** as well as under G.S. 136-104. Berta v. North Carolina State Hwy. Comm'n, 36 N.C. App. 749, 245 S.E.2d 409 (1978).

**A determination of ownership of the area affected is a prerequisite** to a determination of just compensation for the area taken. Limiting the trial court's factfinding to ownership of the area taken alone would deprive the defendants of just compensation. State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247, cert. denied, 311 N.C. 307, 317 S.E.2d 904 (1984).

A valid exercise of the power of eminent domain presupposes a complete determination of the area affected, including ownership. State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247, cert. denied, 311 N.C. 307, 317 S.E.2d 904 (1984).

**Parties are fixed with notice of all motions or orders** made during the session of court in causes pending therein, and the statutory provisions for notice of motions are not applicable in such instances. State Hwy. Comm'n v. Stokes, 3 N.C. App. 541, 165 S.E.2d 550 (1969).

**Judge's Function.** — It is immaterial whether a proceeding before a judge be considered (1) a pretrial hearing for condemnation under this section or (2) a motion to dismiss, converted under G.S. 1A-1, Rule 12(b) into a motion for summary judgment by the introduction of matters outside the pleading. In either event, it is the judge's function to decide all questions of fact and adjudicate the State Highway Commission's (now Department of Transportation's) controverted right to condemn a tract for the purpose specified. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

**Effect of Court's Findings as to Damages.** — In a hearing held under this section, the trial court's findings as to damages would not be competent at the trial on the issue of damages. Cogdill v. North Carolina State Hwy. Comm'n, 279 N.C. 313, 182 S.E.2d 373 (1971).

The trial judge in a proceeding against the State Highway Commission (now Department of Transportation) held under this section could consider evidence of damages for the limited purpose of finding that the plaintiffs had made a prima facie showing of substantial and measurable damages, although his finding as to damages would not be competent at the jury trial on the issue of damages. Cogdill v. North Carolina State Hwy. Comm'n, 279 N.C. 313, 182 S.E.2d 373 (1971).

**Evidence as to damages in a hearing under this section is competent and nec-**

**essary for the limited purpose** of making a prima facie showing that the plaintiffs had suffered substantial and measurable damages. Cogdill v. North Carolina State Hwy. Comm'n, 279 N.C. 313, 182 S.E.2d 373 (1971).

**Assessment of Damages to Tracts Other Than Those Taken.** — Obviously, it would be an exercise in futility, completely thwarting the purpose of this section to have the jury assess damages to four certain tracts if plaintiff were condemning only two other tracts, and the verdict would be set aside on appeal for errors committed by the judge in determining the issues other than damages. North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

A parcel of land owned by an individual and an adjacent parcel of land owned by a corporation of which that individual is the sole or principal shareholder cannot be treated as a unified tract for the purpose of assessing condemnation damages. Board of Transp. v. Martin, 296 N.C. 20, 249 S.E.2d 390 (1978).

**Compensation for Adjacent Traffic Islands.** — The trial court does have authority under this section to pass upon the question whether defendants are entitled to compensation because of the construction of traffic islands adjacent to their property fronting a highway. State Hwy. Comm'n v. Rose, 31 N.C. App. 28, 228 S.E.2d 664, cert. denied, 291 N.C. 448, 230 S.E.2d 766 (1976).

**Immediate Appeal.** — Should there be a fundamental error in the judgment rendered under this section resolving the vital preliminary issues of what land is being condemned and the title thereto, ordinary prudence requires an immediate appeal. North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

Although the parties to a condemnation hearing must resolve all issues other than damages at the hearing under this section, the section does not require the parties to appeal those issues before proceeding to the damages trial. Therefore, defendants were not required to immediately appeal trial court's order unifying four remaining tracts. DOT v. Rowe, 351 N.C. 172, 521 S.E.2d 707 (1999).

Since an appeal specifically contested the trial court's determination of the area affected by the taking, which was a "vital preliminary issue," the case was properly before the appellate court to review the trial court's determination that tracts of land were not united for condemnation purposes. DOT v. Airlie Park, Inc., 156 N.C. App. 63, 576 S.E.2d 341, 2003 N.C. App. LEXIS 29 (2003), appeal dismissed sub nom. DOT v. Airlie, 357 N.C. 504, 587 S.E.2d 417 (2003).

**Nuckles holding limited.** — To the extent that N.C. State Highway Comm'n v. Nuckles was expanded to other issues arising from condemnation hearings, the Supreme Court limited that holding to questions of title and area taken. DOT v. Rowe, 351 N.C. 172, 521 S.E.2d 707 (1999).

**Review on Appeal of Arbitrary and Capricious Conduct.** — If condemnation proceedings are subject to review due to allegations of arbitrary and capricious conduct or abuse of discretion, and if the court finds safety to be of legitimate concern, the trial judge must make a finding of fact on that issue. Absent such a ruling, an appellate court cannot properly review the trial court's decision as to whether or not Department of Transportation's actions were arbitrary and capricious. DOT v. Overton, 111 N.C. App. 857, 433 S.E.2d 471 (1993), discretionary review improvidently granted, 336 N.C. 598, 444 S.E.2d 448 (1994).

**Appeal Held Interlocutory.** — Landowners' appeal of the rejection of their argument in their condemnation case that they were entitled to have business damages included in any just compensation award made to them had to be dismissed as the statute expressly permitted the trial court to decide any and all issues raised by the pleadings except the issue of damages, which were to be determined later in a jury trial; thus, because not all issues were resolved in the condemnation proceeding, the appeal from the trial court's denial of their argument concerning damages was interlocutory and that part of the appeal had to be dismissed. DOT v. Byerly, 154 N.C. App. 454, 573 S.E.2d 522, 2002 N.C. App. LEXIS 1448 (2002).

**Appeal Timely.** — In a case involving an inverse condemnation claim pursuant to G.S. 136-108, property owners' notice of appeal was timely because: (1) it was filed within 30 days after the trial court's order dismissing the inverse condemnation claim became final as required by N.C. R. App. P. 3(c)(1) where the dismissal of the inverse condemnation claim was interlocutory until a contract claim was voluntarily dismissed, and (2) the property owners were not required to immediately appeal the trial court's ruling that the North Carolina Department of Transportation's failure to build a driveway at a 10 percent grade was not a taking where that ruling did not address a question of title or area taken. DeHart v. N.C. DOT, — N.C. App. —, 672 S.E.2d 721, 2008 N.C. App. LEXIS 2433 (2008).

Because a G.S. 136-108 hearing did not finally resolve all issues, and because the department of transportation (DOT) failed to identify what right was at issue or why any substantial right would be jeopardized without immediate review of the trial court's order, its appeal of a finding of inverse condemnation under G.S. 136-111 was dismissed as interlocutory under G.S. 1A-1, Rule 54(a). Wilfong v. N.C. DOT, —

N.C. App. —, 670 S.E.2d 331, 2009 N.C. App. LEXIS 31 (2009).

**Failure to Invoke Section.** — Where landowners failed to avail themselves of the mechanism for determining issues other than damages provided in this section and, instead, specifically stipulated that only the matter of just compensation remained for resolution at trial, the landowners could not dispute the amount of property affected by the plaintiffs' taking nor the plaintiffs' listing thereof in the Declaration of Taking before the appellate court. DOT v. Tilley, 136 N.C. App. 370, 524 S.E.2d 83, 2000 N.C. App. LEXIS 16 (2000), cert. denied, 531 U.S. 878, 121 S. Ct. 186, 148 L. Ed. 2d 129 (2000) cert. denied, 351 N.C. 640, 543 S.E.2d 868 (2000).

**Action Held Not a Taking.** — In a case involving an inverse condemnation claim pursuant to G.S. 136-108, a trial court did not err in concluding that there was no taking of the property owners' property because the property owners failed to prove that the increased slope of their new driveway substantially deprived them of the use of their land. DeHart v. N.C. DOT, — N.C. App. —, 672 S.E.2d 721, 2008 N.C. App. LEXIS 2433 (2008).

**Applied** in Snow v. North Carolina State Hwy. Comm'n, 262 N.C. 169, 136 S.E.2d 678 (1964); State Hwy. Comm'n v. Greensboro City Bd. of Educ., 265 N.C. 35, 143 S.E.2d 87 (1965); State Hwy. Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965); North Carolina State Hwy. Comm'n v. Rankin, 2 N.C. App. 452, 163 S.E.2d 302 (1968); North Carolina State Hwy. Comm'n v. Gamble, 9 N.C. App. 618, 177 S.E.2d 434 (1970); Lautenschlager v. Board of Transp., 25 N.C. App. 228, 212 S.E.2d 551 (1975); Board of Transp. v. Bryant, 59 N.C. App. 256, 296 S.E.2d 814 (1982).

**Cited** in Johnson v. North Carolina State Hwy. Comm'n, 259 N.C. 371, 130 S.E.2d 544 (1963); State Hwy. Comm'n v. Thornton, 271 N.C. 227, 156 S.E.2d 248 (1968); French v. State Hwy. Comm'n, 273 N.C. 108, 159 S.E.2d 320 (1968); North Carolina State Hwy. Comm'n v. Wortman, 4 N.C. App. 546, 167 S.E.2d 462 (1969); North Carolina State Hwy. Comm'n v. Gamble, 6 N.C. App. 568, 170 S.E.2d 359 (1969); Wilcox v. North Carolina State Hwy. Comm'n, 279 N.C. 185, 181 S.E.2d 435 (1971); Ledford v. North Carolina State Hwy. Comm'n, 279 N.C. 188, 181 S.E.2d 466 (1971); Dr. T.C. Smith Co. v. North Carolina State Hwy. Comm'n, 279 N.C. 328, 182 S.E.2d 383 (1971); State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972); Department of Transp. v. Bragg, 308 N.C. 367, 302 S.E.2d 227 (1983); Frander v. Board of Transp., 66 N.C. App. 344, 311 S.E.2d 308 (1984); Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984); North Carolina Dep't of Transp. v. Kaplan, 80 N.C. App. 401, 343 S.E.2d 182 (1986); Department of Transp. v. Higdon, 82 N.C. App. 752, 347 S.E.2d 868 (1986); Department of Transp. v. Quick As A Wink of Asheville West, Inc., 82 N.C. App. 755, 347 S.E.2d 870 (1986); Taylor v. North Carolina DOT, 86 N.C. App. 299, 357 S.E.2d 439 (1987); City of Charlotte v. Cook, 348 N.C. 222, 498 S.E.2d 605 (1998); DOT v. Mahaffey, 137 N.C. App. 511, 528 S.E.2d 381, 2000 N.C. App. LEXIS 426 (2000); DOT v. Rowe, 138 N.C. App. 329, 531 S.E.2d 836, 2000 N.C. App. LEXIS 615 (2000); Onuska v. Barnwell, 140 N.C. App. 590, 537 S.E.2d 840, 2000 N.C. App. LEXIS 1244 (2000); DOT v. Roymac P'ship, 158 N.C. App. 403, 581 S.E.2d 770, 2003 N.C. App. LEXIS 1183 (2003); FMB, Inc. v. Creech, — N.C. App. —, 679 S.E.2d 410, 2009 N.C. App. LEXIS 1105 (July 7, 2009).

## § 136-109. Appointment of commissioners.

(a) Upon request of the owner in the answer, or upon motion filed by either the Department of Transportation or the owner within 60 days after the filing of answer, the clerk shall appoint, after the determination of other issues as provided by G.S. 136-108 of this Chapter, three competent, disinterested freeholders residing in the county to go upon the property and under oath appraise the damage to the land sustained by reason of the taking and report same to the court within a time certain. If no request or motion is made for the appointment of commissioners within the time permitted, the cause shall be transferred to the civil issue docket for trial as to the issue of just compensation.

(b) Such commissioners, if appointed, shall have the power to make such inspection of the property, hold such hearings, swear such witnesses, and take such evidence as they may, in their discretion, deem necessary, and shall file into court a report of their determination of the damages sustained.

(c) Said report of commissioners shall in substance be in written form as follows:

TO THE SUPERIOR COURT OF ______________________ COUNTY

We, ____________, ____________ and ____________ Commissioners appointed by the Court to assess the damages that have been and will be sustained by ____________, the owner of certain land lying in ____________ County, North Carolina, which has been taken by the Department of Transportation for highway purposes, do hereby certify that we convened, and, having first been duly sworn, visited the premises, and took such evidence as was presented to us, and after taking into full consideration the quality and quantity of the land and all other facts which reasonably affect its fair market value at the time of the taking, we have determined the fair market value of the part of the land taken to be the sum of $____________ and the damage to the remainder of the land of the owner by reason of the taking to be the sum of $____________ (if applicable).

We have determined the general and special benefits resulting to said owner from the construction of the highway to be the sum of $____________ (if applicable).

GIVEN under our hands, this the ______ day of ________, ______.

__________________________ (SEAL)

__________________________ (SEAL)

__________________________ (SEAL)

(d) A copy of the report shall at the time of filing be mailed to each of the parties. Within 30 days after the filing of the report, either the Department of Transportation or the owner, may except thereto and demand a trial de novo by a jury as to the issue of damages. Whereupon the action shall be placed on the civil issue docket of the superior court for trial de novo by a jury as to the issue of damages, provided, that upon agreement of both parties trial by jury may be waived and the issue determined by the judge. The report of commissioners shall not be competent as evidence upon the trial of the issue of damages in the superior court, nor shall evidence of the deposit by the Department of Transportation into the court be competent upon the trial of the issue of damages. If no exception to the report of commissioners is filed within the time prescribed final judgment shall be entered by the judge upon a determination and finding by him that the report of commissioners, plus interest computed in accordance with G.S. 136-113 of this Chapter, awards to the property owners just compensation. In the event that the judge is of the opinion and, in his discretion, determines that such award does not provide just compensation he shall set aside said award and order the case placed on the civil issue docket for determination of the issue of damages by a jury. (1959, c. 1025, s. 2; 1961, c. 1084, s. 5; 1963, c. 1156, s. 6; 1973, c. 108, s. 85; c. 507, s. 5; 1977, c. 464, s. 7.1; 1999-456, s. 59.)

## CASE NOTES

**Condemnee is only entitled to fair compensation** for such of his property, if any, as the State Highway Commission (now Department of Transportation) has taken. North Carolina State Hwy. Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

**Neither the Commission's (now Department's) nor the owner's estimate of the value of the land taken is conclusive.** North Carolina State Hwy. Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

**Cited** in Kenco Petro. Marketers, Inc. v. State Hwy. Comm'n, 269 N.C. 411, 152 S.E.2d 508 (1967); DOT v. Combs, 71 N.C. App. 372, 322 S.E.2d 602 (1984); Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

## § 136-110. Parties; orders; continuances.

The judge may appoint some competent attorney to appear for and protect the rights of any party or parties in interest who are unknown, or whose residence is unknown and who has not appeared in the proceeding by an attorney or agent. The judge shall appoint guardians ad litem for such parties as are minors, incompetents, or other parties who may be under a disability and without general guardian, and the judge shall have the authority to make such additional parties as are necessary to the complete determination of the proceeding and enter such other orders either in law or equity as may be necessary to carry out the provisions of this Article.

Upon the coming on of the cause for hearing pursuant to G.S. 136-108 or upon the coming on of the cause for trial, the judge, in order that the material ends of justice may be served, upon his own motion, or upon motion of any of the parties thereto and upon proper showing that the effect of condemnation upon the subject property cannot presently be determined, may, in his discretion, continue the cause until the highway project under which the appropriation occurred is open to traffic, or until such earlier time as, in the opinion of the judge, the effect of condemnation upon said property may be determined. (1959, c. 1025, s. 2; 1963, c. 1156, s. 7.)

### CASE NOTES

**Where, on the day set for trial, defendant failed to take any of the steps available** to obtain a delay or to request an extension, his "voluntary dismissal without prejudice" would be deemed an acknowledgment that he was unable to disprove the Department's valuation of the taken property, and that he would therefore stop contesting the action. DOT v. Combs, 71 N.C. App. 372, 322 S.E.2d 602 (1984).

## § 136-111. Remedy where no declaration of taking filed; recording memorandum of action.

Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the Department of Transportation and no complaint and declaration of taking has been filed by said Department of Transportation may, within 24 months of the date of the taking of the affected property or interest therein or the completion of the project involving the taking, whichever shall occur later, file a complaint in the superior court setting forth the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have estates or interests in the said real estate and if any such persons are under a legal disability, it must be so stated, together with a statement as to any encumbrances on said real estate; said complaint shall further allege with particularity the facts which constitute said taking together with the dates that they allegedly occurred; said complaint shall describe the property allegedly owned by said parties and shall describe the area and interests allegedly taken. Upon the filing of said complaint summons shall issue and together with a copy of said complaint be served on the Department of Transportation as provided by G.S. 1A-1, Rule 4(j)(4). The allegations of said complaint shall be deemed denied; however, the Department of Transportation within 60 days of service of summons and complaint may file answer thereto, and if said taking is admitted by the Department of Transportation, it shall, at the time of filing answer, deposit with the court the estimated amount of compensation for said taking and notice of said deposit shall be given to said owner. Said owner may apply for disbursement of said deposit and disbursement shall be made in accordance with the applicable provisions of G.S. 136-105 of this Chapter. If a taking is admitted, the

Department of Transportation shall, within 90 days of the filing of the answer to the complaint, file a map or plat of the land taken. The procedure hereinbefore set out shall be followed for the purpose of determining all matters raised by the pleadings and the determination of just compensation.

The plaintiff at the time of filing of the complaint shall record a memorandum of action with the register of deeds in all counties in which the land involved therein is located, said memorandum to be recorded among the land records of said county. The memorandum of action shall contain

(1) The names of those persons who the plaintiff is informed and believes may have or claim to have an interest in said lands and who are parties to said action;

(2) A description of the entire tract or tracts affected by the alleged taking sufficient for the identification thereof;

(3) A statement of the estate or interest in said land allegedly taken for public use; and

(4) The date on which plaintiff alleges the taking occurred, the date on which said action was instituted, the county in which it was instituted, and such other reference thereto as may be necessary for the identification of said action. (1959, c. 1025, s. 2; 1961, c. 1084, s. 6; 1963, c. 1156, s. 8; 1965, c. 514, ss. 1, 11/2; 1971, c. 1195; 1973, c. 507, s. 5; 1977, c. 464, ss. 7.1, 29; 1985, c. 182.)

**Legal Periodicals.** — For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

## CASE NOTES

**Statutory Remedy Is Ordinarily Exclusive.** — The statutory remedy for the recovery of damages to private property taken for public service is ordinarily exclusive, and when the statutory procedure is available, the owner, failing to pursue the statutory procedure, may not institute an action in superior court to recover his damages. Midgett v. North Carolina State Hwy. Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963), overruled on other grounds in Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

**But Common Law Provides Action for Taking of Property If Statute Is Inadequate.** — Where the Constitution points out no remedy and no statute affords an adequate remedy under a particular fact situation, the common law will furnish the appropriate action for adequate redress of a grievance based on the constitutional prohibition against taking or damaging private property for public use without just compensation. Midgett v. North Carolina State Hwy. Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963), overruled on other grounds in Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

**Thus, Plaintiff May Recover for Flooding of Land by Ocean from Highway Construction.** — The owner of land may maintain an action at common law to recover for the depreciation in the value of land resulting from a nuisance created by the construction of a highway at an elevation which periodically diverts storm waters of the ocean across the land, there being no undertaking by defendant to condemn plaintiff's property under this Article. Midgett v. North Carolina State Hwy. Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963), overruled on other grounds in Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

**Although Statute of Limitations, If Strictly Applied, Would Bar Cause of Action.** — See Midgett v. North Carolina State Hwy. Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963), overruled on other grounds in Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

**Since plaintiff is not restricted to the procedures set out in this Article.** Midgett v. North Carolina State Hwy. Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963), overruled on other grounds in Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

**Section Provides Legal Remedy When Injunction Is Unavailable.** — Where plaintiffs fail to show substantial or irreparable harm which would entitle them to an injunction prohibiting the State Department of Transportation from removing the remaining portion of an old causeway which is plaintiffs' only means of vehicular ingress to and egress from their property, plaintiffs may resort to their legal remedy under this section to recover just compensation for the taking of their property rights. Frink v. North Carolina Bd. of Transp., 27 N.C. App. 207, 218 S.E.2d 713 (1975).

**This section was designed to limit the time within which an action can be brought.** Wilcox v. North Carolina State Hwy. Comm'n, 279 N.C. 185, 181 S.E.2d 435 (1971).

**Prescribed Remedy Must Be Pursued Within Time Specified.** — Although a property owner is always entitled to just compensation when his land is taken for public use, he must pursue the prescribed remedy within the time specified. Ledford v. North Carolina State Hwy. Comm'n, 279 N.C. 188, 181 S.E.2d 466 (1971).

**Otherwise, Plea of Statute of Limitations Is Complete Defense.** — Where the plaintiff — notwithstanding he had actual knowledge that the State Highway Commission (now Department of Transportation) had appropriated his property — did not bring this action for compensation within the time fixed by this section for its commencement, defendant's plea of the statute is a complete defense to the action. Wilcox v. North Carolina State Hwy. Comm'n, 279 N.C. 185, 181 S.E.2d 435 (1971).

**Construction With Other Statutes.** — Decision and order of the North Carolina Industrial Commission was affirmed because the North Carolina Tort Claims Act, G.S. 143-291 et seq., governed the property owners' negligence claim against a state agency, rather than G.S. 136-111. The statute addressed actions seeking damages for condemnation, while the North Carolina Tort Claims Act governed negligence claims. Pate v. N.C. DOT, 176 N.C. App. 530, 626 S.E.2d 661, 2006 N.C. App. LEXIS 528 (2006), cert. denied, 360 N.C. 535, 633 S.E.2d 819 (2006).

**The statutory time begins to run on completion of the project or the taking,** whichever is later. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

**Limitation on Action Involving Airport Runway.** — Where plaintiffs' action, involving a taking incident to the construction of an airport runway, accrued in June, 1979, and over two years later, in July, 1981, new Chapter 40A was enacted, the period between such enactment and the cutoff date under the new limitation, five months and three weeks (July 10, 1981 to January 1, 1982), was not itself so unreasonably short as to deny plaintiffs due process of law, particularly in light of the fact that plaintiffs lived in an area where large numbers of inverse condemnation actions were filed within the statutory period. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

**The provisions of § 136-108 apply** to condemnation proceedings under this section as well as under G.S. 136-104. Berta v. North Carolina State Hwy. Comm'n, 36 N.C. App. 749, 245 S.E.2d 409 (1978).

**"Taking".** — "Taking" under the power of eminent domain may be defined generally as entering upon private property for more than a momentary period and, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof. Ledford v. North Carolina State Hwy. Comm'n, 279 N.C. 188, 181 S.E.2d 466 (1971).

Although plaintiffs' property damage caused by the bridge construction does not fit squarely within the definition of a "taking," North Carolina courts have consistently held that such damage does, in fact, constitute a "taking." Robinson v. North Carolina DOT, 89 N.C. App. 572, 366 S.E.2d 492 (1988).

**Taking Occurred When Further Use Prevented.** — The taking occurred when the State Highway Commission (now Department of Transportation) erected the fence, severing the right-of-way and preventing its further use, and not at the time plaintiffs were first inconvenienced by it. Ledford v. North Carolina State Hwy. Comm'n, 279 N.C. 188, 181 S.E.2d 466 (1971).

**Inverse Condemnation upon a Further Taking.** — Property owners need not seek to recover compensation in ongoing condemnation proceedings for a subsequent further taking by the State. Property owners may choose to bring a separate action for inverse condemnation pursuant to this section when there is a further taking by the State after the initiation of the original condemnation action. Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

When choosing to bring a separate action for inverse condemnation, the property owners will not be entitled to damages which are merely a consequence of the taking in the prior condemnation action. Injuries accruing to the remaining property caused by the original taking by condemnation, including injuries resulting from the condemnor's use of the previously taken portion, are not compensable in an inverse condemnation action unless they are so great as to amount in themselves to a separate taking. Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

**Effect of Conveyance of Land After Institution of Action.** — The trial court did not err in denying appellants' motion to intervene in an inverse condemnation action, where part of the land in question had been conveyed to the appellants by the plaintiffs in the condemnation action after the institution of the action, since a "taking" is envisioned as already having occurred if the property owner institutes the proceeding under this section. Berta v. North

Carolina State Hwy. Comm'n, 36 N.C. App. 749, 245 S.E.2d 409 (1978).

**Right to Compensation Not Dependent on Intent of Department.** — A landowner's right to recover compensation by court action under this section in no way depends upon whether the State Highway Commission (now Department of Transportation) intends to compensate him. Wilcox v. North Carolina State Hwy. Comm'n, 279 N.C. 185, 181 S.E.2d 435 (1971).

**Owner Entitled to Compensation When Deprived of Easement.** — An owner whose access to a public road is a right-of-way over adjoining property is entitled to just compensation when the State deprives him of this easement. Ledford v. North Carolina State Hwy. Comm'n, 279 N.C. 188, 181 S.E.2d 466 (1971).

**Damage to land which inevitably or necessarily flows from a public construction project results in an appropriation of land for public use.** The remedy for such property damage is an action against the Department of Transportation on the theory of condemnation. Robinson v. North Carolina DOT, 89 N.C. App. 572, 366 S.E.2d 492 (1988).

**Tolling of Statute of Limitations.** — The 24-month statute of limitations contained in this section was automatically and unconditionally tolled by 50 U.S.C.A. App. G.S. 525 until the plaintiff's retirement from military service. Taylor v. North Carolina DOT, 86 N.C. App. 299, 357 S.E.2d 439 (1987).

**Laches.** — The plaintiff's exemption from the statute of limitations in this section during his military service, established by 50 U.S.C.A. App. G.S. 525, applied apart from and irrespective of the doctrine of laches, and the trial court's findings were sufficient to support its conclusion that laches barred the plaintiff's claim under this section. Taylor v. North Carolina Dep't of Transp., 86 N.C. App. 299, 357 S.E. 439 (1987).

**Relative Liabilities of Department and Contractor For Damages from Blasting Operations.** — Because of the inherently dangerous or ultrahazardous nature of blasting, when a contractor employed by the Department of Transportation uses explosives in the performance of his work, he is primarily and strictly liable for any damages proximately resulting therefrom. Cody v. North Carolina Dep't of Transp., 45 N.C. App. 471, 263 S.E.2d 334 (1980).

A contractor employed by the Department of Transportation cannot be held liable to a property owner for damages resulting from the work done with proper skill and care. The owner's remedy is against the Department of Transportation on the theory of condemnation. Cody v. North Carolina Dep't of Transp., 45 N.C. App. 471, 263 S.E.2d 334 (1980).

An agreement between the Department of Transportation and a contractor that the contractor would indemnify the Department of Transportation for any claims arising out of the performance of a highway reconstruction contract, including any claims caused by the contractor's blasting operations, did not affect plaintiff's right to sue the Department of Transportation or the contractor or both for loss of a building on their property allegedly caused by the contractor's blasting operations. Cody v. North Carolina Dep't of Transp., 45 N.C. App. 471, 263 S.E.2d 334 (1980).

**Additional Compensation for Delay in Payment — When Required.** — When the taking of property by the State precedes the payment of compensation, the owner is entitled to additional compensation for the delay in payment. U.S. Const., Amends. V and XIV and N.C. Const., Art. I, § 19 require this additional payment as a part of just compensation. The additional sum awarded for delay in payment of the value for the property taken is not interest eo nomine, but interest is a fair means for measuring the amount to be arrived at of such additional sums. Lea Co. v. North Carolina Bd. of Transp., 317 N.C. 254, 345 S.E.2d 355 (1986).

**Same — Determination as Judicial Function.** — Since the ascertainment of just compensation is a judicial function, and compensation for delay in payment is a part of just compensation, determining the amount of additional compensation for delay in payment is also a judicial function. Lea Co. v. North Carolina Bd. of Transp., 317 N.C. 254, 345 S.E.2d 355 (1986).

**Same — Compound Interest.** — Compound interest should be allowed for delayed payment in condemnation cases if the evidence shows that during the pertinent period the "prudent investor" could have obtained compound interest in the market place. The use of compound interest as a measure in calculating additional compensation for delay is a matter which will turn upon the evidence in each case and must be decided on a case-by-case basis. Lea Co. v. North Carolina Bd. of Transp., 317 N.C. 254, 345 S.E.2d 355 (1986).

**Appeal of Finding of Inverse Condemnation Dismissed as Interlocutory.** — Because a G.S. 136-108 hearing did not finally resolve all issues, and because the department of transportation (DOT) failed to identify what right was at issue or why any substantial right would be jeopardized without immediate review of the trial court's order, its appeal of a finding of inverse condemnation under G.S. 136-111 was dismissed as interlocutory under G.S. 1A-1, Rule 54(a). Wilfong v. N.C. DOT, — N.C. App. —, 670 S.E.2d 331, 2009 N.C. App. LEXIS 31 (2009).

**Applied** in Kaperonis v. North Carolina State Hwy. Comm'n, 260 N.C. 587, 133 S.E.2d

464 (1963); Browning v. North Carolina State Hwy. Comm'n, 263 N.C. 130, 139 S.E.2d 227 (1964); Davis v. North Carolina State Hwy. Comm'n, 271 N.C. 405, 156 S.E.2d 685 (1967); T.C. Smith Co. v. North Carolina State Hwy. Comm'n, 279 N.C. 328, 182 S.E.2d 383 (1971); Lautenschlager v. Board of Transp., 25 N.C. App. 228, 212 S.E.2d 551 (1975); Guyton v. North Carolina Bd. of Transp., 30 N.C. App. 87, 226 S.E.2d 175 (1976); Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

**Cited** in Department of Transp. v. Winston Container Co., 45 N.C. App. 638, 263 S.E.2d 830 (1980); National Adv. Co. v. Bradshaw, 48 N.C. App. 10, 268 S.E.2d 816 (1980); Lea Co. v. North Carolina Bd. of Transp., 57 N.C. App. 392, 291 S.E.2d 844 (1982); Cody v. Department of Transp., 60 N.C. App. 724, 300 S.E.2d 25 (1983); Department of Transp. v. Bragg, 308 N.C. 367, 302 S.E.2d 227 (1983); Robinson v. North Carolina DOT, 89 N.C. App. 574, 366 S.E.2d 494 (1988); Adams Outdoor Adv. v. North Carolina DOT, 112 N.C. App. 120, 434 S.E.2d 666 (1993); Southern Furn. Co. of Conover, Inc. v. DOT, 122 N.C. App. 113, 468 S.E.2d 523 (1996); National Adv. Co. v. North Carolina DOT, 124 N.C. App. 620, 478 S.E.2d 248 (1996).

## § 136-112. Measure of damages.

The following shall be the measure of damages to be followed by the commissioners, jury or judge who determines the issue of damages:

(1) Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

(2) Where the entire tract is taken the measure of damages for said taking shall be the fair market value of the property at the time of taking. (1959, c. 1025, s. 2.)

**Cross References.** — For highway cases discussing offsets against damages prior to the enactment of this section, see case notes under G.S. 136-19.

**Legal Periodicals.** — For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

### CASE NOTES

I. General Consideration.
II. Damages Where Part of Tract Is Taken.
III. Pleading and Practice.

### I. GENERAL CONSIDERATION.

**Constitutionality.** — The provision allowing general benefits to set off the fair market value of the remaining part of a tract of land under this section violates the constitutional requirement of providing just compensation in condemnation proceedings, and the equal protection rights of property owners, because the statute allows a compensation which is unjust to the condemnee while providing a windfall to the public. The property owner is subjected to an involuntary taking of his property while also being subjected to the injustice of receiving an amount less than what he actually lost. He is being required to carry the undue burden of paying an additional cost not paid by the rest of the public. DOT v. Rowe, 138 N.C. App. 329, 531 S.E.2d 836, 2000 N.C. App. LEXIS 615 (2000).

The measure of compensation in this section provides "just compensation" within the scope of both the federal and state constitutions. DOT v. Mahaffey, 137 N.C. App. 511, 528 S.E.2d 381, 2000 N.C. App. LEXIS 426 (2000).

Section 136-112(1) is a valid exercise of the legislative power of the General Assembly and does not violate the equal protection clauses of the United States or North Carolina Constitutions. DOT v. Rowe, 353 N.C. 671, 549 S.E.2d 203, 2001 N.C. LEXIS 673 (2001), cert. denied, 534 U.S. 1130, 122 S. Ct. 1070, 151 L. Ed. 2d 972 (2002).

**Legislative Intent.** — This section clarifies the legislative intent behind G.S. 136-103. State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247, cert. denied, 311 N.C. 307, 317 S.E.2d 904 (1984).

**Special Benefits.** — The provision allowing the value of special benefits to the fair market value of the remaining part of a tract of land partially condemned under this section to be set off against the amount of compensation paid does not violate the constitutional requirement of providing just compensation in condemnation proceedings. DOT v. Rowe, 138 N.C. App. 329, 531 S.E.2d 836, 2000 N.C. App. LEXIS 615 (2000).

**The State's right to exercise the power of eminent domain is limited** by the constitutional requirements of due process and the payment of just compensation for property condemned. State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247, cert. denied, 311 N.C. 307, 317 S.E.2d 904 (1984).

**Reasonable Use Rule Inapplicable.** — Reasonable use rule, pursuant to which possessor of land incurs liability for interference with flow of surface waters only when such interference is unreasonable and causes substantial damage, governs disposal of surface waters among private parties and has no application in condemnation proceedings, since the principle of reasonable use is superseded by the constitutional mandate that just compensation must be paid when private property is taken for public use. Board of Transp. v. Terminal Whse. Corp., 300 N.C. 700, 268 S.E.2d 180 (1980).

**This section prescribes the rule for determining what constitutes just compensation.** North Carolina State Hwy. Comm'n v. Hettiger, 271 N.C. 152, 155 S.E.2d 469 (1967).

**It contains no provision as to factors to be considered by the jury in determining fair market value.** North Carolina State Hwy. Comm'n v. Gasperson, 268 N.C. 453, 150 S.E.2d 860 (1966).

**And Does Not Restrict Methods of Real Estate Appraisers.** — This section speaks only to the exclusive measure of damages to be employed by the "commissioners, jury or judge." It in no way attempts to restrict expert real estate appraisers to any particular method of determining the fair market value of property either before or after condemnation. Board of Transp. v. Jones, 297 N.C. 436, 255 S.E.2d 185 (1979).

**A determination of ownership of the area affected is a prerequisite** to a determination of just compensation for the area taken. Limiting the trial court's factfinding to ownership of the area taken alone would deprive the defendants of just compensation. State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247, cert. denied, 311 N.C. 307, 317 S.E.2d 904 (1984).

A valid exercise of the power of eminent domain presupposes a complete determination of the area affected, including ownership. State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247, cert. denied, 311 N.C. 307, 317 S.E.2d 904 (1984).

**Compensation Must Be Full and Complete.** — In condemnation proceedings, damages are to be awarded to compensate for loss sustained by the landowner. The compensation must be full and complete and include everything which affects the value of the property and in relation to the entire property affected. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**All Pertinent Factors Are to Be Considered.** — All factors pertinent to a determination of what a buyer, willing to buy but not under compulsion to do so, would pay and what a seller, willing to sell but not under compulsion to do so, would take for the property must be considered. City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 178 S.E.2d 601 (1971).

**The market value of property is to be determined on basis of conditions existing at the time of taking.** City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 178 S.E.2d 601 (1971).

The value of land taken should be ascertained as of the date of taking. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854, appeal dismissed, 293 N.C. 740, 241 S.E.2d 515 (1977), aff'd, 296 N.C. 250, 249 S.E.2d 803 (1978).

**And it is not limited by the use then actually being made of the property.** City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 178 S.E.2d 601 (1971).

**But it is determined in the light of all uses to which the property was then adapted** and for which it could have been used. City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 178 S.E.2d 601 (1971).

In estimating the value of property all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner. Williams v. State Hwy. Comm'n, 252 N.C. 514, 114 S.E.2d 340 (1960).

In condemnation proceedings, the determinative question is: In its condition on the day of taking, what was the value of the land for the highest and best use to which it would be put by owners possessed of prudence, wisdom and adequate means? The owner's actual plans or hopes for the future are completely irrelevant. Such aspirations are regarded as too remote and speculative to merit consideration. City of Winston-Salem v. Davis, 59 N.C. App. 172, 296 S.E.2d 21, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

**Valuation of Undeveloped Land Suitable for Subdivision.** — It is proper to show in a highway condemnation proceeding that a particular tract of land is suitable and available for division into lots and is valuable for that purpose, but it is not proper to show the number and value of lots as separated parcels in an imaginary subdivision thereof. In other words, it is not proper for the jury in these cases to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact. Such undeveloped property may not be valued on a per lot basis. The cost factor is too speculative. State Hwy. Comm'n v. Reeves, 8 N.C. App. 47, 173 S.E.2d 494 (1970).

The fair market value of undeveloped land immediately before condemnation is not a speculative value based on an imaginary subdivision and sales in lots to many purchasers. It is the fair market value of the land as a whole in its then state according to the purpose or purposes to which it is best adapted and in accordance to its best and highest capabilities. It is not proper for a jury to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact. Such undeveloped property may not be valued on a per lot basis. State Hwy. Comm'n v. Reeves, 8 N.C. App. 47, 173 S.E.2d 494 (1970).

A designated number of lots multiplied by a price per lot is not a proper basis for determining value of undeveloped land which is suitable for subdivision. State Hwy. Comm'n v. Reeves, 8 N.C. App. 47, 173 S.E.2d 494 (1970).

A court is correct in excluding testimony as to value of the land based on supposed subdivisions and the sale of lots at an estimated price per lot after deducting an estimated cost per lot for development. Such a method of valuation is too speculative and remote. State Hwy. Comm'n v. Reeves, 8 N.C. App. 47, 173 S.E.2d 494 (1970).

**As to land upon which buildings have been erected** and affixed to the soil taken by eminent domain, so far as the buildings add to the market value of the land, they must be considered in determining the compensation to be awarded to the owner. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**Land and Improvements May Be Assessed Separately.** — Market value in a condemnation case may not be arrived at by assessing separately the value of land and improvements and adding the two together. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**Where defendants acquired two tracts as separate tracts at different times,** considered them to be separate tracts, and put them to different usages, and as of the date of taking, neither tract was necessary to defendants' use or enjoyment of the other, and the trial court found that there was no connection between the two tracts such as would render defendants' enjoyment of the smaller tract necessary to their enjoyment of the larger one, the court's findings supported its conclusion that there did not exist, on the date of taking, any unity of use between the two tracts, and such conclusion supported its order that the tracts be considered separately in assessing damages. North Carolina Dep't of Transp. v. Kaplan, 80 N.C. App. 401, 343 S.E.2d 182, cert. denied, 317 N.C. 705, 347 S.E.2d 437 (1986).

**Landowners were not entitled to recover any damages, other than interest, for loss of use** of their property between the time they vacated it and the time the State Highway Commission (now Department of Transportation) deposited its estimate of just compensation for the property appropriated. Its fair market value as of the day of the taking was the full measure of the damages. Davis v. North Carolina State Hwy. Comm'n, 271 N.C. 405, 156 S.E.2d 685 (1967).

**Duty of Property Owners to Mitigate Their Damages.** — The duty of property owners to mitigate their damages includes the avoidance of conduct which would increase their damages. DOT v. Coleman, 127 N.C. App. 342, 489 S.E.2d 187 (1997).

**Evidence that property owners made renovations in bad faith and for the purpose of enhancing their damages** was relevant and competent evidence for a jury to consider in the determination of the value of the property at the time of the taking. DOT v. Coleman, 127 N.C. App. 342, 489 S.E.2d 187 (1997).

**Valid Traffic Regulations Not Amounting to Compensable Taking.** — The enactment of valid traffic regulations which change traffic patterns and cause circuity of travel but do not foreclose reasonable access to the roadway from abutting property are proper exercises of the police power for which no compensation need be made by the State or its agencies. Board of Transp. v. Terminal Whse. Corp., 300 N.C. 700, 268 S.E.2d 180 (1980).

The dead-ending and reclassification of the roadway on which property abutted are valid traffic regulations for which no compensation is ordinarily required. Board of Transp. v. Terminal Whse. Corp., 300 N.C. 700, 268 S.E.2d 180 (1980).

Noncompensable injuries to property values resulting from enactment of valid traffic regulations do not become compensable merely because some property was coincidentally taken in connection with project which put the regulations into effect. Board of Transp. v. Terminal Whse. Corp., 300 N.C. 700, 268 S.E.2d 180 (1980).

**Frequency of flooding is not, in itself, determinative of a taking.** Lea Co. v. North Carolina Bd. of Transp., 57 N.C. App. 392, 291 S.E.2d 844 (1982), aff'd, 308 N.C. 603, 304 S.E.2d 164 (1983).

**Recurring Flood Is Permanent Invasion If Structure Causing It Is Permanent.** — As a 100-year flood is, by statistical definition, an inevitably recurring event, thus, if the structures causing the overflow are permanent, the overflow which occurs with the 100-year flood constitutes a permanent invasion. Lea Co. v. North Carolina Bd. of Transp., 57 N.C. App. 392, 291 S.E.2d 844 (1982), aff'd, 308 N.C. 603, 304 S.E.2d 164 (1983).

**Taker Liable Only for Value of Servient Estate Where Encumbrance Is Not Taken or Destroyed.** — Where the encumbrance was not taken, or destroyed, by the condemnation proceeding, the taker, not having taken or destroyed the right of the owner of the dominant estate, was held liable for the value of the servient estate only. City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 178 S.E.2d 601 (1971).

**Condemnation of Fee Simple Determinable and Possibility of Reverter.** — In the absence of exceptional circumstances, if both the fee simple determinable estate and the possibility of reverter are condemned and if, at the time of the taking, the event which would otherwise terminate the fee simple determinable is not a probability for the near future, the award is made on the basis of the full market value of the land without restrictions as to its use. City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 178 S.E.2d 601 (1971).

Where both the fee simple determinable and the possibility of reverter have been taken in the same condemnation proceeding, the full fee simple absolute has been taken and its full value should be paid by the taker to the party or parties rightfully entitled. City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 178 S.E.2d 601 (1971).

**Taker-Grantor of Fee Simple Determinable Not Liable for Possibility of Reverter.** — Where the taker was the grantor of the fee simple determinable and, therefore, was already the owner of the possibility of reverter, it was not required to pay for it, and the award was properly limited to the value of the fee simple determinable estate. City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 178 S.E.2d 601 (1971).

**Inverse Condemnation upon a Further Taking.** — Property owners need not seek to recover compensation in ongoing condemnation proceedings for a subsequent further taking by the State. Property owners may choose to bring a separate action for inverse condemnation pursuant to G.S. 136-111 when there is a further taking by the State after the initiation of the original condemnation action. Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

When trial on the issue of damages in the initial condemnation action has not yet occurred, principles of judicial economy dictate that the owners of the taken land may allege a further taking by inverse condemnation in ongoing proceedings. Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

**Inverse Condemnation Claim Properly Dismissed After Formal Condemnation Instituted.** — The trial court correctly granted the Department of Transportation's motion to dismiss the defendants' inverse condemnation claim where DOT had already instituted a formal condemnation action prior to defendants' answer and the provisions of this section would guide the determination of the proper amount of just compensation for the DOT's taking from the property. DOT v. Mahaffey, 137 N.C. App. 511, 528 S.E.2d 381, 2000 N.C. App. LEXIS 426 (2000).

**Statutory Provisions Not Affected by Agreement Made in Anticipation of Condemnation.** — Defendants could not, by agreement made in anticipation of the condemnation of a portion of their property, change the statutory provisions relating to the time of, and basis for, the compensation to be paid when the State Highway Commission (now Department of Transportation) condemned the property for highway purposes. North Carolina State Hwy. Comm'n v. Hettiger, 271 N.C. 152, 155 S.E.2d 469 (1967).

**Right of Action Accrues When Damage Occurs.** — Where there has been a taking of property by the construction and maintenance of a nuisance, the right of action does not accrue until damage has occurred. And ordinarily the applicable statute of limitations begins to run against the landowner at the time the first damage arises from the nuisance. Lea Co. v. North Carolina Bd. of Transp., 57 N.C. App. 392, 291 S.E.2d 844 (1982), aff'd, 308 N.C. 603, 304 S.E.2d 164 (1983).

**Applied** in North Carolina State Hwy. Comm'n v. Pearce, 261 N.C. 760, 136 S.E.2d 71 (1964); Board of Transp. v. Harvey, 28 N.C. App. 327, 220 S.E.2d 815 (1976); City of Wilson Redevelopment Comm'n v. Boykin, — N.C. App. —, 667 S.E.2d 282, 2008 N.C. App. LEXIS 1755 (2008).

**Cited** in State Hwy. Comm'n v. Raleigh Farmers Mkt., Inc., 263 N.C. 622, 139 S.E.2d 904 (1965); Town of Hillsborough v. Bartow, 38 N.C. App. 623, 248 S.E.2d 364 (1978); City of Winston-Salem v. Tickle, 53 N.C. App. 516, 281 S.E.2d 667 (1981); Department of Transp. v. Bragg, 308 N.C. 367, 302 S.E.2d 227 (1983); Department of Transp. v. McDarris, 62 N.C. App. 55, 302 S.E.2d 277 (1983); Frander v. Board of Transp., 66 N.C. App. 344, 311 S.E.2d 308 (1984); Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993); Guilford County v. Kane, 114 N.C. App. 243, 441 S.E.2d 556 (1994); DOT v. Rowe, 131 N.C. App. 206, 505 S.E.2d 911 (1998).

## II. DAMAGES WHERE PART OF TRACT IS TAKEN.

**In General.** — Where a portion of a tract of land is taken for highway purposes, the just compensation to which the landowner is entitled is the difference between the fair market value of the property as a whole immediately before and immediately after the appropriation of the portion thereof. City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 178 S.E.2d 601 (1971).

For discussion of formulas for measuring just compensation in partial taking cases, see Board of Transp. v. Jones, 297 N.C. 436, 255 S.E.2d 185 (1979).

The measure of damages to be used in condemnation cases in which the state does not take the plaintiff's property in its entirety is mandated by this section to be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking less any special or general benefits. Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

Subdivision (1) of this section provides that the commissioners, jury or judge are restricted to the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking. The judge is required to instruct the jury to use the above standard—and that standard only—in computing damages. However, a real estate appraiser is given wide latitude regarding permissible bases for opinions on value. Department of Transp. v. Byrum, 82 N.C. App. 96, 345 S.E.2d 416 (1986).

**The factors for determining whether the parcels are one tract or several tracts are** "unity if ownership, physical unity and unity of use." City of Winston-Salem v. Davis, 59 N.C. App. 172, 296 S.E.2d 21, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

**Subdivision (1) states the applicable rule** as to the ultimate measure of damages. North Carolina State Hwy. Comm'n v. Gasperson, 268 N.C. 453, 150 S.E.2d 860 (1966).

Subdivision (1) of this section provides a landowner compensation only for damages arising from a taking of property and which flow directly from the use to which the land taken is put. No compensation is awarded for damages which are shared by neighboring property owners and the public, and which arise regardless of whether the landowner's property has been condemned. Board of Transp. v. Bryant, 59 N.C. App. 256, 296 S.E.2d 814 (1982).

**Which Is in Accord with Rule Adopted and Stated by Supreme Court.** — The rule as to measure of damages stated in subdivision (1) is in accord with that adopted and stated by the Supreme Court in numerous decisions. North Carolina State Hwy. Comm'n v. Gasperson, 268 N.C. 453, 150 S.E.2d 860 (1966).

**To recover under subdivision (1) the area affected and the area taken must constitute a single tract.** Unity of ownership is an important criterion. State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247, cert. denied, 311 N.C. 307, 317 S.E.2d 904 (1984).

**All Pertinent Factors Are to Be Considered.** — All factors pertinent to the fair market value of the remainder immediately after the taking are to be considered by the jury. North Carolina State Hwy. Comm'n v. Gasperson, 268 N.C. 453, 150 S.E.2d 860 (1966).

If only a portion of a single tract is taken, the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854, appeal dismissed, 293 N.C. 740, 241 S.E.2d 515 (1977), aff'd, 296 N.C. 250, 249 S.E.2d 803 (1978).

**Real Estate Appraisers Not Restricted by Subdivision (1).** — Subdivision (1) of this section speaks only to the exclusive measure of damages to be employed by the commissioner, jury or judge. It in no way attempts to restrict expert real estate appraisers to any particular method of determining the fair market value of property. Department of Transp. v. McDarris, 62 N.C. App. 55, 302 S.E.2d 277 (1983).

Real estate appraisers are not required to use the before and after formula in determining damages. Department of Transp. v. McDarris, 62 N.C. App. 55, 302 S.E.2d 277 (1983).

**Expert real estate appraisers need not use the before and after formula in determining damages.** Expert real estate appraisers should be given latitude in determining the value of property. Duke Power Co. v. Mom 'N' Pops Ham House, Inc., 43 N.C. App. 308, 258 S.E.2d 815 (1979).

**Items Making Up Difference in Value Before and After Taking.** — Items going to make up the "difference" in subdivision (1) of this section embrace compensation for the part taken and compensation for injury to the remaining portion, which is to be offset under the terms of this section by any general and special benefits resulting to the landowner from the utilization of the property taken for a highway. Templeton v. State Hwy. Comm'n, 254 N.C. 337, 118 S.E.2d 918 (1961).

**Distinction Between General and Special Benefits.** — The most satisfactory distinction between general and special benefits is that general benefits are those which arise from the fulfillment of the public object which justified the taking, and special benefits are those which arise from the peculiar relation of the land in question to the public improvement. Templeton v. State Hwy. Comm'n, 254 N.C. 337, 118 S.E.2d 918 (1961).

"Special benefits" have been defined as those which arise from the peculiar relation of the land in question to the public improvement. "General benefits" are those accruing to the public at large by reason of increased community property resulting from the project. Department of Transp. v. McDarris, 62 N.C. App. 55, 302 S.E.2d 277 (1983).

**Damage Resulting from Condemnor's Use of Appropriated Portion Included.** — In determining the fair market value of the remaining land where only a part or a tract of land is appropriated for highway purposes, the owner is entitled to damage which is a consequence of the taking of the portion thereof, that is, for the injuries accruing to the residue from the taking, which includes damage resulting from the condemnor's use of the appropriated portion. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854, appeal dismissed, 293 N.C. 740, 241 S.E.2d 515 (1977), aff'd, 296 N.C. 250, 249 S.E.2d 803 (1978).

The fair market value of the remainder immediately after the taking where only a part or a tract of land is appropriated for highway purposes contemplates the project in its completed state and any damage to the remainder due to the user to which the part appropriated may, or probably will, be put. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854, appeal dismissed, 293 N.C. 740, 241 S.E.2d 515 (1977), aff'd, 296 N.C. 250, 249 S.E.2d 803 (1978).

**But Damage Must Result from Use of Particular Land Taken.** — Noise or any other element of damages to the remaining lands where only a part or a tract of land is appropriated for highway purposes is compensable only if it is demonstrably resultant from the use of the particular land taken. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854, appeal dismissed, 293 N.C. 740, 241 S.E.2d 515 (1977), aff'd, 296 N.C. 250, 249 S.E.2d 803 (1978).

As long as a landowner is afforded reasonable access to an abutting street or highway, he is not entitled to compensation. Mere inconvenience resulting from circuity of travel is not compensable. Board of Transp. v. Bryant, 59 N.C. App. 256, 296 S.E.2d 814 (1982).

**And Compensation Does Not Include Diminution of Value Resulting from Taking Lands of Others.** — The rule supported by better reason and the weight of authority is that the just compensation assured by U.S. Const., Amend. V to an owner, a part of whose land is taken for public use, does not include the diminution of value of the remainder, caused by the acquisition and use of adjoining lands of others for the same undertaking. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854, appeal dismissed, 293 N.C. 740, 241 S.E.2d 515 (1977), aff'd, 296 N.C. 250, 249 S.E.2d 803 (1978).

**Damages Not Resulting from Taking Are Not Compensable.** — Damages for unreasonable interference with access to defendants' remaining property during construction on a public road project do not arise from the taking of the right-of-way or from the use to which the taken property is put. These damages are noncompensable because they are not unique to defendants. They are shared by defendants in common with the public at large, and the fact that a taking occurs does not make all other damages automatically compensable. Board of Transp. v. Bryant, 59 N.C. App. 256, 296 S.E.2d 814 (1982).

**Traffic Noise from Proposed Highway as Element of Damage.** — The exclusion of evidence of traffic noise from the controlled-access highway to be constructed on the part of the plaintiffs' land taken by the Department of Transportation, which would cause a diminution in value of the remaining land, was prejudicial error. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854, appeal dismissed, 293 N.C. 740, 241 S.E.2d 515 (1977), aff'd, 296 N.C. 250, 249 S.E.2d 803 (1978).

### III. PLEADING AND PRACTICE.

**Burden of Proof.** — The landowner who has a part of his tract taken has the burden of proving by competent evidence how the use of the land taken results in damage to the remainder. Board of Transp. v. Brown, 34 N.C. App. 266, 237 S.E.2d 854, appeal dismissed, 293 N.C. 740, 241 S.E.2d 515 (1977), aff'd, 296 N.C. 250, 249 S.E.2d 803 (1978).

The burden of proving the existence and the amount of any special or general benefits under this section is on the condemnor. North Carolina Bd. of Transp. v. Rand, 299 N.C. 476, 263 S.E.2d 565 (1980).

**Admissibility of Evidence Generally.** — Any evidence which aids the jury in fixing a fair market value of the land and its diminution by the burden put upon it is relevant and should be heard. Templeton v. State Hwy. Comm'n, 254 N.C. 337, 118 S.E.2d 918 (1961); State Hwy. Comm'n v. Phillips, 267 N.C. 369, 148 S.E.2d 282 (1966).

When the Department of Transportation takes only a part of a tract of land, the owners may introduce at the jury trial on the issue of compensation any evidence of damage to the remaining property caused by the Department of Transportation before the opening of the jury trial. Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

Trial court did not err in admitting evidence of the net income of a hypothetical valet parking business on a condemned property as, inter alia, the owners' experts testified as to the reasons that the net income approach was used and the process by which they derived the necessary numerical values, and the evidence of the net income from operation of a parking lot on the property was not inadmissible evidence of "lost profits" as the owners' experts performed the calculations necessary to convert rental income to fair market value. City of Charlotte v. Hurlahe, 178 N.C. App. 144, 631 S.E.2d 28, 2006 N.C. App. LEXIS 1296 (2006).

**Rules as to Admissibility of Evidence of Purchase Price.** — See City of Winston-Salem v. Davis, 59 N.C. App. 172, 296 S.E.2d 21, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

In general, purchase price is admissible if it is relevant to the value of the land at the time of condemnation. City of Winston-Salem v. Davis, 59 N.C. App. 172, 296 S.E.2d 21, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Where condemnees bought the property at a voluntary sale only four years before the condemnation action and there was no evidence of extensive changes to the condemned parcel or to the surrounding area, the purchase price was admissible. City of Winston-Salem v. Davis, 59 N.C. App. 172, 296 S.E.2d 21, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

The price paid at voluntary sales of land, similar in nature, location, and condition to the condemnee's land, is admissible as independent evidence of the value of the land taken if the prior sale was not too remote in time. Whether two properties are sufficiently similar to admit evidence of the purchase price of one as a guide to the value of the other is a question to be determined by the trial judge in the exercise of a sound discretion guided by law. City of Winston-Salem v. Davis, 59 N.C. App. 172, 296 S.E.2d 21, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Trial court did not abuse its discretion in a condemnation action by allowing testimony as to the purchase price of a comparable property and how that price factored into the price used to convey a portion of the comparable property in an inhouse transfer from one affiliated company to another in determining the value of the condemned property under G.S. 136-112(1). DOT v. Haywood Oil Co., — N.C. App. —, 673 S.E.2d 712, 2009 N.C. App. LEXIS 258 (2009).

**Prima facie showing of substantial physical damage measurable in monetary terms is required.** Lea Co. v. North Carolina Bd. of Transp., 57 N.C. App. 392, 291 S.E.2d 844 (1982), aff'd, 308 N.C. 603, 304 S.E.2d 164 (1983).

**Proof of Monetary Loss Held Sufficient.** — In inverse condemnation action seeking compensation for a flood easement allegedly taken by defendant when its highway structures foreseeably increased the level of flooding on plaintiff's property, resulting in substantial damage to apartments thereon, plaintiff adequately demonstrated its monetary loss through evidence of repair costs, lost present and future rental income, and an estimate of the value of the property immediately before and immediately after the taking by a person familiar with the property. Lea Co. v. North Carolina Bd. of Transp., 57 N.C. App. 392, 291 S.E.2d 844 (1982), aff'd, 308 N.C. 603, 304 S.E.2d 164 (1983).

**Any witness familiar with the land may testify as to his opinion of the value of the land taken,** and as to the value of the respondent's contiguous lands before and after the taking. State Hwy. Comm'n v. Fry, 6 N.C. App. 370, 170 S.E.2d 91 (1969).

**And He May Explain Value Placed on Improvements.** — It is competent for a witness to explain the value he placed on improvements in arriving at the total value of the property before the taking. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**Expert Appraisal.** — Expert appraiser was not required to calculate the value of tract taken according to the strict formula set forth in this section. DOT v. Tilley, 136 N.C. App. 370, 524 S.E.2d 83, 2000 N.C. App. LEXIS 16 (2000), cert. denied, 531 U.S. 878, 121 S. Ct. 186, 148 L. Ed. 2d 129 (2000) cert. denied, 351 N.C. 640, 543 S.E.2d 868 (2000).

**It is permissible for a witness to use a map, diagram or photograph** of a place or object to illustrate his testimony and make it more intelligible to the court and jury. These aids have been particularly helpful in condemnation cases in providing the court and jury with better understanding with respect to the subject property before and after the taking. State Hwy. Comm'n v. Rose, 31 N.C. App. 28, 228 S.E.2d 664, cert. denied, 291 N.C. 448, 230 S.E.2d 766 (1976).

**Failure to Exclude Quantified Estimate of Lost Profits was Error.** — Although the trial court properly admitted testimony from the landowner's president that the Department of Transportation's condemnation made it more difficult for the landowner's customers to enter the service station, a new trial was ordered because the trial court erred in not excluding the quantified estimate of lost profits and any valuation based solely on that evidence. DOT v. M.M. Fowler, Inc., 361 N.C. 1, 637 S.E.2d 885, 2006 N.C. LEXIS 1299 (2006).

**Evidence of Cost of Reproduction of New Building Properly Admitted.** — Evidence of cost of reproduction of a new church building was properly admitted in an eminent domain case because it was relevant to the property's fair market value immediately before and after the taking and thus relevant to the measure of damages set forth in G.S. 136-112. DOT v. Marston Baptist Church, Inc., — N.C. App. —, 676 S.E.2d 313, 2009 N.C. App. LEXIS 515 (2009).

**It is error to permit testimony which attaches a specific value to an imaginary lot.** State Hwy. Comm'n v. Reeves, 8 N.C. App. 47, 173 S.E.2d 494 (1970).

**Testimony Regarding Separate Enhancing Components Allowed.** — The court refused to adopt the "unit rule" of valuation and held that the witness's testimony regarding the separate valuation for timber found on condemned property was properly admitted into evidence; preventing an appraiser witness from disclosing information regarding enhancing components was found to be at odds with the practice of real estate appraisal, and prevented an accurate reflection for the jury of the fair market value of the condemned property. City of Hillsborough v. Hughes, 140 N.C. App. 714, 538 S.E.2d 586, 2000 N.C. App. LEXIS 1270 (2000).

**The jury should be allowed to hear testimony that construction of a highway greatly increased the property values** of all the property along the highway, and the opinion of a witness that petitioners' land had tripled in value in determining what general and special benefits, if any, the petitioners received. Templeton v. State Hwy. Comm'n, 254 N.C. 337, 118 S.E.2d 918 (1961).

**Whether expert testifying from personal knowledge must first relate underlying facts** before giving his opinion is matter left to sound discretion of trial judge. Board of Transp. v. Terminal Whse. Corp., 300 N.C. 700, 268 S.E.2d 180 (1980).

**Cross-Examination of Expert Witness.** — An expert witness may be questioned on cross-examination with respect to the sales prices of nearby property to test his knowledge of values and for the purpose of impeachment, but not for the purpose of fixing value. This is especially true if the witness used such sales as a basis for his appraisal of the property taken, or if he had actually appraised the property sold. Templeton v. State Hwy. Comm'n, 254 N.C. 337, 118 S.E.2d 918 (1961).

**Owner's Testimony as to Intended Use Not Prejudicial.** — Owner's testimony of his intended use for a condemned property did not prejudice a city as the parties agreed that the highest and best use for the property was as an airport parking lot and the city used the property as an airport parking lot after it was condemned. City of Charlotte v. Hurlahe, 178 N.C. App. 144, 631 S.E.2d 28, 2006 N.C. App. LEXIS 1296 (2006).

**Son of Landowner as Witness.** — An objection to the son of the landowner testifying about the value of the land goes to the weight of the evidence rather than to its admissibility. State Hwy. Comm'n v. Fry, 6 N.C. App. 370, 170 S.E.2d 91 (1969).

**Instruction in Partial Taking Case.** — If there is a jury trial on the issue of compensation in a partial taking case the trial court is required to instruct the jury only on the before and after value rule set forth in subdivision (1) of this section. Board of Transp. v. Jones, 297 N.C. 436, 255 S.E.2d 185 (1979).

The judge is required to instruct the jury to use the standard set out in subdivision (1) of this section — and that standard only — in computing damages. Duke Power Co. v. Mom 'N' Pops Ham House, Inc., 43 N.C. App. 308, 258 S.E.2d 815 (1979).

**Jury Instructions, Taken in Their Entirety, Were Without Error.** — Although the language of a jury instruction in an eminent domain case, which stated that the jury should have based its verdict on the "peculiar" value of the property rather than the difference between the fair market value of the property immediately before and after the taking, would likely have been problematic in isolation, the instructions, when viewed contextually and in their entirety, were without error; in light of the trial court's repeated use of the proper calculation of damages throughout its instructions, the isolated statement of the value peculiar to the church was likely not misleading, and did not warrant invalidation of the award. DOT v. Marston Baptist Church, Inc., — N.C. App. —, 676 S.E.2d 313, 2009 N.C. App. LEXIS 515 (2009).

**Jury Must Strictly Adhere to Formula.** — A jury was required to calculate the value of tract taken according to the strict formula set forth in this section. DOT v. Tilley, 136 N.C. App. 370, 524 S.E.2d 83, 2000 N.C. App. LEXIS 16 (2000), cert. denied, 531 U.S. 878, 121 S. Ct. 186, 148 L. Ed. 2d 129 (2000) cert. denied, 351 N.C. 640, 543 S.E.2d 868 (2000).

## § 136-113. Interest as a part of just compensation.

To said amount awarded as damages by the commissioners or a jury or judge, the judge shall, as a part of just compensation, add interest at the legal rate as provided in G.S. 24-1 on said amount from the date of taking to the date of judgment; but interest shall not be allowed from the date of deposit on so much thereof as shall have been paid into court as provided in this Article. (1959, c. 1025, s. 2; 1983, c. 812.)

CASE NOTES

**Interest Is Separate From and Additional to Damages.** — Interest is an element of recovery that is separate from and in addition to the measure of damages to be used by the jury in arriving at just compensation. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**Formerly It Was Jury's Function to Award Interest.** — Prior to the enactment of this section it was the jury's function to award interest as just compensation for a delay in the payment for the property taken and it was necessary for the court to charge as to that duty. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**But now it is the duty of the court** to add interest to an award of damages for the taking of property pursuant to this Chapter. State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**And Court Has No Duty to Instruct Jury Not to Award Interest.** — See State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**Additional Compensation for Delay in Payment — When Required.** — When the taking of property by the State precedes the payment of compensation, the owner is entitled to additional compensation for the delay in payment. U.S. Const., Amends. V and XIV and N.C. Const., Art. I, § 19 require this additional payment as a part of just compensation. The additional sum awarded for delay in payment of the value for the property taken is not interest eo nomine, but interest is a fair means for measuring the amount to be arrived at of such additional sums. Lea Co. v. North Carolina Bd. of Transp., 317 N.C. 254, 345 S.E.2d 355 (1986).

**Same — Determination as Judicial Function.** — Since the ascertainment of just compensation is a judicial function, and compensation for delay in payment is a part of just compensation, determining the amount of additional compensation for delay in payment is also a judicial function. Lea Co. v. North Carolina Bd. of Transp., 317 N.C. 254, 345 S.E.2d 355 (1986).

**Same — Legal Rate as Prima Facie Rate.** — This section provides for the legal rate as a prima facie rate to be imposed for delay in compensation. This statutory rate is deemed presumptively reasonable. However, the landowner may rebut the rate's reasonableness by introducing evidence of prevailing market rates and demonstrating that the prevailing rates are higher than the statutory rate. Lea Co. v. North Carolina Bd. of Transp., 317 N.C. 254, 345 S.E.2d 355 (1986).

**Same — Compound Interest.** — Compound interest should be allowed for delayed payment in condemnation cases if the evidence shows that during the pertinent period the "prudent investor" could have obtained compound interest in the market place. The use of compound interest as a measure in calculating additional compensation for delay is a matter which will turn upon the evidence in each case and must be decided on a case-by-case basis. Lea Co. v. North Carolina Bd. of Transp., 317 N.C. 254, 345 S.E.2d 355 (1986).

**Cited** in DOT v. M.M. Fowler, Inc., 361 N.C. 1, 637 S.E.2d 885, 2006 N.C. LEXIS 1299 (2006).

## § 136-114. Additional rules.

In all cases of procedure under this Article where the mode or manner of conducting the action is not expressly provided for in this Article or by the statute governing civil procedure or where said civil procedure statutes are inapplicable the judge before whom such proceeding may be pending shall have the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter and the practice in such cases shall conform as near as may be to the practice in other civil actions in said courts. (1959, c. 1025, s. 2.)

CASE NOTES

**Cited** in City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

## § 136-115. Definitions.

For the purpose of this Article

(1) The word "judge" shall mean the resident judge of the superior court in

the district where the cause is pending, or special judge residing in said district, or the judge of the superior court assigned to hold the courts of said district or the emergency or special judge holding court in the county where the cause is pending.

(2) The words "person," "owner," and "party" shall include the plural; the word "person" shall include a firm or public or private corporation, and the word "Department" shall mean the Department of Transportation. (1959, c. 1025, s. 2; 1961, c. 1084, s. 7; 1965, c. 422; 1973, c. 507, s. 5; 1975, c. 19, s. 47; 1977, c. 464, s. 30.)

## § 136-116. Final judgments.

Final judgments entered in actions instituted under the provisions of this Article shall contain a description of the property affected, together with a description of the property and estate of interest acquired by the Department of Transportation and a copy of said judgment shall be certified to the register of deeds in the county in which the land or any part thereof lies and be recorded among the land records of said county. (1959, c. 1025, s. 2; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

## § 136-117. Payment of compensation.

If there are adverse and conflicting claimants to the deposit made into the court by the Department of Transportation or the additional amount determined as just compensation, on which final judgment is entered in said action, the judge may direct the full amount determined to be paid into said court by the Department of Transportation and may retain said cause for determination of who is entitled to said moneys and may by further order in the cause direct to whom the same shall be paid and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made. (1959, c. 1025, s. 2; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

### CASE NOTES

**Section is directed at adverse and conflicting claims to a specific sum.** State Hwy. Comm'n v. Cape, 49 N.C. App. 137, 270 S.E.2d 555 (1980).

**Taker Not Affected by Court's Division of Award.** — The taker of the property, once having its total liability determined, is not affected by or interested in the division of the award by the court. City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 178 S.E.2d 601 (1971).

**Method for Determining Compensation of Holders of Separate Interests in Condemned Property.** — In condemnation proceedings, where there are several separately owned interests in the condemned property, a proper method for determining compensation to be paid the holder of each interest is, first, to determine the value of the property taken, as a whole, and then apportion the award among the several claimants. City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 178 S.E.2d 601 (1971).

**Owner of Fee Simple Determinable Entitled to Full Compensation for Taking If Termination Not Probable.** — If, at the time of the taking of both the fee simple determinable estate and the possibility of reverter, the event which would otherwise have terminated the fee simple determinable estate is not a probability for the near future, the owner of the fee simple determinable estate is entitled to the full award of compensation for the taking, the possibility of reverter being considered of no value. City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 178 S.E.2d 601 (1971).

**Or If Claimants of Possibility of Reverter Fail to Answer or Disclaim Interest.** — Where those designated as claimants of the possibility of reverter have either failed to file answer, or have filed answer disclaiming any interest in the award and asserting that they have transferred such interest as they might otherwise have to the holder of the fee simple determinable the holder of that interest is entitled to the full award to be made. City of Charlotte v. Charlotte Park & Recreation Comm'n, 278 N.C. 26, 178 S.E.2d 601 (1971).

## § 136-118. Agreements for entry.

The provisions of this Article shall not prevent the Department of Transportation and the owner from entering into a written agreement whereby the owner agrees and consents that the Department of Transportation may enter upon his property without filing the complaint and declaration of taking and depositing estimated compensation as herein provided and the Department of Transportation shall have the same rights under such agreement with the owner in carrying on work on such project as it would have by having filed a complaint and a declaration of taking and having deposited estimated compensation as provided in this Article. (1959, c. 1025, s. 2; 1961, c. 1084, s. 8; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

## § 136-119. Costs and appeal.

The Department of Transportation shall pay all court costs taxed by the court. Either party shall have a right of appeal to the Supreme Court for errors of law committed in any proceedings provided for in this Article in the same manner as in any other civil actions and it shall not be necessary that an appeal bond be posted.

The court having jurisdiction of the condemnation action instituted by the Department of Transportation to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable cost, disbursements, and expenses, including reasonable attorney fees, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if (i) the final judgment is that the Department of Transportation cannot acquire real property by condemnation; or (ii) the proceeding is abandoned by the Department of Transportation.

The judge rendering a judgment for the plaintiff in a proceeding brought under G.S. 136-111 awarding compensation for the taking of property, shall determine and award or allow to such plaintiff, as a part of such judgment, such sum as will in the opinion of the judge reimburse such plaintiff for his reasonable cost, disbursements and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding. (1959, c. 1025, s. 2; 1971, c. 1102, s. 1; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

### CASE NOTES

**This section is intended to accomplish the same purpose as that expressed in former § 160A-243.1,** which allows for the payment of costs in condemnation proceedings involving the State Housing Authority. Housing Auth. v. Farabee, 17 N.C. App. 431, 194 S.E.2d 553, aff'd, 284 N.C. 242, 200 S.E.2d 12 (1973).

**Section Is Inapplicable If Department Is Found Not to Have Taken Property.** — Where it is adjudicated upon supporting evidence that the State Highway Commission (now Department of Transportation) had taken no property of the complaining landowners, this section does not apply, and plaintiffs may not complain of the taxing of the costs against them upon the dismissal of their action to recover compensation for the asserted taking. Kaperonis v. North Carolina State Hwy. Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963).

**Litigation expenses and costs** incurred by landowner in condemnation proceeding do not constitute part of the "just compensation" required by U.S. Const., Amend. V to be paid and may be taxed as part of the costs only if authorized by statute. Department of Transp. v. Winston Container Co., 45 N.C. App. 638, 263 S.E.2d 830 (1980).

In a condemnation action, there was no statutory authority for taxing a prevailing landowner's appraisal fees as costs against the opposing condemning authority, as G.S. 7A-305(d), which delineated generally recoverable costs, did not mention appraisal fees, and G.S. 136-119, which dealt with highway condemnation costs, did not authorize the taxing of appraisal fees under the facts. DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003).

**When Reimbursement for Attorney, Ap-**

**praisal and Engineering Fees Is Authorized.** — This section authorizes the court having jurisdiction of a condemnation action instituted by the Department of Transportation to award the landowner reimbursement for reasonable attorney, appraisal, and engineering fees actually incurred because of the condemnation proceedings only if: (1) "the final judgment is that the Department of Transportation cannot acquire real property by condemnation"; (2) "the proceeding is abandoned by the Department of Transportation"; or (3) judgment is rendered for the plaintiff in an inverse condemnation proceeding brought under G.S. 136-111. Department of Transp. v. Winston Container Co., 45 N.C. App. 638, 263 S.E.2d 830 (1980).

A judgment entered by the trial court dismissing a condemnation action brought by the Department of Transportation because the court was of the opinion that it lacked jurisdiction for the reason that the resolution of the State Board of Transportation authorizing condemnation of defendant's property was insufficient did not constitute a final judgment that the Department of Transportation could not acquire defendant's real property by condemnation within the purview of this section, and this section did not authorize the trial court to award defendant reimbursement for attorney, appraisal and engineering fees incurred because of the condemnation proceeding. Department of Transp. v. Winston Container Co., 45 N.C. App. 638, 263 S.E.2d 830 (1980).

**The award of attorneys' fees is in the sound discretion of the trial judge and is unappealable** unless there is an abuse of discretion. Cody v. Department of Transp., 60 N.C. App. 724, 300 S.E.2d 25 (1983); Lea Co. v. North Carolina Bd. of Transp., 323 N.C. 691, 374 S.E.2d 868 (1989).

**When a statute provides for attorneys' fees to be awarded as a part of the costs** to be paid by the governmental authority which is appropriating the property, it is not a contingent fee, but an amount equal to the actual reasonable value of the attorney services. Cody v. Department of Transp., 60 N.C. App. 724, 300 S.E.2d 25 (1983).

**Possibility of Two Trials.** — Although the landowners were required to raise the issue of whether, in the condemnation action against them, they were entitled to have business damages included in a just compensation award in a separate trial than in the condemnation proceeding itself, there was no threat that a second trial on damages would produce an inconsistent verdict; the first trial would involve evidence on just compensation without consideration of business damages and the second trial, if the landowners persuaded a court that business damages should be included in a just compensation award, would be limited to just compensation including business damages. DOT v. Byerly, 154 N.C. App. 454, 573 S.E.2d 522, 2002 N.C. App. LEXIS 1448 (2002).

**Appeals Governed by § 1-277.** — When the State Highway Commission (now Department of Transportation) condemns property under this Article, appeals by either party are governed by G.S. 1-277, the same as any other civil action. North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

**Denial of Fees Held Proper.** — Trial court did not abuse its discretion in denying portion of plaintiff's application for fees relating to its G.S. 1A-1, Rule 60(b) motion where plaintiff sought attorneys' fees for a G.S. 1A-1, Rule 60(b) motion to reopen a judgment it could not reopen as to interest on award of damages, since plaintiff was bound by the mandate of the Superior Court; therefore, the motion was denied and fees were not reasonably incurred. Lea Co. v. North Carolina Bd. of Transp., 323 N.C. 691, 374 S.E.2d 868 (1989).

Trial court did not err in denying portion of plaintiff's application for fees attributable to services of paralegals and secretaries acting as paralegals since trial judge could reasonably have concluded that these services of paralegals and secretaries acting as paralegals were largely clerical in nature or, even if not, were part of ordinary office overhead and ought to be subsumed in the hourly rate of attorneys. Lea Co. v. North Carolina Bd. of Transp., 323 N.C. 691, 374 S.E.2d 868 (1989).

Trial court's decision finding that it did not have the authority to award a successful litigant in a condemnation case the appraisal fees incurred by the litigant as costs taxable against the non-prevailing condemning authority was consistent with precedent of the North Carolina Supreme Court, as well as G.S. 6-20. DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003).

**Applied** in Board of Transp. v. Royster, 40 N.C. App. 1, 251 S.E.2d 921 (1979); Bandy v. City of Charlotte, 72 N.C. App. 604, 325 S.E.2d 17 (1985); DOT v. Rowe, 351 N.C. 172, 521 S.E.2d 707 (1999).

**Cited** in City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972); N.C. DOT v. County of Durham, 181 N.C. App. 346, 638 S.E.2d 577, 2007 N.C. App. LEXIS 78 (2007).

## § 136-120. Entry for surveys.

The Department of Transportation without having filed a complaint and a declaration of taking as provided in this Article is authorized to enter upon any lands and structures upon lands to make surveys, borings, soundings or examinations as may be necessary in carrying out and performing its duties under this Chapter, and such entry shall not be deemed a trespass, or taking within the meaning of this Article; provided, however, that the Department of Transportation shall make reimbursement for any damage resulting to such land as a result of such activities and the owner, if necessary, shall be entitled to proceed under the provisions of G.S. 136-111 of this Chapter to recover for such damage. (1959, c. 1025, s. 2; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

## § 136-121. Refund of deposit.

In the event the amount of the final judgment is less than the amount deposited by the Department of Transportation pursuant to the provisions of this Article, the Department of Transportation shall be entitled to recover the excess of the amount of the deposit over the amount of the final judgment and court costs incident thereto: Provided, however, in the event there are not sufficient funds on deposit to cover said excess the Department of Transportation shall be entitled to a judgment for said sum against the person or persons having received said deposit. (1959, c. 1025, s. 2; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

### CASE NOTES

**Cited** in State Hwy. Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968).

## § 136-121.1. Reimbursement of owner for taxes paid on condemned property.

(a) A property owner whose property is totally taken in fee simple by any condemning agency (as defined in G.S. 133-7(1)) exercising the power of eminent domain, under this Chapter or any other statute or charter provision, shall be entitled to reimbursement from the condemning agency of the pro rata portion of real property taxes paid that are allocable to a period subsequent to vesting of title in the agency, or the effective date of possession of the real property, whichever is earlier.

(b) An owner who meets the following conditions is entitled to reimbursement from the condemning agency for all deferred taxes paid by the owner pursuant to G.S. 105-277.4(c) as a result of the condemnation:

(1) The owner is a natural person whose property is taken in fee simple by a condemning agency exercising the power of eminent domain under this Chapter or any other statute.

(2) The owner also owns agricultural land, horticultural land, or forestland that is contiguous to the condemned property and that is in active production.

A potential condemning agency that seeks to acquire property by gift or purchase shall give the owner written notice of the provisions of this section. The definitions in G.S. 105-277.2 apply in this subsection. (1975, c. 439, s. 1; 1997-270, s. 2.)

## ARTICLE 10.

## *Preservation, etc., of Scenic Beauty of Areas along Highways.*

### § 136-122. Legislative findings and declaration of policy.

The General Assembly finds that the rapid growth and the spread of urban development along and near the State highways is encroaching upon or eliminating many areas having significant scenic or aesthetic values, which if restored, preserved and enhanced would promote the enjoyment of travel and the protection of the public investment in highways within the State and would constitute important physical, aesthetic or economic assets to the State. It is the intent of the General Assembly in enacting this statute to provide a means whereby the Department of Transportation may acquire the fee or any lesser interest or right in real property in order to restore, preserve and enhance natural or scenic beauty of areas traversed by the highways of the State highway system.

The General Assembly hereby declares that it is a public purpose and in the public interest of the people of North Carolina, to expend public funds, in connection with the construction, reconstruction or improvement of State highways, for the acquisition of the fee or any lesser interest in real property in the vicinity of public highways forming a part of the State highway system, in order to restore, preserve and enhance natural or scenic beauty. The General Assembly hereby finds, determines and declares that this Article is necessary for the immediate preservation and promotion of public convenience, safety and welfare. (1967, c. 1247, s. 1; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

### § 136-123. Restoration, preservation and enhancement of natural or scenic beauty.

(a) The Department of Transportation is hereby authorized and empowered to acquire by purchase, exchanges or gift, the fee-simple title or any lesser interest therein in real property in the vicinity of public highways forming a part of the State highway system, for the restoration, preservation and enhancement of natural or scenic beauty; provided that no lands, rights-of-way or facilities of a public utility as defined by G.S. 62-3(23), or of an electric membership corporation or telephone membership corporation, may be acquired, except that the Department of Transportation upon payment of the full cost thereof may require the relocation of electric distribution or telephone lines or poles; provided further, that such lands may be acquired by the Department of Transportation with the consent of the public utility or membership corporation.

(b) No landscaping or highway beautification project undertaken by the Department or any other unit of government may use oyster shells as a ground cover. The Department or any other unit of government that possesses oyster shells shall make them available to the Department of Environment and Natural Resources, Division of Marine Fisheries, without remuneration, for use in any oyster bed revitalization programs or any other program that may use the shells. (1967, c. 1247, s. 2; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 2007-84, s. 1; 2008-198, s. 4.)

**Effect of Amendments.** — Session Laws 2008-198, s. 4, effective August 8, 2008, substituted "possesses" for "comes into possession of" and inserted "without remuneration" in the second sentence of subsection (b).

### § 136-124. Availability of federal aid funds.

The Department of Transportation shall not be required to expend any funds for the acquisition of property under the provisions of this Article unless federal aid funds are made available for this purpose. (1967, c. 1247, s. 3; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

### § 136-125. Regulation of scenic easements.

The Department of Transportation shall have the authority to promulgate rules and regulations governing the use, maintenance and protection of the areas or interests acquired under this Article. Any violation of such rules and regulations shall be a Class 1 misdemeanor. (1967, c. 1247, s. 4; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1993, c. 539, s. 997; 1994, Ex. Sess., c. 24, s. 14(c).)

## ARTICLE 10A.

## *Litter Prevention Account.*

### § 136-125.1. Litter Prevention Account.

There is established under the control and direction of the Department of Transportation the Litter Prevention Account. The Account shall be a nonreverting special revenue account within the Highway Fund and shall consist of moneys credited to the Account under G.S. 20-81.12(b15) from the sale of litter prevention special registration plates. The Department of Transportation shall allocate the funds in the Account to reduce litter in the State. (2000-159, s. 9(a).)

### § 136-125.2. Report.

The Department of Transportation shall report no later than October 1 of each year to the Joint Legislative Transportation Oversight Committee and the Environmental Review Commission regarding the allocation of funds from the Litter Prevention Account. The report shall include all receipts to and allocations from the Account made during the previous fiscal year and shall explain how each allocation serves to reduce litter in the State. (2000-159, s. 9(a).)

## ARTICLE 11.

## *Outdoor Advertising Control Act.*

### § 136-126. Title of Article.

This Article may be cited as the Outdoor Advertising Control Act. (1967, c. 1248, s. 1.)

**Legal Periodicals.** — For comment, "Illegal Billboards: Why the General Assembly Should Revise the Outdoor Advertising Control Act to Comply with North Carolina Easement Law," see 80 N.C.L. Rev. 2067 (2002).

## CASE NOTES

**As to the effective date of this Article,** see Days Inn of Am., Inc. v. Board of Transp., 24 N.C. App. 636, 211 S.E.2d 864, cert. denied, 287 N.C. 258, 214 S.E.2d 429 (1975).

**Purpose**. — Outdoor Advertising Control Act, G.S. 136-126, was passed to control the placement, maintenance, and removal of billboards adjacent to highways, and delegated to the North Carolina Department of Transportation (NCDOT) authority to further promulgate rules and regulations governing erection and maintenance of billboards, permitting procedures, appeal procedures related to administrative decisions denying or revoking a permit, and administrative procedures for appealing a decision that a billboard was illegal, G.S. 136-130. Capital Outdoor, Inc. v. Tolson, 159 N.C. App. 55, 582 S.E.2d 717, 2003 N.C. App. LEXIS 1417 (2003), cert. denied, 357 N.C. 504, 587 S.E.2d 662 (2003).

**This Article does not affect signs located in areas zoned commercial or industrial** and nothing in it prohibits municipalities from regulating advertising which falls outside its provisions. This interpretation is supported by G.S. 160A-174(b) which expressly provides that the fact that "a State or federal law, standing alone, makes a given act, omission or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition." Thus, a town is authorized to outlaw outdoor advertising which is not regulated by State law and to provide compensation by amortization since in such instance this Article's compensation provision has no relevance. R.O. Givens, Inc. v. Town of Nags Head, 58 N.C. App. 697, 294 S.E.2d 388, cert. denied, 307 N.C. 127, 297 S.E.2d 400 (1982).

**Effect on Local Regulation**. — North Carolina's Outdoor Advertising Control Act, G.S. 136-126 to 136-140.1, did not preempt the City of Hendersonville from enforcing a local ordinance affecting billboards, and the record supported the City of Hendersonville Zoning Board of Adjustment's decision that an outdoor advertising company did not meet its burden of proving it was entitled to repair a billboard that was damaged in a windstorm. Lamar Outdoor Adver., Inc. v. City of Hendersonville Zoning Bd. of Adjustment, 155 N.C. App. 516, 573 S.E.2d 637, 2002 N.C. App. LEXIS 1581 (2002).

Provision of the Gastonia, North Carolina City Code that governed outdoor billboards conflicted with a regulation that was adopted by the North Carolina Department of Transportation (DOT) to implement North Carolina's Outdoor Advertising Control Act, G.S. 136-126 to G.S. 136-140.1, and was preempted by the DOT's regulation. Morris Communs. Corp. v. Bd. of Adjustment, 159 N.C. App. 598, 583 S.E.2d 419, 2003 N.C. App. LEXIS 1530 (2003), appeal dismissed sub nom. Morris Communs. v. Bd. of Adjust., 357 N.C. 658, 590 S.E.2d 269 (2003).

While the Outdoor Advertising Control Act and corresponding North Carolina DOT regulations did not preempt local regulation, nevertheless the DOT's outdoor advertising regulations expressly authorized the relocation of a billboard within certain limitations, and the Stanly County, N.C., Zoning Ordinance made such action unlawful; pursuant to G.S. 160A-174(b)(2), those regulations preempted the local zoning ordinance. Lamar OCI South Corp. v. Stanly County Zoning Bd. of Adjustment, 186 N.C. App. 44, 650 S.E.2d 37, 2007 N.C. App. LEXIS 1985 (2007).

**Off-premises advertising restriction is within the police power of a municipal government.** R.O. Givens, Inc. v. Town of Nags Head, 58 N.C. App. 697, 294 S.E.2d 388, cert. denied, 307 N.C. 127, 297 S.E.2d 400 (1982).

A town's prohibition of off-premise commercial signs, while permitting on-premise signs does not violate equal protection. R.O. Givens, Inc. v. Town of Nags Head, 58 N.C. App. 697, 294 S.E.2d 388, cert. denied, 307 N.C. 127, 297 S.E.2d 400 (1982).

**"Esthetics" constitute a legitimate consideration in the exercise of police power.** R.O. Givens, Inc. v. Town of Nags Head, 58 N.C. App. 697, 294 S.E.2d 388, cert. denied, 307 N.C. 127, 297 S.E.2d 400 (1982).

**No individual rights are created under 23 U.S.C. § 131, pertaining to control of outdoor advertising,** since it does not impose regulation, but only authorizes federal-State agreements pursuant to which State regulatory statutes may be adopted. Therefore, it does not furnish a basis for an action under 42 U.S.C. § 1983 for violation of a federal statutory right. R.O. Givens, Inc. v. Town of Nags Head, 58 N.C. App. 697, 294 S.E.2d 388, cert. denied, 307 N.C. 127, 297 S.E.2d 400 (1982).

**Nature of Administrative Appeal to Secretary of Transportation.** — There was no provision within the Outdoor Advertising Control Act or the administrative regulations published pursuant to the act which required or provided for anything other than a written administrative appeal to the Secretary of Transportation, and there is no provision for an administrative hearing by the secretary. National Adv. Co. v. Bradshaw, 48 N.C. App. 10, 268 S.E.2d 816, cert. denied and appeal dismissed, 301 N.C. 400, 273 S.E.2d 446 (1980).

**Administrative Procedure Act does not apply to Outdoor Advertising Control Act or regulations** published pursuant to the act because there was no statute or administrative rule which required the Department of Transportation to make an agency decision after providing an opportunity for an adjudicatory hearing, and the subject controversy was therefore not a contested case within the meaning of G.S. 150A-23 (now G.S. 150B-23). National Adv. Co. v. Bradshaw, 48 N.C. App. 10, 268 S.E.2d 816, cert. denied and appeal dismissed, 301 N.C. 400, 273 S.E.2d 446 (1980).

**Cited** in Whiteco Metrocom Inc. v. Roberson, 84 N.C. App. 305, 352 S.E.2d 277 (1986); Whiteco Indus., Inc. v. Harrelson, 111 N.C. App. 815, 434 S.E.2d 229 (1993); Whiteco Indus., Inc. v. Harrington, 111 N.C. App. 839, 434 S.E.2d 234 (1993).

## § 136-127. Declaration of policy.

The General Assembly hereby finds and declares that outdoor advertising is a legitimate commercial use of private property adjacent to roads and highways but that the erection and maintenance of outdoor advertising signs and devices in areas in the vicinity of the right-of-way of the interstate and primary highway systems within the State should be controlled and regulated in order to promote the safety, health, welfare and convenience and enjoyment of travel on and protection of the public investment in highways within the State, to prevent unreasonable distraction of operators of motor vehicles and to prevent interference with the effectiveness of traffic regulations and to promote safety on the highways, to attract tourists and promote the prosperity, economic well-being and general welfare of the State, and to preserve and enhance the natural scenic beauty of the highways and areas in the vicinity of the State highways and to promote the reasonable, orderly and effective display of such signs, displays and devices. It is the intention of the General Assembly to provide and declare herein a public policy and statutory basis for the regulation and control of outdoor advertising. (1967, c. 1248, s. 2; 1999-404, s. 6.)

### CASE NOTES

**The purpose of this Article** is to control the erection and maintenance of outdoor advertising devices in order to promote the safety, convenience and enjoyment of travel and to protect public investment in interstate and primary highways within the State. Bracey Adv. Co. v. North Carolina Dep't of Transp., 35 N.C. App. 226, 241 S.E.2d 146, cert. denied, 295 N.C. 89, 244 S.E.2d 257 (1978).

**Preemption of Local Ordinance.** — While the Outdoor Advertising Control Act and corresponding North Carolina DOT regulations did not preempt local regulation, nevertheless the DOT's outdoor advertising regulations expressly authorized the relocation of a billboard within certain limitations, and the Stanly County, N.C., Zoning Ordinance made such action unlawful; pursuant to G.S. 160A-174(b)(2), those regulations preempted the local zoning ordinance. Lamar OCI South Corp. v. Stanly County Zoning Bd. of Adjustment, 186 N.C. App. 44, 650 S.E.2d 37, 2007 N.C. App. LEXIS 1985 (2007).

**Regulation for Aesthetic Reasons.** — Regulations governing the height of outdoor advertising signs did not violate the substantive due process rights of the outdoor advertising companies which owned them because the regulations did not infringe on a fundamental right, and they were rationally related to the legitimate state interests of safety and aesthetics. Capital Outdoor, Inc. v. Tolson, 159 N.C. App. 55, 582 S.E.2d 717, 2003 N.C. App. LEXIS 1417 (2003), cert. denied, 357 N.C. 504, 587 S.E.2d 662 (2003).

**Outdoor Advertising Did Not Involve a Fundamental Right.** — While the general assembly had declared that outdoor advertising was a legitimate commercial use of private property adjacent to roads and highways, such advertising did not involve a fundamental right, for purposes of a substantive due process analysis of regulations governing the height of billboards. Capital Outdoor, Inc. v. Tolson, 159 N.C. App. 55, 582 S.E.2d 717, 2003 N.C. App. LEXIS 1417 (2003), cert. denied, 357 N.C. 504, 587 S.E.2d 662 (2003).

**Regulation for Aesthetic Reasons.** — Police power may be broad enough to include reasonable regulation of property use for aesthetic reasons only. County of Cumberland v. Eastern Fed. Corp., 48 N.C. App. 518, 269 S.E.2d 672, cert. denied, 301 N.C. 527, 273 S.E.2d 453 (1980).

**Applied** in National Adv. Co. v. Bradshaw, 48 N.C. App. 10, 268 S.E.2d 816 (1980); Ace-Hi, Inc. v. Department of Transp., 70 N.C. App. 214, 319 S.E.2d 294 (1984).

**Cited** in Bracey Adv. Co. v. North Carolina Dep't of Transp., 62 N.C. App. 197, 302 S.E.2d 490 (1983).

## § 136-128. Definitions.

As used in this Article:

(1) "Erect" means to construct, build, raise, assemble, place, affix, attach, create, paint, draw, or in any other way bring into being or establish.

(1a) "Illegal sign" means one which was erected and/or maintained in violation of State law.

(1b) "Information center" means an area or site established and maintained at safety rest areas for the purpose of informing the public of places of interest within the State and providing such other information as the Department of Transportation may consider desirable.

(2) "Interstate system" means that portion of the National System of Interstate and Defense Highways located within the State, as officially designated, or as may hereafter be so designated, by the Department of Transportation, or other appropriate authorities and are also so designated by interstate numbers. As to highways under construction so designated as interstate highways pursuant to the above procedures, the highway shall be a part of the interstate system for the purposes of this Article on the date the location of the highway has been approved finally by the appropriate federal authorities.

(2a) "Nonconforming sign" shall mean a sign which was lawfully erected but which does not comply with the provisions of State law or State rules and regulations passed at a later date or which later fails to comply with State law or State rules or regulations due to changed conditions. Illegally erected or maintained signs are not nonconforming signs.

(3) "Outdoor advertising" means any outdoor sign, display, light, device, figure, painting, drawing, message, plaque, poster, billboard, or any other thing which is designed, intended or used to advertise or inform, any part of the advertising or information contents of which is visible from any place on the main-traveled way of the interstate or primary system, whether the same be permanent or portable installation.

(4) "Primary systems" means the federal-aid primary system in existence on June 1, 1991, and any highway which is not on that system but which is on the National Highway System. As to highways under construction so designated as primary highways pursuant to the above procedures, the highway shall be a part of the primary system for purposes of this Article on the date the location of the highway has been approved finally by the appropriate federal or State authorities.

(5) "Safety rest area" means an area or site established and maintained within or adjacent to the highway right-of-way by or under public supervision or control, for the convenience of the traveling public.

(6) "State law" means a State constitutional provision or statute, or an ordinance, rule or regulation enacted or adopted by a State agency or political subdivision of a State pursuant to a State Constitution or statute.

(7) "Unzoned area" shall mean an area where there is no zoning in effect.

(8) "Urban area" shall mean an area within the boundaries or limits of any incorporated municipality having a population of five thousand or more as determined by the latest available federal census.

(9) "Visible" means capable of being seen (whether or not legible) without visual aid by a person of normal visual acuity. (1967, c. 1248, s. 3;

1973, c. 507, s. 5; 1975, c. 568, ss. 1-4; 1977, c. 464, s. 7.1; 1997-456, s. 27; 1999-404, s. 7.)

**Editor's Note.** — Subdivisions (0.1), (0.2), and (1) of this section were renumbered as subdivisions (1), (1a), and (1b), respectively, pursuant to S.L. 1997-456, s. 27 which authorized the Revisor Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

### CASE NOTES

**Applied** in National Adv. Co. v. Bradshaw, 48 N.C. App. 10, 268 S.E.2d 816 (1980).

**Cited** in Bracey Adv. Co. v. North Carolina Dep't of Transp., 62 N.C. App. 197, 302 S.E.2d 490 (1983); Morris Communs. Corp. v. Bd. of Adjustment, 159 N.C. App. 598, 583 S.E.2d 419, 2003 N.C. App. LEXIS 1530 (2003).

## § 136-129. Limitations of outdoor advertising devices.

No outdoor advertising shall be erected or maintained within 660 feet of the nearest edge of the right-of-way of the interstate or primary highway systems in this State so as to be visible from the main-traveled way thereof after the effective date of this Article as determined by G.S. 136-140, except the following:

(1) Directional and other official signs and notices, which signs and notices shall include those authorized and permitted by Chapter 136 of the General Statutes, which include but are not limited to official signs and notices pertaining to natural wonders, scenic and historic attractions and signs erected and maintained by a public utility, electric or telephone membership corporation, or municipality for the purpose of giving warning of or information as to the location of an underground cable, pipeline or other installation.

(2) Outdoor advertising which advertises the sale or lease of property upon which it is located.

(2a) Outdoor advertising which advertises the sale of any fruit or vegetable crop by the grower at a roadside stand or by having the purchaser pick the crop on the property on which the crop is grown provided: (i) the sign is no more than two feet long on any side; (ii) the sign is located on property owned or leased by the grower where the crop is grown; (iii) the grower is also the seller; and (iv) the sign is kept in place by the grower for no more than 30 days.

(3) Outdoor advertising which advertises activities conducted on the property upon which it is located.

(4) Outdoor advertising, in conformity with the rules and regulations promulgated by the Department of Transportation, located in areas which are zoned industrial or commercial under authority of State law.

(5) Outdoor advertising, in conformity with the rules and regulations promulgated by the Department of Transportation, located in unzoned commercial or industrial areas. (1967, c. 1248, s. 4; 1972, c. 507, s. 5; 1975, c. 568, s. 5; 1977, c. 464, s. 7.1; 1991 (Reg. Sess., 1992), c. 946, s. 1; 1999-404, s. 8.)

**Local Modification.** — Buncombe and Surry: 1993 (Reg. Sess., 1994), c. 559, ss. 1, 2.

### CASE NOTES

**Advertising in Industrial or Commercial Zones.** — Outdoor advertising in conformity with the rules and regulations promulgated by North Carolina Department of Transportation is permitted in areas which are zoned industrial or commercial under authority of State law. Naegele Outdoor Adv., Inc. v. Hunt, 121 N.C. App. 205, 465 S.E.2d 549 (1996).

Having zoned property as a highway commercial zone under authority of State law and in accordance with a comprehensive plan, the trial court properly concluded that the Secretary's revocation of the permits exceeded his authority under the statutory mandate of subsection (4) which expressly allows advertising in areas which are zoned industrial or commercial under authority of State law. Naegele Outdoor Adv., Inc. v. Hunt, 121 N.C. App. 205, 465 S.E.2d 549 (1996).

**Preemption of Local Ordinance.** — While the Outdoor Advertising Control Act and corresponding North Carolina DOT regulations did not preempt local regulation, nevertheless the DOT's outdoor advertising regulations expressly authorized the relocation of a billboard within certain limitations, and the Stanly County, N.C., Zoning Ordinance made such action unlawful; pursuant to G.S. 160A-174(b)(2), those regulations preempted the local zoning ordinance. Lamar OCI South Corp. v. Stanly County Zoning Bd. of Adjustment, 186 N.C. App. 44, 650 S.E.2d 37, 2007 N.C. App. LEXIS 1985 (2007).

**Right of Way of Interstate or Primary Highway.** — Where the ramp constructed as part of a parkway project was built to manage the interchange of traffic between the parkway and an interstate business highway, the right-of-way adjacent to the interchange ramp was considered part of the "right-of-way of the interstate or primary highway system" as contemplated under this section. Whiteheart v. Garrett, 128 N.C. App. 78, 493 S.E.2d 493 (1997).

## § 136-129.1. Limitations of outdoor advertising devices beyond 660 feet.

No outdoor advertising shall be erected or maintained beyond 660 feet of the nearest edge of the right-of-way of the interstate or primary highway systems in this State outside of the urban areas so as to be visible and intended to be read from the main-traveled way except the following:

(1) Directional and other official signs and notices, which signs and notices shall include those authorized and permitted by Chapter 136 of the General Statutes, which include but are not limited to official signs and notices pertaining to natural wonders, scenic and historic attractions and signs erected and maintained by a public utility, electric or telephone membership corporation, or municipality for the purpose of giving warning of or information as to the location of an underground cable, pipeline or other installation.

(2) Outdoor advertising which advertises the sale or lease of property upon which it is located.

(3) Outdoor advertising which advertises activities conducted on the property upon which it is located. (1975, c. 568, s. 6; 1999-404, s. 9.)

## § 136-129.2. Limitation of outdoor advertising devices adjacent to scenic highways, State and National Parks, historic areas and other places.

(a) In addition to the limitations contained in G.S. 136-129 and G.S. 136-129.1, in order to further the purposes set forth in Article 10 of this Chapter and to promote the reasonable, orderly, and effective display of outdoor advertising devices along highways adjacent to scenic and historical areas, while protecting the public investment in these highways and promoting the safety and recreational value of public travel, and to preserve natural beauty, no outdoor advertising sign shall be erected adjacent to any highway which is either:

(1)a. A scenic highway or scenic byway designated by the Board of Transportation;

b. Within 1,200 feet, on the same side of the highway, of the boundary line of a North Carolina State Park, a National Park, a State or national wildlife refuge, or a designated wild and scenic river; or
c. Within 500 feet, on the same side of the highway, of the boundary lines of any historic districts and other properties listed in the National Register of Historic Places or State rest areas, or within the boundary lines of any historic district;

except as permitted under G.S. 136-129(1), (2), (2a), or (3); or

(2) Within one-third of the applicable distances under sub-subdivision (a)(1)b. and (a)(1)c. of this section, along the opposite side of the highway from any of the properties designated in sub-subdivision (a)(1)b. and (a)(1)c. of this section, except as permitted under G.S. 136-129(1), (2), (2a), (3), (4), or (5).

(b) The distances set forth in this section shall be measured horizontally in linear feet extending in each direction along the edge of the pavement of the highway from any point on the boundary of the subject property, or any point on the opposite side of the highway perpendicular to any point on the boundary line of the subject property.

(c) As used in sub-subdivision (a)(1)b. and (a)(1)c. of this section, the term "highway" means a highway that is designated as a part of the interstate or federal-aid primary highway system as of June 1, 1991, or any highway which is or becomes a part of the National Highway System. (1993, c. 524, s. 1.)

## § 136-130. Regulation of advertising.

The Department of Transportation is authorized to promulgate rules and regulations in the form of ordinances governing:

(1) The erection and maintenance of outdoor advertising permitted in G.S. 136-129,
(2) The erection and maintenance of outdoor advertising permitted in G.S. 136-129.1,
(2a) The erection and maintenance of outdoor advertising permitted in G.S. 136-129.2,
(3) The specific requirements and procedures for obtaining a permit for outdoor advertising as required in G.S. 136-133 and for the administrative procedures for appealing a decision at the agency level to refuse to grant or in revoking a permit previously issued, and
(4) The administrative procedures for appealing a decision at the agency level to declare any outdoor advertising illegal and a nuisance as pursuant to G.S. 136-134, as may be necessary to carry out the policy of the State declared in this Article. (1967, c. 1248, s. 5; 1973, c. 507, s. 5; 1975, c. 568, s. 7; 1977, c. 464, ss. 7.1, 31; 1993, c. 524, s. 2.)

### CASE NOTES

**North Carolina Department of Transportation unquestionably had the authority** to promulgate a rule governing the height of billboards owned by outdoor advertising companies. Capital Outdoor, Inc. v. Tolson, 159 N.C. App. 55, 582 S.E.2d 717, 2003 N.C. App. LEXIS 1417 (2003), cert. denied, 357 N.C. 504, 587 S.E.2d 662 (2003).

**Permit to erect and maintain advertising signs was not subject to revocation** pursuant to a regulation providing for revocation for "unlawful violation of control of access on interstate … facilities," where employees of the permit holder had parked their truck on the shoulder of the interstate and were servicing a sign, but had not crossed any access control fence or other barrier in order to service the sign. Ace-Hi, Inc. v. Department of Transp., 70 N.C. App. 214, 319 S.E.2d 294 (1984).

**Revocation Permitted.** — The Department of Transportation had the authority to revoke petitioner's permit where petitioner erected nonconforming outdoor advertising in noncommercial/nonindustrial area. Outdoor E. v. Harrelson, 123 N.C. App. 685, 476 S.E.2d 136 (1996).

**Conflict Between Regulation Adopted by Department of Transportation and a Municipal Ordinance.** — Provision of the Gastonia (North Carolina) City Code that governed outdoor billboards conflicted with a regulation that was adopted by the North Carolina Department of Transportation (DOT) to implement North Carolina's Outdoor Advertising Control Act, G.S. 136-126 to 136-140.1, and was preempted by the DOT's regulation. Morris Communs. Corp. v. Bd. of Adjustment, 159 N.C. App. 598, 583 S.E.2d 419, 2003 N.C. App. LEXIS 1530 (2003), appeal dismissed sub nom. Morris Communs. v. Bd. of Adjust., 357 N.C. 658, 590 S.E.2d 269 (2003).

**Cited** in Freeland v. Greene, 33 N.C. App. 537, 235 S.E.2d 852 (1977); National Adv. Co. v. Bradshaw, 48 N.C. App. 10, 268 S.E.2d 816 (1980); Whiteco Metrocom Inc. v. Roberson, 84 N.C. App. 305, 352 S.E.2d 277 (1986).

## § 136-131. Removal of existing nonconforming advertising.

The Department of Transportation is authorized to acquire by purchase, gift, or condemnation all outdoor advertising and all property rights pertaining thereto which are prohibited under the provisions of G.S. 136-129, 136-129.1 or 136-129.2, provided such outdoor advertising is in lawful existence on the effective date of this Article as determined by G.S. 136-140, or provided that it is lawfully erected after the effective date of this Article as determined by G.S. 136-140.

In any acquisition, purchase or condemnation, just compensation to the owner of the outdoor advertising, where the owner of the outdoor advertising does not own the fee, shall be limited to the fair market value at the time of the taking of the outdoor advertising owner's interest in the real property on which the outdoor advertising is located and such value shall include the value of the outdoor advertising.

In any acquisition, purchase or condemnation, just compensation to the owner of the fee or other interest in the real property upon which the outdoor advertising is located where said owner does not own the outdoor advertising located thereon shall be limited to the difference in the fair market value of the entire tract immediately before and immediately after the taking by the Department of Transportation of the right to maintain such outdoor advertising thereon and in arriving at the fair market value after the taking, any special or general benefits accruing to the property by reason of the acquisition shall be taken into consideration.

In any acquisition, purchase or condemnation, just compensation to the owner of the fee in the real property upon which the outdoor advertising is located, where said owner also owns the outdoor advertising located thereon, shall be limited to the fair market value of the outdoor advertising plus the difference in the fair market value of the entire tract immediately before and immediately after the taking by the Department of Transportation of the right to maintain such outdoor advertising thereon and in arriving at the fair market value after the taking, any special or general benefits accruing to the property by reason of the acquisition shall be taken into consideration. (1967, c. 1248, s. 6; 1973, c. 507, s. 5; 1975, c. 568, ss. 8-10; 1977, c. 464, s. 7.1; 1993, c. 524, s. 3.)

### CASE NOTES

**Legislative Intent.** — If the General Assembly had intended to require payment of compensation whenever the Department of Transportation (DOT) removes a sign under the Outdoor Advertising Control Act (OACA), it could have used the term "required" rather than "authorized" in this section. National Adv. Co. v. North Carolina DOT, 124 N.C. App. 620, 478 S.E.2d 248 (1996).

**Cash Compensation Required for Removal of Certain Signs.** — With respect to advertising signs which are not located in areas zoned commercial or industrial, this section and 23 U.S.C. § 131 specifically require cash compensation to sign owners whose signs are removed pursuant to those acts. R.O. Givens, Inc. v. Town of Nags Head, 58 N.C. App. 697, 294 S.E.2d 388, cert. denied, 307 N.C. 127, 297 S.E.2d 400 (1982).

**However, in order to be compensable, this section requires that a sign be lawfully erected under State law.** Signs rendered unlawful by local zoning ordinances adopted pursuant to the enabling statute, G.S. 160A-381, are not signs "lawfully erected" and therefore are not compensable. R.O. Givens, Inc. v. Town of Nags Head, 58 N.C. App. 697, 294 S.E.2d 388, cert. denied, 307 N.C. 127, 297 S.E.2d 400 (1982).

**Applied** in Ace-Hi, Inc. v. Department of Transp., 70 N.C. App. 214, 319 S.E.2d 294 (1984).

**Cited** in National Adv. Co. v. Bradshaw, 48 N.C. App. 10, 268 S.E.2d 816 (1980); Bracey Adv. Co. v. North Carolina Dep't of Transp., 62 N.C. App. 197, 302 S.E.2d 490 (1983).

## § 136-131.1. (See Editor's note for expiration of section) Just compensation required for the removal of billboards on federal-aid primary highways by local authorities.

No municipality, county, local or regional zoning authority, or other political subdivision, shall, without the payment of just compensation in accordance with the provisions that are applicable to the Department of Transportation as provided in paragraphs 2, 3, and 4 of G.S. 136-131, remove or cause to be removed any outdoor advertising adjacent to a highway on the National System of Interstate and Defense Highways or a highway on the Federal-aid Primary Highway System for which there is in effect a valid permit issued by the Department of Transportation pursuant to the provisions of Article 11 of Chapter 136 of the General Statutes and regulations promulgated pursuant thereto. (1981 (Reg. Sess., 1982), c. 1147, ss. 1, 2; 1983, c. 318, s. 1; 1987 (Reg. Sess., 1988), c. 1024, s. 1; 1989, c. 166, s. 1; 1993 (Reg. Sess., 1994), c. 725, s. 1; 1998-23, s. 7; 1998-212, s. 27.5(a); 2002-11, s. 1.)

**Editor's Note.** — Session Laws 1981, c. 1147, s. 2, as amended by Session Laws 1983, c. 318, s. 1, Session Laws 1987 (Reg. Sess., 1988), c. 1024, s. 1, Session Laws 1989, c. 166, s. 1, Session Laws 1993, c. 725, s. 1, Session Laws 1998-23, s. 7, Session Laws, 1998-212, s. 27.5(a), and Session Laws 2002-11, s. 1, will expire upon amendment to or repeal of 23 U.S.C § 131(g).

### CASE NOTES

**Applicability.** — North Carolina DOT outdoor advertising regulations expressly authorized the relocation of a billboard within certain limitations, and the Stanly County, N.C., Zoning Ordinance made such action unlawful; pursuant to G.S. 160A-174(b)(2), those regulations preempted the local zoning ordinance, and the county's denial of a permit would in effect have caused the billboard to be removed, which was impermissible without the payment of just compensation. Lamar OCI South Corp. v. Stanly County Zoning Bd. of Adjustment, 186 N.C. App. 44, 650 S.E.2d 37, 2007 N.C. App. LEXIS 1985 (2007).

**Applied** in R.O. Givens, Inc. v. Town of Nags Head, 58 N.C. App. 697, 294 S.E.2d 388 (1982).

**Cited** in Capital Outdoor Adv., Inc. v. City of Raleigh, 337 N.C. 150, 446 S.E.2d 289.

## § 136-132. Condemnation procedure.

For the purpose of this Article, the Department of Transportation shall use the procedure for condemnation of real property as provided by Article 9 of Chapter 136 of the General Statutes. (1967, c. 1248, s. 7; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

CASE NOTES

**Cited** in National Adv. Co. v. Bradshaw, 48 N.C. App. 10, 268 S.E.2d 816 (1980).

## § 136-133. Permits required.

(a) No person shall erect or maintain any outdoor advertising within 660 feet of the nearest edge of the right-of-way of the interstate or primary highway system, except those allowed under G.S. 136-129, subdivisions (2) and (3) in this Article, or beyond 660 feet of the nearest edge of the right-of-way of the interstate or primary highway system, except those allowed under G.S. 136-129.1, subdivisions (2) and (3), without first obtaining a permit from the Department of Transportation or its agents pursuant to the procedures set out by rules adopted by the Department of Transportation. The permit shall be valid until revoked for nonconformance with this Article or rules adopted by the Department of Transportation. Any person aggrieved by the decision of the Department of Transportation or its agents in refusing to grant or in revoking a permit may appeal the decision in accordance with the rules adopted by the Department of Transportation pursuant to this Article to the Secretary of Transportation who shall make the final decision on the agency appeal. The Department of Transportation shall have the authority to charge permit fees to defray the costs of administering the permit procedures under this Article. The fees for directional signs as set forth in G.S. 136-129(1) and G.S. 136-129.1(1) shall not exceed a forty dollar ($40.00) initial fee and a thirty dollar ($30.00) annual renewal fee. The fees for outdoor advertising structures, as set forth in G.S. 136-129(4) and (5) shall not exceed a one hundred twenty dollar ($120.00) initial fee and a sixty dollar ($60.00) annual renewal fee.

(b) If outdoor advertising is under construction and the Department of Transportation determines that a permit has not been issued for the outdoor advertising, the Department may require that all work on the outdoor advertising cease until the owner of the outdoor advertising shows that the outdoor advertising does not violate this section. The stopwork order shall be prominently posted on the outdoor advertising structure, and no further notice of the stopwork order is required. The failure of an owner of outdoor advertising to comply immediately with the stopwork order shall subject the outdoor advertising to removal by the Department of Transportation or its agents. Outdoor advertising is under construction when it is in any phase of construction prior to the attachment and display of the advertising message in final position for viewing by the traveling public. The cost of removing outdoor advertising by the Department of Transportation or its agents pursuant to this section shall be assessed against the owner of the unpermitted outdoor advertising by the Department of Transportation. No stopwork order may be issued when the Department of Transportation process agent has been served with a court order allowing the sign to be constructed. (1967, c. 1248, s. 8; 1973, c. 507, s. 5; 1975, c. 568, s. 11; 1977, c. 464, ss. 7.1, 32; 1983, c. 604, s. 2; 1989, c. 677; 1999-404, s. 1.)

CASE NOTES

**Permit to erect and maintain advertising signs was not subject to revocation** pursuant to a regulation providing for revocation for "unlawful violation of control of access on interstate ... facilities," where employees of the permit holder had parked their truck on the shoulder of the interstate and were servicing a sign, but had not crossed any access control fence or other barrier in order to service the sign. Ace-Hi, Inc. v. Department of Transp., 70 N.C. App. 214, 319 S.E.2d 294 (1984).

**Local Ordinance Preempted.** — North Carolina DOT outdoor advertising regulations expressly authorized the relocation of a billboard within certain limitations, and the Stanly County, N.C., Zoning Ordinance made such action unlawful; pursuant to G.S. 160A-174(b)(2), those regulations preempted the local zoning ordinance, and at all times the advertising company had a valid DOT permit allowing the relocation of the billboard, which was valid until revoked for nonconformance. Lamar OCI South Corp. v. Stanly County Zoning Bd. of Adjustment, 186 N.C. App. 44, 650 S.E.2d 37, 2007 N.C. App. LEXIS 1985 (2007).

**Revocation Permitted.** — The Department of Transportation had the authority to revoke petitioner's permit where petitioner erected nonconforming outdoor advertising in noncommercial/nonindustrial area. Outdoor E. v. Harrelson, 123 N.C. App. 685, 476 S.E.2d 136 (1996).

**Cited** in Freeland v. Greene, 33 N.C. App. 537, 235 S.E.2d 852 (1977); National Adv. Co. v. Bradshaw, 48 N.C. App. 10, 268 S.E.2d 816 (1980); Whiteheart v. Garrett, 128 N.C. App. 78, 493 S.E.2d 493 (1997).

## § 136-134. Illegal advertising.

Any outdoor advertising erected or maintained adjacent to the right-of-way of the interstate or primary highway system after the effective date of this Article as determined by G.S. 136-140, in violation of the provisions of this Article or rules adopted by the Department of Transportation, or any outdoor advertising maintained without a permit regardless of the date of erection shall be illegal and shall constitute a nuisance. The Department of Transportation or its agents shall give 30 days' notice to the owner of the illegal outdoor advertising with the exception of the owner of unlawful portable outdoor advertising for which the Department of Transportation shall give five days' notice, if such owner is known or can by reasonable diligence be ascertained, to remove the outdoor advertising or to make it conform to the provisions of this Article or rules adopted by the Department of Transportation hereunder. The Department of Transportation or its agents shall have the right to remove the illegal outdoor advertising at the expense of the owner if the owner fails to remove the outdoor advertising or to make it conform to the provisions of this Article or rules issued by the Department of Transportation within 30 days after receipt of such notice or five days for owners of portable outdoor advertising. The Department of Transportation or its agents may enter upon private property for the purpose of removing the outdoor advertising prohibited by this Article or rules adopted by the Department of Transportation hereunder without civil or criminal liability. The costs of removing the outdoor advertising, whether by the Department of Transportation or its agents, shall be assessed against the owner of the illegal outdoor advertising by the Department of Transportation. Any person aggrieved by the decision declaring the outdoor advertising structure illegal shall be granted the right to appeal the decision in accordance with the terms of the rules and regulations enacted by the Department of Transportation pursuant to this Article to the Secretary of Transportation who shall make the final decision on the agency appeal. (1967, c. 1248, s. 9; 1973, c. 507, s. 5; 1975, c. 568, s. 12; 1977, c. 464, ss. 7.1, 32; 1999-404, s. 2.)

### CASE NOTES

**Preemption**. — County moratorium on outdoor advertising signs did not conflict with a sign owner's right to cure defects in such signs where the owner erected a sign structure without first applying for a permit from the Department of Transportation, and did not apply for the permit until the day after the county moratorium was passed. PNE AOA Media, L.L.C. v. Jackson County, 146 N.C. App. 470, 554 S.E.2d 657, 2001 N.C. App. LEXIS 981 (2001).

**Cited** in Freeland v. Greene, 33 N.C. App. 537, 235 S.E.2d 852 (1977); National Adv. Co. v. Bradshaw, 48 N.C. App. 10, 268 S.E.2d 816 (1980).

## § 136-134.1. Judicial review.

Any person who is aggrieved by a final decision of the Secretary of Transportation after exhausting all administrative remedies made available to him by rules and regulations enacted pursuant to this Article is entitled to judicial review of such decision under this Article. In order to obtain judicial review of the Secretary of Transportation's decision under this Article, the person seeking review must file a petition in the Superior Court of Wake County within 30 days after written copy of the decision of the Secretary of Transportation is served upon the person seeking review. Failure to file such a petition within the time stated shall operate as a waiver of the right of such person to review under this Chapter.

The petition shall state explicitly what exceptions are taken to the decision of the Secretary of Transportation and what relief petitioner seeks. Within 10 days after the petition is filed with the court, the person seeking the review shall serve copies of the petition by registered mail, return receipt requested, upon the Department of Transportation. Within 30 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the Department of Transportation shall transmit to the reviewing court a certified copy of the written decision.

At any time before or during the review proceeding, the aggrieved party may apply to the reviewing court for an order staying the operation of the decision of the Secretary of Transportation pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper. The review of the decision of the Secretary of Transportation under this Article shall be conducted by the court without a jury and shall hear the matter de novo pursuant to the rules of evidence as applied in the General Court of Justice. The court, after hearing the matter may affirm, reverse or modify the decision if the decision is:

(1) In violation of constitutional provisions; or
(2) Not made in accordance with this Article or rules or regulations promulgated by the Department of Transportation; or
(3) Affected by other error of law.

The party aggrieved shall have the burden of showing that the decision was violative of one of the above.

A party to the review proceedings, including the agency, may appeal to the appellate division from the final judgment of the Superior Court under the rules of procedure applicable in civil cases. The appealing party may apply to the Superior Court for a stay for its final determination or a stay of the administrative decision, whichever shall be appropriate, pending the outcome of the appeal to the appellate division. (1975, c. 568, s. 13; 1977, c. 464, ss. 32, 33.)

### CASE NOTES

**This section preempts § 150B-43** and specifically provides opportunity to have a de novo proceeding before trial judge which satisfies due process requirements. National Adv. Co. v. Bradshaw, 48 N.C. App. 10, 268 S.E.2d 816, cert. denied and appeal dismissed, 301 N.C. 400, 273 S.E.2d 446 (1980).

**Administrative Remedies Must Be Exhausted.** — The express language of this section makes clear the legislative intent that recourse to the courts is to be had by the aggrieved party only after exhausting all administrative remedies made available to him by rules and regulations enacted pursuant to this Article. Freeland v. Greene, 33 N.C. App. 537, 235 S.E.2d 852 (1977).

**This section clearly limits the scope of review** to (1) constitutional violations, (2) statutory or regulatory irregularities or (3) other errors of law. National Adv. Co. v. Bradshaw, 60 N.C. App. 745, 299 S.E.2d 817 (1983).

Although the scope of review de novo is broad, the superior court may take action only if the agency decision is (1) in violation of constitutional provisions; (2) not made in accordance with this article or the regulations thereunder; or (3) affected by other error of law. Thus, the superior court has the implied power to reverse when the evidence does not support the decision. Ace-Hi, Inc. v. Department of Transp., 70 N.C. App. 214, 319 S.E.2d 294 (1984).

**Court Not Bound by Secretary's Findings and Conclusions.** — While an interpretation of a statute or rule of an agency administering it is to be accorded some deference, the superior court's review of a decision by the Secretary of Transportation is de novo. Therefore, the superior court is thus not bound by the Secretary's findings of fact and conclusions of law and may arrive at a different conclusion of law based upon the same evidence. Appalachian Poster Adv. Co. v. Bradshaw, 65 N.C. App. 117, 308 S.E.2d 764 (1983).

**Appellant Is Not Limited to Administrative Record.** — Under this section, an appellant from decision and order of the Department of Transportation has the right to a hearing de novo in the Superior Court of Wake County; therefore, appellant is not limited to the administrative record. Ace-Hi, Inc. v. Department of Transp., 70 N.C. App. 214, 319 S.E.2d 294 (1984).

**Although a review of a final agency decision is de novo, trial court still limited by this section in scope of review.** However, this does not circumvent the requirements of G.S. 1A-1, Rule 52(a)(1). This section limits the scope of the findings of fact and conclusions of law which can be made; it does not limit the requirements for properly setting forth such findings and conclusions. Appalachian Poster Adv. Co. v. Harrington, 89 N.C. App. 476, 366 S.E.2d 705 (1988).

**De Novo Review of DOT Decision.** — Pursuant to this section petitioner whose signed permit was revoked by DOT was entitled to a non-jury de novo review of the DOT decision by the Superior Court, where the court had to hear the merits of plaintiff's case without any presumption in favor of DOT's decision. Appalachian Poster Adv. Co. v. Harrington, 89 N.C. App. 476, 366 S.E.2d 705 (1988).

**Superior Court Jurisdiction.** — When permit holder petitioned the superior court for review of Department of Transportation revocation of permit for highway sign, this gave the superior court jurisdiction to determine the whole case including the taxing of costs including section providing for attorney's fees to be taxed as costs in some instances. Able Outdoor, Inc. v. Harrelson, 341 N.C. 167, 459 S.E.2d 626 (1995).

**Applied** in Capital Outdoor, Inc. v. Tolson, 159 N.C. App. 55, 582 S.E.2d 717, 2003 N.C. App. LEXIS 1417 (2003).

**Cited** in Bracey Adv. Co. v. North Carolina Dep't of Transp., 62 N.C. App. 197, 302 S.E.2d 490 (1983); Whiteco Metrocom Inc. v. Roberson, 84 N.C. App. 305, 352 S.E.2d 277 (1986).

## § 136-134.2. Notification requirements.

When the Department of Transportation notifies a permit applicant, permit holder, or the owner of an outdoor advertising structure that the application is denied, the permit revoked, or the structure is in violation of this Article or rules issued pursuant to this Article, it shall do so in writing by certified mail, return receipt requested, and shall include a copy of this Article and all rules issued pursuant to this Article.

If the Department of Transportation fails to include a copy of this Article and the rules, the time period during which the permit applicant, permit holder, or owner of the outdoor advertising structure has to request a review hearing shall be tolled until the Department of Transportation provides the required materials. (1999-404, s. 3.)

## § 136-135. Enforcement provisions.

Any person, firm, corporation or association, placing, erecting or maintaining outdoor advertising along the interstate system or primary system in violation of this Article or rules adopted by the Department of Transportation shall be guilty of a Class 1 misdemeanor. In addition thereto, the Department of Transportation may seek injunctive relief in the Superior Court of Wake County or of the county where the outdoor advertising is located and require the outdoor advertising to conform to the provisions of this Article or rules adopted pursuant hereto, or require the removal of the said illegal outdoor advertising. (1967, c. 1248, s. 10; 1973, c. 507, s. 5; 1975, c. 568, s. 14; 1977, c. 464, s. 32; 1993, c. 539, s. 998; 1994, Ex. Sess., c. 24, s. 14(c); 1999-404, s. 4.)

### CASE NOTES

**Applied** in Ace-Hi, Inc. v. Department of Transp., 70 N.C. App. 214, 319 S.E.2d 294 (1984).

## § 136-136. Zoning changes.

All zoning authorities shall give written notice to the Department of Transportation of the establishment or revision of any commercial and industrial zones within 660 feet of the right-of-way of interstate or primary highway systems. Notice shall be by registered mail sent to the offices of the Department of Transportation in Raleigh, North Carolina, within 15 days after the effective date of the zoning change or establishment. (1967, c. 1248, s. 11; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1999-404, s. 10.)

## § 136-137. Information directories.

The Department of Transportation is authorized to maintain maps and to permit informational directories and advertising pamphlets to be made available at safety rest areas and to establish information centers at safety rest areas and install signs on the right-of-way for the purpose of informing the public of facilities for food, lodging and vehicle services and of places of interest and for providing such other information as may be considered desirable. (1967, c. 1248, s. 12; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

## § 136-138. Agreements with United States authorized.

The Department of Transportation is authorized to enter into agreements with other governmental authorities relating to the control of outdoor advertising in areas adjacent to the interstate and primary highway systems, including the establishment of information centers and safety rest areas, and to take action in the name of the State to comply with the terms of the agreements. (1967, c. 1248, s. 13; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

## § 136-139. Alternate control.

In addition to any other control provided for in this Article, the Department of Transportation may regulate outdoor advertising in accordance with the standards provided by this Article and regulations promulgated pursuant thereto, by the acquisition by purchase, gift, or condemnation of easements or any other interests in real property prohibiting or controlling the erection and maintenance of advertising within 660 feet of the right-of-way line of the interstate and primary system of the State. (1967, c. 1248, s. 14; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

## § 136-140. Availability of federal aid funds.

The Department of Transportation shall not be required to expend any funds for the regulation of outdoor advertising under this Article, nor shall the provisions of this Article, with the exception of G.S. 136-138 hereof, have any force and effect until federal funds are made available to the State for the purpose of carrying out the provisions of this Article, and the Department of Transportation has entered into an agreement with the United States Secretary of Transportation as authorized by G.S. 136-138 hereof and as provided by the Highway Beautification Act of 1965 or subsequent amendment thereto. (1967, c. 1248, s. 15; 1973, c. 507, s. 5; 1975, c. 568, s. 15; 1977, c. 464, s. 7.1.)

CASE NOTES

**Applied** in Bracey Adv. Co. v. North Carolina Dep't of Transp., 35 N.C. App. 226, 241 S.E.2d 146 (1978).

**Cited** in National Adv. Co. v. Bradshaw, 48 N.C. App. 10, 268 S.E.2d 816 (1980).

## § 136-140.1. Adopt-A-Highway.

(a) Notwithstanding any other provision of this Article, the Department of Transportation may permit individuals or groups participating in its Adopt-A-Highway Program access to controlled access facilities for the purpose of removing litter from the right-of-way. Acknowledgment of participation in the program may be indicated by appropriate signs that shall be owned, controlled, and erected by the Department of Transportation. The size, style, specifications, and content of the signs shall be determined in the sole discretion of the Department of Transportation. The Department of Transportation may issue rules and policies necessary to administer the program.

(b) Adopt-A-Highway participants may use contract services to clean the roadside of the sections of highway the participants have adopted only in accordance with the rules and policies issued by the Department of Transportation. (1995, c. 324, s. 18.1.)

**§§ 136-140.2 through 136-140.5:** Reserved for future codification purposes.

## ARTICLE 11A.

## *Exemption and Deferment from Removal of Certain Directional Signs, Displays, and Devices.*

## § 136-140.6. Declaration of policy.

Notwithstanding any other provision of law, the State of North Carolina hereby finds and declares that the removal of certain directional signs, displays, and devices, lawfully erected under State law in force at the time of their erection, which do not conform to the requirements of subsection (C) of 23 U.S.C. 131, which provide directional information about goods and services in the interest of the traveling public, and which were in existence on May 6, 1976, may work a substantial economic hardship in certain defined areas, and shall be exempt according to Section 131 United States Code and the rules and regulations promulgated pursuant thereto. (1977, c. 639.)

## § 136-140.7. Definitions.

As used in this Article: "Motorist services directional signs" means signs, displays, and devices giving directional information about goods and services in the interest of the traveling public, including but not limited to:

(1) Places of public lodging;
(2) Places where food is served to the public on a regular basis;
(3) Places where automotive fuel or emergency automotive repair services, including truck stops, are regularly available to the public;
(4) Educational institutions;
(5) Places of religious worship;
(6) Public or private recreation areas, including campgrounds, resorts and attractions, natural wonders, wildlife and water fowl refuges, and nature trails;

(7) Plays, concerts and fairs;
(8) Antiques, gift and souvenir shops;
(9) Agricultural products in a natural state, including vegetables and fruit. (1977, c. 639.)

## § 136-140.8. Exemption procedures.

The North Carolina Department of Transportation shall upon receipt of a declaration, petition, resolution, certified copy of an ordinance, or other clear direction from a board of county commissioners, municipality, county, city, provided that such resolution is not in conflict with existing statute or ordinance, that removal of motorist services directional signs would cause an economic hardship in a defined area, shall forward such declaration, resolution, or finding to the Secretary of the North Carolina Department of Transportation for inclusion as a defined hardship area qualifying for exemption pursuant to 23 U.S.C. 131 (O). Any such declaration or resolution submitted to the North Carolina Department of Transportation shall further find that such motorist service signs provided directional information about goods and services in the interest of the traveling public and shall request the retention by the State of said directional motorist services signs as defined herein. The North Carolina Department of Transportation shall thereupon comply with all regulations issued both now and hereafter by the Federal Highway Administration necessary for application for the exemption provided in 23 U.S.C. 131 (O), provided such motorist services directional signs were lawfully erected under State law at the time of their erection and were in existence on May 5, 1976. The petitioner seeking exemption of those signs defined in G.S. 136-140.7 shall furnish the information required by the United States Department of Transportation to the North Carolina Department of Transportation and the North Carolina Department of Transportation shall request exemption from the United States Department of Transportation. (1977, c. 639.)

### CASE NOTES

**Cited** in Town of Spencer v. Town of E. Spencer, 129 N.C. App. 751, 501 S.E.2d 367 (1998).

## § 136-140.9. Deferment.

The North Carolina Department of Transportation shall adopt programs to assure that removal of directional signs, displays or devices, providing directional information about goods and services in the interest of the traveling public, not otherwise exempted by economic hardship, be deferred until July 1, 1979. (1977, c. 639.)

### CASE NOTES

**As to effective date of this Article,** see Days Inn of Am., Inc. v. Board of Transp., 24 N.C. App. 636, 211 S.E.2d 864, cert. denied, 287 N.C. 258, 214 S.E.2d 429 (1975).

## §§ 136-140.10 through 136-140.14: Reserved for future codification purposes.

## ARTICLE 11B.

## *Tourist-Oriented Directional Sign Program.*

### § 136-140.15. Scope of operations.

(a) Program. — The Department of Transportation shall administer a tourist-oriented directional signs (TODS) program.

(b) Definitions. — The following definitions apply in this Article:

(1) TODS. — Tourist-oriented directional signs (TODS) are guide signs that display the business identification of and directional information for tourist-oriented businesses and tourist-oriented facilities or for classes of businesses or facilities that are tourist-oriented.

(2) Tourist-oriented business. — A business, the substantial portion of whose products or services is of significant interest to tourists. The term may include a business involved with seasonal agricultural products. When used in this Article, the term "business" means a tourist-oriented business.

(3) Tourist-oriented facility. — A business, service, or activity facility that derives a major portion of income or visitors during the normal business season from road users not residing in the immediate area of the facility. When used in this Article, the term "facility" means a tourist-oriented facility.

(c) Limitation. — The Department shall not install TODS for a business or facility if the signs would be required at intersections where, due to the number of conflicting locations of other highway signs or traffic control devices or other physical or topographical features of the roadside, their presence would be impractical or unfeasible or result in an unsafe or hazardous condition.

(d) Duplication. — If a business or facility is currently shown on another official highway guide sign, such as a logo sign or supplemental guide sign, on the same approach to an intersection where a TODS panel for that business or facility would be located, the business or facility may elect to keep the existing highway guide sign or have it removed and participate in the TODS program. If the business or facility elects to retain the existing highway guide sign, the business or facility is ineligible for the TODS program at that intersection. (2001-383, s. 1.)

**Editor's Note.** — Session Laws 2004-199, s. 61, provides: "The Department of Transportation shall install highway directional guide signs at limited-access highway terminals for the nonresidential campuses of colleges or universities located in North Carolina, if the nonresidential campus is located within one mile from the limited-access highway terminal and if the college or university is licensed by the Board of Governors of The University of North Carolina, offers both undergraduate and graduate degree programs, and has a minimum of 350 students enrolled at the nonresidential campus. The college or university requesting the sign installment shall pay for all charges related to the construction of the sign."

### § 136-140.16. Eligibility criteria.

A business or facility is eligible to participate in the TODS program if it meets all of the following conditions:

(1) It is open to the general public and is not restricted to "members only".

(2) It does not restrict access to its facilities by the general public.

(3) It complies with all applicable laws, ordinances, rules, and regulations concerning the provision of public accommodations without regard to race, religion, color, age, sex, national origin, disability, and any other

category protected by federal or State constitutional or statutory law concerning the granting of licenses and approvals for public facilities.

(4) It meets the following standards:

a. It is in continuous operation at least eight hours a day, five days a week during its normal season or the normal operating season for the type of business or facility.

b. It is licensed and approved by the appropriate State and local agencies regulating the particular type of business or activity. (2001-383, s. 1.)

## § 136-140.17. Terminating participation in program.

A business or facility may terminate its participation in the TODS program at any time. The business or facility is not entitled to a refund of any part of any fees paid because of voluntary termination of participation by the business or facility, for any reason, before the end of its current contract period. (2001-383, s. 1.)

## § 136-140.18. Temporary modification of TODS panels.

(a) The Department shall allow a participating business or facility to close for remodeling or to repair damage from fire or other natural disaster if its TODS panels are covered or removed while the business or facility is closed. No refund of fees or extension of the time remaining in the contract for participation will be provided for the period of closure.

(b) The Department may, at its discretion, remove or cover TODS panels for roadway construction or maintenance, for routine maintenance of the TODS assembly, for traffic research study, or for any other reason it considers appropriate. Businesses or facilities are not entitled to any refunds of fee amounts for the period that the TODS panels are covered or removed under this subsection unless the period exceeds seven days.

(c) The TODS panels for seasonal businesses or facilities shall have an appropriate message added during the period in which the businesses or facilities are open to the public as part of their normal seasonal operation. (2001-383, s. 1.)

## § 136-140.19. Department to adopt rules to implement the TODS program.

The Department shall adopt rules to implement the TODS program created by this Article. The rules shall include all of the following:

(1) The Department shall set fees to cover the initial costs of signs, sign maintenance, and administering the program.

(2) The Department shall establish a standard for the size, color, and letter height of the TODS as specified in the National Manual of Uniform Traffic Control Devices for Streets and Highways.

(3) TODS shall not be placed more than five miles from the business or facility.

(4) TODS shall not be placed where prohibited by local ordinance.

(5) The number of TODS panels shall not exceed six per intersection with only one business or facility on each panel.

(6) If a business or facility is not directly on a State highway, it is eligible for TODS panels only if both of the following requirements are met:

a. It is located on a street that directly connects with a State road.

b. It is located so that only one directional sign, placed on a State road, will lead the tourist to the business or facility.

(7) A TODS shall not be placed immediately in advance of the business or facility if the business or facility and its on-premise advertising signs are readily visible from the roadway.

(8) The Department shall limit the placement of TODS to highways other than fully controlled access highways and to rural areas in and around towns or cities with a population of less than 40,000. (2001-383, s. 1.)

## ARTICLE 12.

## *Junkyard Control Act.*

### § 136-141. Title of Article.

This Article may be cited as the Junkyard Control Act. (1967, c. 1198, s. 1.)

**Legal Periodicals.** — For comment discussing aesthetics-based municipal regulation in light of State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982), see 18 Wake Forest L. Rev. 1167 (1982).

CASE NOTES

**Act Did Not Preempt Local Ordinance.** — Since the Junkyard Control Act applies only to junkyards located on primary highways, and since the trial court found as fact that the junkyard owner's property was located on Highway 211, and that Highway 211 was designated by the North Carolina Department of Transportation as a federal-aid secondary road and was therefore not subject to the provisions of the Junkyard Control Act, junkyard owner's assertion that the ordinance was preempted by the statute was without merit. County of Hoke v. Byrd, 107 N.C. App. 658, 421 S.E.2d 800 (1992).

### § 136-142. Declaration of policy.

The General Assembly hereby finds and declares that although junkyards are a legitimate business, the establishment and use and maintenance of junkyards in the vicinity of the interstate and primary highways or within the vicinity of North Carolina routes in counties that have no interstate or federal aid primary highways within the State should be regulated and controlled in order to promote the safety, health, welfare and convenience and enjoyment of travel on and the protection of the public investment in highways within the State, to prevent unreasonable distraction of operators of motor vehicles and to prevent interference with the effectiveness of traffic regulations, to attract tourists and promote the prosperity, economic well-being and general welfare of the State, and to preserve and enhance the natural scenic beauty of the highways and areas in the vicinity. It is the intention of the General Assembly to provide and declare herein a public policy and statutory basis for regulation and control of junkyards. (1967, c. 1198, s. 2; 1993, c. 493, s. 1.)

**Editor's Note.** — Session Laws 1993, c. 493, s. 1, which amended this section, was effective July 23, 1993, and applicable to all counties with no interstate or federal aid primary highways as of that date.

### § 136-143. Definitions.

As used in this Article:

(1) The term "automobile graveyard" shall mean any establishment or place of business which is maintained, used, or operated for storing,

keeping, buying or selling wrecked, scrapped, ruined, or dismantled motor vehicles or motor vehicle parts. Any establishment or place of business upon which six or more unlicensed, used motor vehicles which cannot be operated under their own power are kept or stored for a period of 15 days or more shall be deemed to be an "automobile graveyard" within the meaning of this Article.

(2) "Interstate system" means that portion of the National System of Interstate and Defense Highways located within the State, as now officially designated, or as may hereafter be so designated as interstate system by the Department of Transportation, or other appropriate authorities. As to highways under construction so designated as interstate highways pursuant to the above procedures, the highway shall be a part of the interstate system for the purpose of this Article on the date the location of the highway has been approved finally by the appropriate federal authorities.

(3) The term "junk" shall mean old or scrap copper, brass, rope, rags, batteries, paper, trash, rubber, debris, waste, or junked, dismantled or wrecked automobiles, or parts thereof, iron, steel, and other old or scrap ferrous or nonferrous material.

(4) The term "junkyard" shall mean an establishment or place of business which is maintained, operated, or used for storing, keeping, buying, or selling junk, or for maintenance or operation of an automobile graveyard, and the term shall include garbage dumps and sanitary fills. An establishment or place of business which stores or keeps for a period of 15 days or more materials within the meaning of "junk" as defined by subdivision (3) of G.S. 136-143 which had been derived or created as a result of industrial activity shall be deemed to be a junkyard within the meaning of this Article.

(5) "Primary system" means that portion of connected main highways, as now officially designated, or as may hereafter be so designated as primary system by the Department of Transportation or other appropriate authorities. As to highways under construction so designated as federal-aid primary highways pursuant to the above procedures, the highway shall be part of the federal-aid primary system for purposes of this Article on the date the location of the highway has been approved finally by the appropriate federal or State authorities.

(6) "Unzoned area" shall mean an area where there is no zoning in effect.

(7) "Visible" means capable of being seen without visual aid by a person of normal visual acuity. (1967, c. 1198, s. 3; 1973, c. 507, s. 5; c. 1439, ss. 1-5; 1977, c. 464, s. 7.1.)

## § 136-144. Restrictions as to location of junkyards.

No junkyard shall be established, operated or maintained, any portion of which is within 1,000 feet of the nearest edge of the right-of-way of any interstate or primary highway, or a North Carolina route in a county that has no interstate or federal aid primary highways, except the following:

(1) Those which are screened by natural objects, plantings, fences or other appropriate means so as not to be visible from the main-traveled way of the highway at any season of the year or otherwise removed from sight or screened in accordance with the rules and regulations promulgated by the Department of Transportation.

(2) Those located within areas which are zoned for industrial use under authority of law.

(3) Those located within unzoned industrial areas, which areas shall be determined from actual land uses and defined by regulations to be promulgated by the Department of Transportation.

(4) Those which are not visible from the main-traveled way of an interstate or primary highway or a North Carolina route in a county that does not have an interstate or federal aid primary highway at any season of the year. (1967, c. 1198, s. 4; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1; 1993, c. 493, s. 2.)

**Editor's Note.** — Session Laws 1993, c. 493, s. 2, which amended this section, was effective July 23, 1993, and applicable to all counties with no interstate or federal aid primary highways as of that date.

### CASE NOTES

**Act Did Not Preempt Local Ordinance.** — Since the Junkyard Control Act applies only to junkyards located on primary highways, and since the trial court found as fact that the junkyard owner's property was located on Highway 211, and that Highway 211 was designated by the North Carolina Department of Transportation as a federal-aid secondary road and was therefore not subject to the provisions of the Junkyard Control Act, junkyard owner's assertion that the ordinance was preempted by the statute was without merit. County of Hoke v. Byrd, 107 N.C. App. 658, 421 S.E.2d 800 (1992).

**Cited** in Naegele Outdoor Adv., Inc. v. Harrelson, 112 N.C. App. 98, 434 S.E.2d 244 (1993).

### OPINIONS OF ATTORNEY GENERAL

**Application of Act to Ashe County.** — The ban (with exceptions) on junkyards applies to all areas in Ashe County that are within 1,000 feet of a North Carolina route; the North Carolina routes in Ashe County are: NC 16, NC 88, NC 163, and NC 194. See opinion of Attorney General to John T. Kilby, on behalf of the Ashe County Board of Commissioners, 2002 N.C.A.G. 27 (10/9/02).

## § 136-145. Enforcement provisions.

Any person, firm, corporation or association that establishes, operates or maintains a junkyard within 1,000 feet of the nearest edge of the right-of-way of any interstate or primary highway, after the effective date of this Article as determined by G.S. 136-155, that does not come within one or more of the exceptions contained in G.S. 136-144 hereof, shall be guilty of a Class 1 misdemeanor, and each day that the junkyard remains within the prohibited distance shall constitute a separate offense. In addition thereto, said junkyard is declared to be a public nuisance and the Department of Transportation may seek injunctive relief in the superior court of the county in which the offense is committed to abate the said nuisance and to require the removal of all junk from the prohibited area. (1967, c. 1198, s. 5; 1973, c. 507, s. 5; c. 1439, s. 6; 1977, c. 464, s. 7.1; 1993, c. 539, s. 999; 1994, Ex. Sess., c. 24, s. 14(c).)

### OPINIONS OF ATTORNEY GENERAL

**Enforcement of Act.** — It is the responsibility of sworn law enforcement officers to write citations for the criminal enforcement of the Junkyard Control Act; the local district attorney ultimately determines the merits of prosecuting cases based on such citations. See opinion of Attorney General to John T. Kilby, on behalf of the Ashe County Board of Commissioners, 2002 N.C.A.G. 27 (10/9/02).

The Junkyard Control Act does not expressly give a private right of action to individual citizens, however, it does not preempt the authority of local municipal and county governments to enact their own restrictions or bans on junkyards. See opinion of Attorney General to John T. Kilby, on behalf of the Ashe County Board of Commissioners, 2002 N.C.A.G. 27 (10/9/02).

## § 136-146. Removal of junk from illegal junkyards.

Any junkyard established after the effective date of this Article as determined by G.S. 136-155, in violation of the provisions of this Article or rules and regulations issued by the Department of Transportation pursuant to this Article, shall be illegal and shall constitute a public nuisance. The Department of Transportation or its agents shall give 30 days' notice to the owner of said junkyard to remove the junk or to make the junkyard to conform to the provisions of this Article or rules and regulations promulgated by the Department of Transportation hereunder. The Department of Transportation or its agents may remove the junk from the illegal junkyard at the expense of the owner if the said owner fails to act within 30 days after receipt of such notice. The Department of Transportation or its agents may enter upon private property for the purpose of removing junk from the junkyards prohibited by this Article without civil or criminal liability. Any person aggrieved by the decision declaring the junkyard illegal shall be granted the right to appeal the decision in accordance with the terms of the rules and regulations enacted by the Department of Transportation pursuant to this Article to the Secretary of Transportation who shall make the final decision on the agency appeal. (1967, c. 1198, s. 6; 1973, c. 507, s. 5; c. 1439, s. 7; 1977, c. 464, s. 7.1.)

## § 136-147. Screening of junkyards lawfully in existence.

Any junkyard lawfully in existence on the effective date of this Article as determined by G.S. 136-155 which does not conform to the requirements for exceptions in G.S. 136-144 hereof, and any other junkyard lawfully in existence along any highway which may be hereafter designated as an interstate or primary highway or a North Carolina route in a county without an interstate or federal aid primary highway and which does not conform to the requirements for exception under G.S. 136-144 hereof, shall be screened, if feasible, by the Department of Transportation at locations on the highway right-of-way or in areas acquired for such purposes outside the right-of-way in such manner that said junkyard shall not be visible from the main-traveled way of such highways. The Department of Transportation is authorized to acquire fee simple title or any lesser interest in real property for the purpose required by this section, by gift, purchase or condemnation. (1967, c. 1198, s. 7; 1973, c. 507, s. 5; c. 1439, s. 8; 1977, c. 464, s. 7.1; 1993, c. 493, s. 3.)

**Editor's Note.** — Session Laws 1993, c. 493, s. 3, which amended this section, was effective July 23, 1993, and applicable to all counties with no interstate or federal aid primary highways as of that date, in the first sentence inserted "or a North Carolina route in a county without an interstate or federal aid primary highway."

Session Laws 2003-383, s. 4, provides: "The General Assembly reaffirms its intent that the proceeds of the issuance of any bonds pursuant to the Highway Bond Act of 1996, Chapter 590 of the 1995 Session Laws, shall be used only for the purposes stated in that act, and for no other purpose."

### CASE NOTES

**Cited** in Naegele Outdoor Adv., Inc. v. Harrelson, 112 N.C. App. 98, 434 S.E.2d 244 (1993).

## § 136-148. Acquisition of existing junkyards where screening impractical.

(a) In the event that the Department of Transportation shall determine that screening of any existing junkyard designated in G.S. 136-147 hereof would be inadequate to accomplish the purposes of this Article, the said Department of Transportation is authorized to secure the relocation, removal or disposal of such junkyard by acquiring the fee simple title, or such lesser interest in land as may be necessary, to the land upon which said junkyard is located, through purchase, gift, exchange or condemnation.

(b) The Department of Transportation is authorized to move and relocate junk located on lands within the provisions of this section, and is authorized to pay the costs of such moving or relocation.

(c) The Department of Transportation is authorized to acquire by purchase, gift, exchange or condemnation, fee simple title or any lesser interest in real property for the purpose of placing and relocating the junk required to be moved under this section or permitted by G.S. 136-146 hereof to be removed. The Department of Transportation is authorized to convey in the manner provided by law for the conveyance of state-owned property, the lands on which junk is to be relocated, to the owner of the junk with or without consideration, under such conditions and reservations as it deems to be in the public interest.

(d) The Department of Transportation is authorized to convey in the manner provided by law for the conveyance of state-owned property any property acquired under the provisions of this section, under such conditions and reservations as it deems to be in the public interest.

(e) The Department of Transportation upon a determination that the same is necessary for the removal of any junkyard which is prohibited by G.S. 136-144 may acquire by gift, exchange, purchase or condemnation, the junk located on any junkyard which is acquired under this section and may acquire by gift, exchange, purchase or condemnation the fee simple title or lesser interest in land for the purpose of storing said junk by the Department of Transportation and may dispose of said junk in any manner which is not inconsistent with this Article. (1967, c. 1198, s. 8; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

## § 136-149. Permit required for junkyards.

No person shall establish, operate or maintain a junkyard any portion of which is within 1,000 feet of the nearest edge of the right-of-way of the interstate or primary system or a North Carolina route in a county that does not have an interstate or federal aid primary highway without obtaining a permit from the Department of Transportation or its agents pursuant to the procedures set out by the rules and regulations promulgated by the Department of Transportation. No permit shall be issued under the provisions of this section for the establishment, operation or maintenance of a junkyard within 1,000 feet to the nearest edge of the right-of-way of interstate or primary system except those junkyards which conform to one or more of the exceptions of G.S. 136-144. The permit shall be valid until revoked for the nonconformance of this Article or rules and regulations promulgated by the Department of Transportation thereunder. Any person aggrieved by the decision of the Department of Transportation or its agents in refusing to grant or revoking a permit may appeal the decision in accordance with the rules and regulations enacted by the Department of Transportation pursuant to this Article to the Secretary of Transportation who shall make the final decision upon the agency appeal. The Department of Transportation shall have the authority to charge fees to defray the costs of administering the permit procedures under this

Article. The fees for junkyard permits to be issued under this Article shall not exceed a twenty dollar ($20.00) initial fee and a fifteen dollar ($15.00) annual renewal fee. (1967, c. 1198, s. 9; 1973, c. 507, s. 5; c. 1439, s. 9; 1977, c. 464, s. 7.1; 1983, c. 604, s. 3; 1993, c. 493, s. 4.)

**Editor's Note.** — Session Laws 1993, c. 493, s. 4, which amended this section, was effective July 23, 1993, and applicable to all counties with no interstate or federal aid primary highways as of that date.

## § 136-149.1. Judicial review.

Any person who is aggrieved by a final decision of the Secretary of Transportation after exhausting all administrative remedies made available to him by rules and regulations enacted pursuant to this Article is entitled to judicial review of such decision under this Article. In order to obtain judicial review of the Secretary of Transportation's decision under this Article, the person seeking review must file a petition in the superior court of the county in which the junkyard is located within 30 days after written copy of the decision of the Secretary of Transportation is served upon the person seeking review. Failure to file such a petition within the time stated shall operate as a waiver of the right of such person to review under this Chapter.

The petition shall state explicitly what exceptions are taken to the decisions of the Secretary of Transportation and what relief petitioner seeks. Within 10 days after the petition is filed with the court, the person seeking the review shall serve copies of the petition by registered mail, return receipt requested, upon the Department of Transportation. Within 30 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the Department of Transportation shall transmit to the reviewing court a certified copy of the written decision.

At any time before or during the review proceeding, the aggrieved party may apply to the reviewing court for an order staying the operation of the decision of the Secretary of Transportation pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper. The review of the decision of the Secretary of Transportation under this Article shall be conducted by the court without a jury and shall hear the matter de novo pursuant to the rules of evidence as applied in the general court of justice. The court, after hearing the matter may affirm, reverse or modify the decision if the decision is:

(1) In violation of constitutional provisions; or
(2) Not made in accordance with this Article or rules or regulations promulgated by the Department of Transportation;
(3) Affected by other error or law.

The party aggrieved shall have the burden of showing that the decision was violative of one of the above.

A party to the review proceedings, including the agency, may appeal to the appellate division from the final judgment of the superior court under the rules of procedure applicable in other civil cases. The appealing party may apply to the superior court for a stay for its final determination or a stay of the administrative decision, whichever shall be appropriate, pending the outcome of the appeal to the appellate division. (1973, c. 1439, s. 10; 1977, c. 464, ss. 7.1, 32, 33.)

## § 136-150. Condemnation procedure.

The Department of Transportation shall use the condemnation procedure as provided by Article 9 of Chapter 136 of the General Statutes for the purposes of this Article. (1967, c. 1198, s. 10; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

## § 136-151. Rules and regulations by Department of Transportation; delegation of authority to Secretary of Transportation.

The Department of Transportation is authorized to promulgate rules and regulations in the form of ordinances governing:

(1) The establishment, operation and maintenance of junkyards permitted in G.S. 136-144 which shall include, but not be limited to, rules and regulations for determining unzoned industrial areas for the purpose of this Article.

(2) The specific requirements and procedures for obtaining a permit for junkyards as required in G.S. 136-149 and for the administrative procedures for appealing a decision at the agency level to refuse to grant or in revoking a permit previously issued.

(3) The administrative procedures for appealing a decision at the agency level to declare any junkyard illegal and a nuisance as pursuant to G.S. 136-146.

(4) The specific requirements governing the location, planting, construction and maintenance of material used in the screening or fencing required by this Article, all as may be necessary to carry out the policy of the State as declared in this Article.

The Department of Transportation, in its discretion, may delegate to the Secretary of Transportation the authority to promulgate such rules and regulations on its behalf. (1967, c. 1198, s. 11; 1973, c. 507, s. 5; c. 1439, s. 11; 1977, c. 464, s. 7.1.)

## § 136-152. Agreements with United States.

The Department of Transportation is authorized to enter into agreements with other governmental authorities relating to the control of junkyards and areas in the vicinity of interstate and primary systems, and to take action in the name of the State to comply with the terms of such agreement. (1967, c. 1198, s. 12; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

## § 136-153. Zoning changes.

All zoning authorities shall give written notice to the Department of Transportation of the establishment or revision of any industrial zone within 660 feet of the right-of-way of interstate or primary highways. Notice shall be by registered mail sent to the offices of the Department of Transportation in Raleigh, North Carolina, within 15 days after the effective date of the zoning change or establishment. (1967, c. 1198, s. 13; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

## § 136-154. Alternate control.

In addition to any other provisions of this Article, the Department of Transportation shall have the authority to acquire by purchase, gift, exchange, or condemnation, such interests in real property as may be necessary to control the establishment and maintenance of junkyards in accordance with the policy, standards and regulations set out herein. (1967, c. 1198, s. 14; 1973, c. 507, s. 5; 1977, c. 464, s. 7.1.)

## § 136-155. Availability of federal aid funds.

The Department of Transportation shall not be required to expend any funds for the regulation of junkyards under this Article, nor shall the provisions of this Article, with the exception of G.S. 136-152 hereof, have any force and effect until federal funds are made available to the State for the purpose of carrying out the provisions of this Article, and the Department of Transportation has entered into an agreement with the United States Secretary of Transportation as authorized by G.S. 136-152 hereof and as provided by the Highway Beautification Act of 1965 or subsequent amendment thereto. (1967, c. 1198, s. 15; 1973, c. 507, s. 5; c. 1439, s. 12; 1977, c. 464, s. 7.1.)

### CASE NOTES

**Cited** in County of Hoke v. Byrd, 107 N.C. App. 658, 421 S.E.2d 800 (1992).

## ARTICLE 13.

## *Highway Relocation Assistance Act.*

### §§ 136-156 through 136-174: Repealed by Session Laws 1971, c. 1107, s. 2.

**Cross References.** — For present provisions as to relocation assistance, see G.S. 133-5 to 133-17. As to authority of the Department of Administration to provide relocation assistance in the same manner as is prescribed for the Department of Transportation in this Article, see G.S. 146-26.1.

**Editor's Note.** — Former sections 136-167 through 136-174 had been reserved for future codification purposes.

## ARTICLE 14.

## *North Carolina Highway Trust Fund.*

### § 136-175. Definitions.

The following definitions apply in this Article:

(1) Intrastate System. The network of major, multilane arterial highways composed of those routes, segments, or corridors listed in G.S. 136-178, and any other route added by the Department of Transportation under G.S. 136-178.

(2) Transportation Improvement Program. The schedule of major transportation improvement projects required by G.S. 143B-350(f)(4).

(3) Trust Fund. The North Carolina Highway Trust Fund. (1989, c. 692, s. 1.1; 2004-124, s. 30.21(a).)

**Editor's Note.** — Session Laws 2007-527, s. 25, repealed Session Laws 1989, c. 692, s. 8.4, as amended by Session Laws 1995 (Reg. Sess., 1996), 590, s. 7, as amended by Session Laws 1999, c. 380, s. 3, which provided for the contingent repeal of this article.

Session Laws 1989, c. 799, s. 21, provides: "Notwithstanding the establishment of the North Carolina Highway Trust Fund as an entity, since various components of that Fund are coordinated with programs of the Highway Fund, all projects funded shall be subject to the provisions of the Executive Budget Act (Article 1 of Chapter 143) with respect to allotments, obligations, encumbrances, and expenditures with appropriate reporting to the Director of the Budget in the same manner as currently employed for the Highway Fund and the Highway Bond Fund."

Session Laws 2003-383, s. 4, provides: "The General Assembly reaffirms its intent that the proceeds of the issuance of any bonds pursuant to the Highway Bond Act of 1996, Chapter 590 of the 1995 Session Laws, shall be used only for the purposes stated in that act, and for no other purpose."

## § 136-176. Creation, revenue sources, and purpose of North Carolina Highway Trust Fund.

(a) A special account, designated the North Carolina Highway Trust Fund, is created within the State treasury. The Trust Fund consists of the following revenue:

(1) Motor fuel, alternative fuel, and road tax revenue deposited in the Fund under G.S. 105-449.125, 105-449.134, and 105-449.43, respectively.
(2) Motor vehicle use tax deposited in the Fund under G.S. 105-187.9.
(3) Revenue from the certificate of title fee and other fees payable under G.S. 20-85.
(4) Repealed by Session Laws 2001-424, s. 27.1.
(5) Interest and income earned by the Fund.

(a1) The Department shall use two hundred twenty million dollars ($220,000,000) in fiscal year 2001-2002, two hundred twelve million dollars ($212,000,000) in fiscal year 2002-2003, and two hundred fifty-five million dollars ($255,000,000) in fiscal year 2003-2004 of the cash balance of the Highway Trust Fund for the following purposes:

(1) For primary route pavement preservation. — One hundred seventy million dollars ($170,000,000) in fiscal year 2001-2002, and one hundred fifty million dollars ($150,000,000) in each of the fiscal years 2002-2003 and 2003-2004. Up to ten percent (10%) of the amount for each of the fiscal years 2001-2002, 2002-2003, and 2003-2004 is available in that fiscal year, at the discretion of the Secretary of Transportation, for:
    a. Highway improvement projects that further economic growth and development in small urban and rural areas, that are in the Transportation Improvement Program, and that are individually approved by the Board of Transportation; or
    b. Highway improvements that further economic development in the State and that are individually approved by the Board of Transportation.
(2) For preliminary engineering costs not included in the current year Transportation Improvement Program. — Fifteen million dollars ($15,000,000) in each of the fiscal years 2001-2002, 2002-2003, and 2003-2004. If any funds allocated by this subdivision, in the cash balance of the Highway Trust Fund, remain unspent on June 30, 2008, the Department may transfer within the Department up to twenty-nine million dollars ($29,000,000) of available funds to contract for freight transportation system improvements for the Global TransPark.
(3) For computerized traffic signal systems and signal optimization projects. — Fifteen million dollars ($15,000,000) in each of the fiscal years 2001-2002, 2002-2003, and 2003-2004.
(4) For public transportation twenty million dollars ($20,000,000) in fiscal year 2001-2002, twenty-five million dollars ($25,000,000) in fiscal year 2002-2003, and seventy-five million dollars ($75,000,000) in fiscal year 2003-2004.
(5) For small urban construction projects. — Seven million dollars ($7,000,000) in fiscal year 2002-2003.

Funds authorized for use by the Department pursuant to this subsection shall remain available to the Department until expended.

(a2) Repealed by Session Laws 2002-126, s. 26.4(b), effective July 1, 2002.

(a3) The Department may obligate three hundred million dollars ($300,000,000) in fiscal year 2003-2004 and four hundred million dollars

($400,000,000) in fiscal year 2004-2005 of the cash balance of the Highway Trust Fund for the following purposes:

(1) Six hundred thirty million dollars ($630,000,000) for highway system preservation, modernization, and maintenance, including projects to enhance safety, reduce congestion, improve traffic flow, reduce accidents, upgrade pavement widths and shoulders, extend pavement life, improve pavement smoothness, and rehabilitate or replace deficient bridges; and for economic development transportation projects recommended by local officials and approved by the Board of Transportation.

(2) Seventy million dollars ($70,000,000) for regional public transit systems, rural and urban public transportation system facilities, regional transportation and air quality initiatives, rail system track improvements and equipment, and other ferry, bicycle, and pedestrian improvements. For any project or program listed in this subdivision for which the Department receives federal funds, use of funds pursuant to this subdivision shall be limited to matching those funds.

Funds authorized for obligation and use by the Department pursuant to this subsection shall remain available to the Department until expended.

(a4) Project selection pursuant to subsection (a3) of this section shall be based on identified and documented need. Funds expended pursuant to subdivision (1) of subsection (a3) of this section shall be distributed in accordance with the distribution formula in G.S. 136-17.2A. No funds shall be expended pursuant to subsection (a3)(1) of this section on any project that does not meet Department of Transportation standards for road design, materials, construction, and traffic flow.

(a5) The Department shall report to the Joint Legislative Transportation Oversight Committee, on or before September 1, 2003, on its intended use of funds pursuant to subsection (a3) of this section. The Department shall report to the Joint Transportation Appropriations Subcommittee, on or before May 1, 2004, on its actual current and intended future use of funds pursuant to subsection (a3) of this section. The Department shall certify to the Joint Legislative Transportation Oversight Committee each year, on or before November 1, that use of the Highway Trust Fund cash balances for the purposes listed in subsection (a3) of this section will not adversely affect the delivery schedule of any Highway Trust Fund projects. If the Department cannot certify that the full amounts authorized in subsection (a3) of this section are available, then the Department may determine the amount that can be used without adversely affecting the delivery schedule and may proportionately apply that amount to the purposes set forth in subsection (a3) of this section.

(b) Funds in the Trust Fund are annually appropriated to the Department of Transportation to be allocated and used as provided in this subsection. A sum, not to exceed four and eight-tenths percent (4.8%) of the amount of revenue deposited in the Trust Fund under subdivisions (a)(1), (2), and (3) of this section may be used each fiscal year by the Department for expenses to administer the Trust Fund. Operation and project development costs of the North Carolina Turnpike Authority are eligible administrative expenses under this subsection. Any funds allocated to the Authority pursuant to this subsection shall be repaid by the Authority from its toll revenue as soon as possible, subject to any restrictions included in the agreements entered into by the Authority in connection with the issuance of the Authority's revenue bonds. Beginning one year after the Authority begins collecting tolls on a completed Turnpike Project, interest shall accrue on any unpaid balance owed to the

---

Highway Trust Fund at a rate equal to the State Treasurer's average annual yield on its investment of Highway Trust Fund funds pursuant to G.S. 147-6.1. Interest earned on the unpaid balance shall be deposited in the Highway Trust Fund upon repayment. The sum up to the amount anticipated to be necessary to meet the State matching funds requirements to receive federal-aid highway trust funds for the next fiscal year may be set aside for that purpose. The rest of the funds in the Trust Fund shall be allocated and used as follows:

(1) Sixty-one and ninety-five hundredths percent (61.95%) to plan, design, and construct projects on segments or corridors of the Intrastate System as described in G.S. 136-178 and to pay debt service on highway bonds and notes that are issued under the State Highway Bond Act of 1996 and whose proceeds are applied to these projects.

(2) Twenty-five and five hundredths percent (25.05%) to plan, design, and construct the urban loops described in G.S. 136-180 and to pay debt service on highway bonds and notes that are issued under the State Highway Bond Act of 1996 and whose proceeds are applied to these urban loops.

(3) Six and one-half percent (6.5%) to supplement the appropriation to cities for city streets under G.S. 136-181.

(4) Six and one-half percent (6.5%) for secondary road construction as provided in G.S. 136-182 and to pay debt service on highway bonds and notes that are issued under the State Highway Bond Act of 1996 and whose proceeds are applied to secondary road construction.

The Department must administer funds allocated under subdivisions (1), (2), and (4) of this subsection in a manner that ensures that sufficient funds are available to make the debt service payments on bonds issued under the State Highway Bond Act of 1996 as they become due.

(b1) The Secretary may authorize the transfer of funds allocated under subdivisions (1) through (4) of subsection (b) of this section to other projects that are ready to be let and were to be funded from allocations to those subdivisions. The Secretary shall ensure that any funds transferred pursuant to this subsection are repaid promptly and in any event in no more than four years. The Secretary shall certify, prior to making any transfer pursuant to this subsection, that the transfer will not affect the delivery schedule of Highway Trust Fund projects in the current Transportation Improvement Program. No transfers shall be allowed that do not conform to the applicable provisions of the equity formula for distribution of funds, G.S. 136-17.2A. If the Secretary authorizes a transfer pursuant to this subsection, the Secretary shall report that decision to the next regularly scheduled meetings of the Joint Legislative Commission on Governmental Operations, the Joint Legislative Transportation Oversight Committee, and to the Fiscal Research Division.

(b2) **(Effective until July 1, 2010)** There is annually appropriated to the North Carolina Turnpike Authority from the Highway Trust Fund the sum of sixty-four million dollars ($64,000,000). Of the amount allocated by this subsection, twenty-five million dollars ($25,000,000) shall be used to pay debt service or related financing costs and expenses on revenue bonds or notes issued for the construction of the Triangle Expressway, twenty-four million dollars ($24,000,000) shall be used to pay debt service or related financing expenses on revenue bonds or notes issued for the construction of the Monroe Connector/Bypass, and fifteen million dollars ($15,000,000) shall be used to pay debt service or related financing expenses on revenue bonds or notes issued for the construction of the Mid-Currituck Bridge. The amounts appropriated to the Authority pursuant to this subsection shall be used by the Authority to pay debt service or related financing costs and expenses on revenue bonds or notes issued by the Authority to finance the costs of one or more Turnpike Projects, to refund such bonds or notes, or to fund debt service reserves, operating reserves, and similar reserves in connection therewith. The appropriations established by this subsection constitute an agreement by the State to pay the funds appropriated hereby to the Authority within the meaning of G.S. 159-81(4). Notwithstanding the foregoing, it is the intention of the General Assembly that the enactment of this provision and the issuance of bonds or notes by the Authority in reliance thereon shall not in any manner constitute a pledge of the faith and credit and taxing power of the State, and nothing contained herein shall prohibit the General Assembly from amending the appropriations made in this subsection at any time to decrease or eliminate the amount annually appropriated to the Authority. Funds transferred from the Highway Trust Fund to the Authority pursuant to this subsection are not subject to the equity formula in G.S. 136-17.2A.

(b2) **(Effective July 1, 2010)** There is annually appropriated to the North Carolina Turnpike Authority from the Highway Trust Fund the sum of ninety-nine million dollars ($99,000,000). Of the amount allocated by this subsection, twenty-five million dollars ($25,000,000) shall be used to pay debt service or related financing costs and expenses on revenue bonds or notes issued for the construction of the Triangle Expressway, twenty-four million dollars ($24,000,000) shall be used to pay debt service or related financing expenses on revenue bonds or notes issued for the construction of the Monroe Connector/Bypass, fifteen million dollars ($15,000,000) shall be used to pay debt service or related financing expenses on revenue bonds or notes issued for the construction of the Mid-Currituck Bridge, and thirty-five million dollars ($35,000,000) shall be used to pay debt service or related financing expenses on revenue bonds or notes issued for the construction of the Garden Parkway. The amounts appropriated to the Authority pursuant to this subsection shall be used by the Authority to pay debt service or related financing costs and expenses on revenue bonds or notes issued by the Authority to finance the costs of one or more Turnpike Projects, to refund such bonds or notes, or to fund debt service reserves, operating reserves, and similar reserves in connection therewith. The appropriations established by this subsection constitute an agreement by the State to pay the funds appropriated hereby to the Authority within the meaning of G.S. 159-81(4). Notwithstanding the foregoing, it is the intention of the General Assembly that the enactment of this provision and the issuance of bonds or notes by the Authority in reliance thereon shall not in any manner constitute a pledge of the faith and credit and taxing power of the State, and nothing contained herein shall prohibit the General Assembly from amending the appropriations made in this subsection at any time to decrease or eliminate the amount annually appropriated to the Authority. Funds transferred from the Highway Trust Fund to the Authority pursuant to this subsection are not subject to the equity formula in G.S. 136-17.2A.

(c) If funds are received under 23 U.S.C. Chapter 1, Federal-Aid Highways, for a project for which funds in the Trust Fund may be used, the amount of federal funds received plus the amount of any funds from the Highway Fund that were used to match the federal funds may be transferred by the Secretary of Transportation from the Trust Fund to the Highway Fund and used for projects in the Transportation Improvement Program.

(d) A contract may be let for projects funded from the Trust Fund in anticipation of revenues pursuant to the cash-flow provisions of G.S. 143C-6-11 only for the two bienniums following the year in which the contract is let. (1989, c. 692, s. 1.1; c. 770, ss. 68.2, 74.6; 1989 (Reg. Sess., 1990), c. 1024, s. 46(a), (b); 1991, c. 193, s. 9; c. 280, s. 1; c. 689, s. 62; 1995, c. 390, s. 27; 1995

(Reg. Sess., 1996), c. 590, s. 6; 1996, 2nd Ex. Sess., c. 18, s. 19.4(a); 1998-212, s. 27.2; 1999-237, s. 27.1; 2000-140, s. 31; 2001-424, ss. 27.1, 27.23(d), 27.23(e), 27.23(f); 2002-126, ss. 26.4(a), 26.4(b), 26.9(b); 2002-133, s. 3; 2002-159, s. 41.5; 2003-284, ss. 29.4, 29.22; 2003-383, ss. 1, 2, 3; 2004-124, ss. 30.3(a), (b), 30.21(b); 2006-203, s. 78; 2007-323, s. 27.17; 2008-107, ss. 25.1, 25.5(b), (d), (f), 25.15; 2009-56, s. 1.)

**Subsection (b2) Set Out Twice.** — The first version of subsection (b2) set out above is effective until July 1, 2010. The second version of subsection (b2) set out above is effective July 1, 2010.

**Editor's Note.** — Session Laws 1995 (Reg. Sess., 1996), c. 590, s. 17, provides that c. 590, s. 6 shall become effective upon the certification of a favorable vote on the bonds by the State Board of Elections to the Secretary of State as provided in Section 9 of that act. A favorable vote on the bonds in the State Highway Bond Act of 1996 was certified November 26, 1996.

Session Laws 1995 (Reg. Sess., 1996), c. 590, s. 1, provides that this act shall be known and may be cited as the State Highway Bond Act of 1996.

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capitol Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 26.4(c), provides: "The Department of Transportation is encouraged to use all existing resources including bonded indebtedness to mitigate any delays in the construction of Transportation Improvement Program projects."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2003-383, s. 4, provides: "The General Assembly reaffirms its intent that the proceeds of the issuance of any bonds pursuant to the Highway Bond Act of 1996, Chapter 590 of the 1995 Session Laws, shall be used only for the purposes stated in that act, and for no other purpose."

Session Laws 2005-276, s. 2.2(f), as amended by Session Laws 2006-66, s. 2.2(e), provides: "Notwithstanding G.S. 105-187.9(b)(1), the sum to be transferred under that subdivision for the 2005-2006 fiscal year is two hundred fifty million dollars ($250,000,000) and for the 2006-2007 fiscal year is fifty-five million dollars ($55,000,000)."

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2006-203, s. 78, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "G.S. 143C-6-11" for "G.S. 143-28.1" in subsection (d).

Session Laws 2008-107, ss. 25.1, 25.5(b), and 25.15, effective July 1, 2008, added the last sentence in subdivision (a1)(2); in subsection (b), in the second sentence, substituted "four and eight-tenths percent (4.8%)" for "four percent (4%)" and deleted "for the 2003-2004 fiscal year, three and eight-tenths percent (3.8%) through fiscal year 2006-2007, and four and two-tenths percent (4.2%) thereafter" following "of this section"; and added subsection (b2).

Session Laws 2008-107, s. 25.5(d), effective July 1, 2009, substituted the language beginning with "sixty-four million dollars ($64,000,000)..." and ending with "...for the construction of the Mid-Currituck Bridge" for "twenty-five million dollars ($25,000,000) to be used to service debt on bonds issued for the construction of the Triangle Expressway" near the beginning of subsection (b2).

Session Laws 2008-107, s. 25.5(f), effective July 1, 2010, in subsection (b2), substituted "ninety-nine million dollars ($99,000,000)" for "sixty-four million dollars ($64,000,000)" in the first sentence, added "and thirty-five million dollars ($35,000,000) shall be used to pay debt service or related financing expenses on revenue bonds or notes issued for the construction of the Garden Parkway" at the end of the second sentence, and made minor grammatical changes.

Session Laws 2009-56, s. 1, effective June 5, 2009, in both versions of subsection (b2), substituted "made in this subsection" for "set forth in this act" in the next-to-last sentence, and added the last sentence.

### CASE NOTES

**Standing to Challenge Transfers from Trust Fund.** — Taxpayers had standing to challenge unlawful or unconstitutional government expenditures and were entitled to seek a declaratory judgment; a trial court erred in dismissing taxpayers' suit, on behalf of themselves and others similarly situated, which challenged money transfers from the North Carolina Highway Trust Fund to the general fund. Goldston v. State, 361 N.C. 26, 637 S.E.2d 876, 2006 N.C. LEXIS 1300 (2006).

## § 136-177. Limitation on funds obligated from Trust Fund.

In a fiscal year, the Department of Transportation may not obligate more Trust Fund revenue, other than revenue allocated for city streets under G.S. 136-176(b)(3) or secondary roads under G.S. 136-176(b)(4) and G.S. 20-85(b), to construct or improve highways and other forms of transportation than the amount indicated in the following table:

| Fiscal Year | Maximum Expenditure |
|---|---|
| 1989-90 | $200,000,000 |
| 1990-91 | 250,000,000 |
| 1991-92 | 300,000,000 |
| 1992-93 | 400,000,000 |
| 1993-94 | 500,000,000 |
| 1994-95 and following years | Unlimited |

The amount of revenue credited to the Trust Fund in a fiscal year under G.S. 136-176(a) that exceeds the maximum allowable expenditure set in the table above may be used only for preliminary planning and design and the acquisition of rights-of-way for scheduled highways and highway improvements to be funded from the Trust Fund. (1989, c. 692, s. 1.1; 2009-266, s. 27.)

**Effect of Amendments.** — Session Laws 2009-266, s. 27, effective August 1, 2009, inserted "and other forms of transportation" in the introductory language.

## § 136-177.1. Requirement to use federal funds for Intrastate System projects and urban loops.

For fiscal years 1996-97 through 2010-11, the Department of Transportation must use ten million dollars ($10,000,000) of the funds it receives each year under 23 U.S.C. Chapter 1, Federal-Aid Highways, to construct the Intrastate System projects described in G.S. 136-179. For fiscal years 1996-97 through 2011-12, the Department of Transportation must use ten million dollars ($10,000,000) of the funds it receives each year under 23 U.S.C. Chapter 1, Federal-Aid Highways, to construct the urban loops described in G.S. 136-180. G.S. 136-176(c) does not apply to federal funds required to be used under this section for Intrastate System projects or urban loops, nor does it apply to any funds from the Highway Fund that were used to match these federal funds. (1995 (Reg. Sess., 1996), c. 590, s. 15.)

**Editor's Note.** — Session Laws 1995 (Reg. Sess., 1996), c. 590, s. 17, provides that c. 590, s. 15, which enacted this section, shall become effective upon the certification of a favorable vote on the bonds by the State Board of Elections to the Secretary of State as provided in Section 9 of that act. A favorable vote on the bonds in the State Highway Bond Act of 1996 was certified November 26, 1996.

Session Laws 1995 (Reg. Sess., 1996), c. 590, s. 1, provides that this act shall be known and may be cited as the State Highway Bond Act of 1996.

Session Laws 2003-383, s. 4, provides: "The General Assembly reaffirms its intent that the proceeds of the issuance of any bonds pursuant to the Highway Bond Act of 1996, Chapter 590 of the 1995 Session Laws, shall be used only for the purposes stated in that act, and for no other purpose."

## § 136-178. Purpose and description of Intrastate System.

(a) The Intrastate System is established to provide high-speed, safe travel service throughout the State. It connects major population centers both inside and outside the State and provides safe, convenient, through-travel for motorists. It is designed to support statewide growth and development objectives and to connect to major highways of adjoining states. All segments of the routes in the Intrastate System shall have at least four travel lanes except those for which projected traffic volumes and environmental considerations dictate fewer lanes. When warranted, segments of the Intrastate System shall have vertical separation or interchanges at crossings, more than four travel lanes, or bypasses. Access to a route in the Intrastate System is determined by travel service and economic considerations.

Funds allocated from the Trust Fund for the Intrastate System are primarily intended to be used to complete the projects listed in G.S. 136-179. If Intrastate Trust Funds assigned to a distribution region through the provisions of G.S. 136-17.2A cannot be used for projects listed in G.S. 136-179, then they may be used for projects on the following route segments or corridors:

I-26 from Tennessee to South Carolina.
I-40 from Tennessee to US 17 in New Hanover County.
I-73 from South Carolina to Virginia.
I-74 from South Carolina to Virginia.
I-77 from South Carolina to Virginia.
I-85 from South Carolina to Virginia.
I-95 from South Carolina to Virginia.
I-240 in Buncombe County.
I-277 in Mecklenburg County.
I-440 in Wake County.
US 1 from South Carolina to I-85 in Vance County.
US 13 from US 17 in Bertie County to Virginia.
US 17 from South Carolina to Virginia.
US 19/19E from I-26 in Madison County to NC 194 in Avery County.
US 23/441 from Georgia to US 74 in Jackson County.
US 29 from I-40 in Guilford County to Virginia.
US 52 from I-74 in Surry County to I-85 in Davidson County.

US 64 from US 52 in Davidson County to US 158 in Dare County.

US 70 from I-40 in Wake County to NC 24 in Carteret County.

US 74 from Tennessee to US 17 in Brunswick County, including Independence Boulevard from I-277 to I-485 in Mecklenburg County.

US 158 from US 52 in Forsyth County to I-85 in Granville County, and from I-85 in Warren County to US 64 in Dare County.

US 221 from South Carolina to NC 105 in Avery County.

US 264 from US 64 in Wake County to US 17 in Beaufort County.

US 321 from South Carolina to Tennessee.

US 421 from US 321 west of Boone in Watauga County to I-40 in Forsyth County, and from I-85 in Guilford County to NC 87 in Lee County.

NC 24 from I-77 in Mecklenburg County to US 70 in Carteret County.

NC 87 from US 421 in Lee County to US 74/76 in Columbus County.

NC 105 from US 221 in Avery County to US 321 in Watauga County.

NC 168 from US 158 in Currituck County to Virginia.

NC 194 from US 19E to US 221 in Avery County.

New route from US 158 to NC 12, including a new toll bridge over the Currituck Sound in Currituck County.

Interstate routes or corridors designated by Congress or officially accepted onto the Interstate System by the United States Department of Transportation.

Any portion of an urban loop project, as described in G.S. 136-180, that has been certified by the Department as complete and is no longer eligible for funding from the urban loop allocation specified in G.S. 136-176(b)(2).

The Department of Transportation may add a route to the Intrastate System if the route is a multilane route and has been designed and built to meet the construction criteria of the Intrastate System projects. No funds may be expended from the Trust Fund on routes added by the Department.

(b) Before encumbering or spending any funds on projects added to the Intrastate System by this section, in addition to those projects required to receive first priority pursuant to G.S. 136-179, the Department shall submit a report to the legislators representing the counties in which the priority projects that have not been completed are located on the current status of the project, the projected date for completion of the project, and the reasons for the delay in completing the project. (1989, c. 692, s. 1.1; 2004-124, s. 30.21(c).)

## § 136-179. Projects of Intrastate System funded from Trust Fund.

In the allocation of funds as specified in G.S. 136-176(b)(1), first priority shall be given to the following projects on the Intrastate System:

| Route | Improvements | Affected Counties |
|---|---|---|
| I-40 | Widening | Buncombe, Haywood, Guilford, Wake, Durham |
| I-77 | Widening | Mecklenburg |
| I-85 | Widening | Durham, Orange, Alamance, Guilford, Cabarrus, Mecklenburg, Gaston |
| I-95 | Widening | Halifax |

| Route | Improvements | Affected Counties |
|---|---|---|
| US-1 | Complete 4-laning from Henderson to South Carolina Line (including 6-laning of Raleigh Beltline) | Vance, Franklin, Wake, Chatham, Lee, Moore, Richmond |
| US-13 | Complete 4-laning from Virginia Line to US-17 | Gates, Hertford, Bertie |
| US-17 | Complete 4-laning from Virginia Line to South Carolina Line (including Washington, New Bern, Hampstead from Military Cutoff Road in New Hanover County to US 17 north of Hampstead, and Jacksonville Bypasses) | Camden, Pasquotank, Perquimans, Chowan, Bertie, Martin, Beaufort, Craven, Jones, Onslow, Pender, New Hanover, Brunswick |
| US-19/US-19E | Complete 4-laning from US-23 to NC 194 in Ingalls | Madison, Yancey, Mitchell, Avery |
| US-19 | Complete 4-laning | Cherokee, Macon, Swain |
| US-23 | Complete 4-laning and upgrading existing 4-lanes from Tennessee Line to I-240 | Madison, Buncombe |
| US-23-441 | Complete 4-laning from US-19/US-74 to Georgia Line | Macon |
| US-52 | Complete 4-laning from I-77 to Lexington (including new I-77 Connector) | Surry, Davidson |
| US-64 | Complete 4-laning from Raleigh to Coast (including freeway construction from I-95 to US-17) | Edgecombe, Pitt, Martin, Washington, Tyrrell, Dare |
| US-64 | Complete 4-laning from Lexington to Raleigh | Davidson, Randolph, Chatham, Wake |
| US-70 | Complete 4-laning from Raleigh to Morehead City (including Clayton, Goldsboro, Kinston, Smithfield-Selma, and Havelock Bypasses predominately freeways on predominately new locations) | Wake, Johnston, Wayne, Lenoir, Craven |

| Route | Improvements | Affected Counties |
|---|---|---|
| US-74 | Complete 4-laning from Charlotte to US-17 (including multilaning of Independence Blvd. in Charlotte, and Bypasses of Monroe, Rockingham, and Hamlet) | Mecklenburg, Union, Richmond, Robeson, Columbus |
| US-74 | Complete 4-laning from I-26 to I-85 (including Shelby Bypass) | Polk, Rutherford, Cleveland |
| US-158 | Complete 4-laning from Winston-Salem to Whalebone | Forsyth, Guilford, Rockingham, Caswell, Person, Granville, Vance, Warren, Halifax, Northampton, Gates, Hertford, Pasquotank, Camden, Currituck, Dare |
| | New toll bridge over Currituck Sound | Currituck |
| US-221 | Complete 4-laning from Linville to South Carolina | Avery, McDowell, Rutherford |
| US-220 | Complete 4-laning from I-40 to US-1 | Guilford, Randolph, Montgomery, Richmond |
| US-220/NC-68 | Complete 4-laning from Virginia Line to I-40 | Rockingham, Guilford |
| US-264 | Complete 4-laning from US-64 to Washington (including Wilson and Greenville Bypasses) (including freeway construction from I-95 to Greenville) | Wilson, Greene, Pitt |
| US-321 | Complete 4-laning from Tennessee Line to South Carolina Line | Avery, Caldwell, Catawba, Lincoln, Gaston, Watauga |
| US-421 | Complete 4-laning from US 321 west of Boone to I-40 | Watauga, Wilkes, Yadkin |
| US-421 | Complete 4-laning from Greensboro to Sanford (including Bypass of Sanford) | Chatham, Lee |
| NC-24 | Complete 4-laning from Charlotte to Morehead City | Mecklenburg, Cabarrus, Stanly, Montgomery, Moore, Harnett, Cumberland, Sampson, Duplin, Onslow, Carteret |

| Route | Improvements | Affected Counties |
|---|---|---|
| NC-87 | Complete 4-laning from Sanford to US-74 | Lee, Harnett, Cumberland, Bladen, Columbus |
| NC-105 | Complete 4-laning from Boone to Linville | Watauga, Avery |
| NC-168 | Complete multilaning from Virginia Line to US-158 | Currituck |
| NC-194 | Complete 4-laning from US-19E to US-221 | Avery |

(1989, c. 692, s. 1.1; 2003-284, s. 29.11(b); 2004-124, s. 30.21(d); 2004-184, s. 4.)

## § 136-180. Urban loops.

(a) Funds allocated from the Trust Fund for urban loops may be used only for the following urban loops:

| Loop | Description | Affected Counties |
|---|---|---|
| Asheville Western Loop | Multilane facility on new location from I-26 west of Asheville to US-19/23 north of Asheville for the purpose of connecting these roads. The funds may be used to improve existing corridors. | Buncombe |
| Charlotte Outer Loop | Multilane facility encircling City of Charlotte including 6-laning of the portion from Johnston Road/US 521 south to I-77 south of Charlotte-including widening, resurface, and interchange | Mecklenburg |
| Durham Northern Loop | The projects listed below are eligible for funding under this section as part of the Durham Northern Loop.<br>The priorities for planning and constructing these projects will be established by mutual agreement of the Metropolitan Planning Organization (MPO) and the Department of Transportation through the federally mandated | |

| Loop | Description | Affected Counties |
|---|---|---|
| | Transportation Improvement Program development process. The cross sections for these projects will be established by mutual agreement of the MPO and the Department of Transportation through the State and federal environmental review process.<br>(1) East end connector, from N.C. 147 to U.S. 70 East.<br>(2) U.S. 70, from Lynn Rd. to the Northern Durham Parkway.<br>(3) I-85, from U.S. 70 to Red Mill Rd.<br>(4) Northern Durham Parkway, Section B, from Old Oxford Rd. to I-85.<br>(5) Northern Durham Parkway, Section A, from I-85 to I-540.<br>(6) Northern Durham Parkway, Section C, from Old Oxford Rd. to Roxboro Rd.<br>(7) Roxboro Rd. from Duke St. to Goodwin Rd. | Durham, Wake |
| Fayetteville Western Outer Loop | Multilane facility on new location from US 401 north of Fayetteville to I-95 south of Hope Mills | Cumberland |
| Gastonia Loop | Multilane facility, known as the Garden Parkway, on a new location beginning at I-485, extending west across southern Gaston County to I-85, and continuing north to US 321 | Gaston, Mecklenburg |
| Greensboro Loop | Multilane facility on new location encircling City of Greensboro including interchanges with Cone Boulevard Extension and Lewiston-Fleming Road Extension | Guilford |

| Loop | Description | Affected Counties |
|---|---|---|
| Greenville Loop | Multilane extension of the Greenville Loop from US 264 west of Greenville to NC-11 south of Winterville | Pitt |
| Raleigh Outer Loop | Multilane facility on new location encircling City of Raleigh | Wake, Durham, Johnston |
| Wilmington Bypass | Multilane facility on new location from US-17 northeast of Wilmington to US 421 in southern Wilmington, continuing from US 421 in southern Wilmington northeast along Independence Blvd., and extending to Martin Luther King, Jr. Parkway, and including the Blue Clay Road interchange | New Hanover |
| Winston-Salem Northbelt | Multilane facility on new location from I-40 west of Winston-Salem northerly to US 311/Future I-74 in eastern Forsyth County | Forsyth |

(b) The Board of Transportation may, by official resolution, accept a new interstate or freeway as the revised termini of an urban loop described in subsection (a) of this section, and the revised project shall be eligible for funding with funds described in G.S. 136-176(b)(2) if the following conditions are met:

(1) The Department of Transportation has constructed a new interstate or freeway facility since 1989 and has changed the official route designation from the termini described in subsection (a) of this section to the new facility.

(2) The Board of Transportation finds that the purposes of the urban loop facility, specifically including reduced congestion and high-speed, safe, regional through-travel service, would be enhanced by the action.

(1989, c. 692, s. 1.1; 2002-126, s. 26.10(a); 2003-284, s. 29.11(a); 2004-124, s. 30.19; 2004-148, s. 4.)

§ **136-180.1:** Repealed by Session Laws 2002-126, s. 26.10(b), effective July 1, 2002.

## § 136-181. Supplement for city streets.

Funds allocated to supplement the appropriations for city streets made under G.S. 136-41.1 shall be distributed to cities as provided in that statute. (1989, c. 692, s. 1.1.)

## § 136-182. Supplement for secondary road construction.

Funds are allocated from the Trust Fund to increase allocations for secondary road improvement made under G.S. 136-44.2A so that all State-maintained unpaved secondary roads eligible for paving pursuant to G.S. 136-44.5(a) can be paved by the 2009-2010 fiscal year.

Allocations of these funds shall be based on the percentage proportion of the number of miles in the county of State-maintained unpaved secondary roads that are eligible to be paved under G.S. 136-44.5(a) bears to the total number of miles in the State of State-maintained unpaved secondary roads that are eligible to be paved.

As an exception to the formula for the allocation of these funds, the Department shall, beginning in the 2006-2007 fiscal year and until the 2009-2010 fiscal year, set aside up to five million dollars ($5,000,000) to pay for the paving of any unpaved secondary road that had previously been determined to be ineligible for paving.

Beginning in fiscal year 2010-2011, allocations from the Trust Fund shall be based on the total number of secondary miles in a county in proportion to the total State-maintained secondary road mileage.

The Department shall make every effort to acquire right-of-way for the purpose of paving unpaved State secondary roads included in the annual secondary road program. The Division Engineer is authorized to reduce the width of a right-of-way to less than 60 feet to pave an unpaved secondary road with the allocated funds, provided that in all circumstances the safety of the public is not compromised and the minimum accepted design practice is satisfied. (1989, c. 692, s. 1.1; 2003-112, s. 2; 2004-124, s. 30.21(e); 2005-404, s. 3; 2006-258, ss. 1, 3, 4.)

**§ 136-183:** Repealed by Session Laws 2001-424, s. 27.1, effective July 1, 2001.

## § 136-184. Reports by Department of Transportation.

(a) The Department of Transportation shall develop, and update annually, a report containing a completion schedule for all projects to be funded from the Trust Fund. The report shall include a separate schedule for the Intrastate System projects, the urban loop projects, and the paving of unpaved State-maintained secondary roads that have a traffic vehicular equivalent of at least 50 vehicles a day. The annual update shall indicate the projects, or portions thereof, that were completed during the preceding fiscal year, any changes in the original completion schedules, and the reasons for the changes. The Department shall submit the report and the annual updates to the Joint Legislative Transportation Oversight Committee.

(b) The Department of Transportation shall make quarterly reports to the Joint Legislative Transportation Oversight Committee containing any information requested by the Committee. The Department shall provide the Committee with all information needed to determine if funds available under the Trust Fund and the Transportation Improvement Program are being spent in accordance with G.S. 136-17.2A. (1989, c. 692, s. 1.1; 1993, c. 321, s. 169.2(e).)

## § 136-185. Maintenance reserve created in certain circumstances.

If the Highway Trust Fund has not terminated but all contracts for the projects of the Intrastate System described in G.S. 136-179 have been let and the amount collected and allocated for the Intrastate System is enough to pay the contracts and retire any bonds issued under the State Highway Bond Act of 1996 for projects of the Intrastate System, all subsequent allocations of revenue for the Intrastate System shall be credited to a reserve account within the Trust Fund. Revenue in this reserve may be used only to maintain the projects of the Intrastate System.

If the Highway Trust Fund has not terminated but all contracts for the urban loops described in G.S. 136-180 have been let and the amount collected and allocated for the urban loops is enough to pay the contracts and retire any bonds issued under the State Highway Bond Act of 1996 for the urban loops, then all urban loops shall be considered a part of the Intrastate System, and all subsequent allocations of revenue for the urban loops shall be credited to the Intrastate account within the Trust Fund. (1995 (Reg. Sess., 1996), c. 590, s. 16; 2004-124, s. 30.21(f).)

**Editor's Note.** — Session Laws 1995 (Reg. Sess., 1996), c. 590, s. 17, provides that c. 590, s. 16, which enacted this section, shall become effective upon the certification of a favorable vote on the bonds by the State Board of Elections to the Secretary of State as provided in Section 9 of that act. A favorable vote on the bonds in the State Highway Bond Act of 1996 was certified November 26, 1996.

Session Laws 1995 (Reg. Sess., 1996), c. 590, s. 1, provides that this act shall be known and may be cited as the State Highway Bond Act of 1996.

Session Laws 2003-383, s. 4, provides: "The General Assembly reaffirms its intent that the proceeds of the issuance of any bonds pursuant to the Highway Bond Act of 1996, Chapter 590 of the 1995 Session Laws, shall be used only for the purposes stated in that act, and for no other purpose."

**§§ 136-186 through 136-189:** Reserved for future codification purposes.

## Article 15.

## *Railroads.*

### § 136-190. Powers of railroad corporations.

Every railroad corporation shall have power:

(1) To Survey and Enter on Land. — To cause such examination and surveys for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto.

(2) To Condemn Land under Eminent Domain. — To appropriate land and rights therein by condemnation, as provided in the Chapter Eminent Domain.

(3) To Take Property by Grant. — To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purposes of such grant only.

(4) To Purchase and Hold Property. — To purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad, the stations and other accommodations necessary to accomplish the object of its incorporation.

(5) To Grade and Construct Road. — To lay out its road, not exceeding 100 feet in width, and to construct the same; to take, for the purpose of

cuttings and embankments, as much more land as may be necessary for the proper construction and security of the road; and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in the Chapter Eminent Domain.

(6) To Intersect with Highways and Waterways. — To construct its road across, along or upon any stream, watercourse, street, highway, turnpike, railroad or canal which the route of its road shall intersect or touch; but the company shall restore the stream, watercourse, street, highway or turnpike, thus intersected or touched, to its former state or to such state as not unnecessarily to impair its usefulness. Nothing in this Chapter shall be construed to authorize the erection of any bridge or any other construction across, in or over any stream or lake navigated by motor boats commensurate in size to sailboat, or sailboats or vessels, at the place where any bridge or other obstructions may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any streets in any municipality without the assent of such municipality.

(7) To Intersect with Other Railroads. — To cross, intersect, join and unite its railroad with any other railroad at any point on its route and upon the grounds of such other railroad, with the necessary turnouts, sidings, switches and other conveniences in furtherance of the object of its connections. Every company whose railroad is or shall be hereafter intersected by any other railroad shall unite with the owners of such other railroad in forming such intersections and connections and grant the facilities aforesaid, and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by the Commission.

(8) To Transport Persons and Property. — To take and convey persons and property on its railroad or by water by the power or force of steam, electricity, or by any other power, and to receive compensation therefor.

(9) To Erect Stations and Other Buildings. — To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of its passengers, freight and business.

(10) To Borrow Money, Issue Bonds and Execute Mortgages. — From time to time to borrow such sums of money as may be necessary for completing and finishing or operating its railroad, to issue and dispose of its bonds for any amount so borrowed, to mortgage its corporate property and franchises and to secure the payment of any debt contracted by the company for the purposes aforesaid; and the directors of the company may confer on any holder of any bond issued for money borrowed, as aforesaid, the right to convert the principal due or owing thereon into stock of such company at any time under such regulations as the directors may see fit to adopt.

(11) To Lease Rails. — To lease iron rails to any person for such time and upon such terms as may be agreed on by the contracting parties, and upon the termination of the lease by expiration, forfeiture or surrender, to take possession of and remove the rails so leased as if they had never been laid.

(12) To Establish Hotels and Eating Houses. — To purchase, lease, hold, operate or maintain eating houses, hotels and restaurants for the accommodation of the traveling public along the line of its road. (1871-2, c. 138, s. 29; Code, s. 1957; 1887, c. 341; 1889, c. 518; Rev., ss. 2567, 2575; C.S., s. 3444; 1953, c. 675, ss. 6, 7; 1963, c. 1165, s. 1; 1998-128, s. 14.)

**Cross References.** — As to adverse possession of property owned by a railroad, see G.S. 1-44. As to presumption of abandonment of railroad right-of-way, see G.S. 1-44.1. As to power of Utilities Commission to prevent discrimination in service and charges, see G.S. 62-140. As to control of Utilities Commission over pledge of assets, issuing securities, etc., see G.S. 62-160 et seq. As to duty to provide cattle guards, see G.S. 62-226. As to railroad's duty to transport, see G.S. 62-234. As to the power of the Utilities Commission to regulate crossings, see G.S. 62-237. As to administration of federal railroad revitalization programs by the Department of Transportation, see G.S. 136-44.35. As to the duty of railroads constructing bridges over watercourses to provide draws, see G.S. 136-78.

**Virginia-North Carolina Interstate High-Speed Rail Commission.** — The preamble to Session Laws 2001-266 reads as follows: "Whereas, levels of congestion on interstate highways and at major airports along the east coast of the United States are rapidly rising, and in some locations have reached virtual gridlock for hours each day; and

"Whereas, it is therefore necessary to develop and use alternative modes of transportation for the movement of goods and passengers long distances along the east-coast corridor; and

"Whereas, preliminary engineering studies have documented that the creation of high-speed passenger rail service between points in Virginia and points in North Carolina could provide travelers along the corridor with an attractive alternative to highway travel, thus reducing highway congestion; and

"Whereas, establishment of high-speed passenger rail service between Virginia and North Carolina offers the additional possibility of connection through the District of Columbia to origins and destinations as far north as New England; and

"Whereas, establishment of high-speed passenger rail service between Virginia and North Carolina offers the additional possibility of connections to destinations in the South, including Florida, Greenville-Spartanburg, South Carolina, and Atlanta, Georgia; and

"Whereas, the Virginia General Assembly by passage of Senate Joint Resolution 396 of the 2001 Session has taken its action to create the Virginia-North Carolina Interstate High-Speed Rail Commission; and

"Whereas, it is useful and prudent to have a panel of legislators from both Virginia and North Carolina established in order to explore the benefits, costs, and required legislative actions associated with establishing high-speed passenger rail service; Now, therefore,"

Session Laws 2001-266, ss. 1-5, as amended by Session Laws 2001-486, s. 2.22, and as amended by Session Laws 2003-284, s. 29.19, provides: "Section 1. Upon the Virginia General Assembly's concurring action, the Virginia-North Carolina Interstate High-Speed Rail Commission is established. The North Carolina component shall consist of eight members to be appointed as follows:

"(1) Three members of the House of Representatives to be appointed by the Speaker of the House of Representatives.

"(1a) One public member appointed by the Speaker of the House of Representatives; and

"(2) Four members of the Senate to be appointed by the President Pro Tempore of the Senate, at least one of whom is a member of the North Carolina Railroad Study Committee.

"Section 2. In conducting its study, the Commission shall hold regularly scheduled meetings in this State and in Virginia, tours of inspection, and public hearings as appropriate to determine the desirability and feasibility of establishing high-speed passenger rail service between Virginia and North Carolina. The Commission shall also study the establishment of an interstate high-speed rail compact between North Carolina, Virginia, and other states. If it appears to the Commission that establishment of such service or compact is desirable and feasible, the Commission shall consider and recommend to the Governor and General Assembly those legislative actions necessary to do so, including the identification of the necessary levels of funding and the sources of those funds.

"Section 3. Upon approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional and clerical staff to assist in the work of the Commission. Technical support shall be provided by the Rail Division of the Department of Transportation. Clerical staff shall be furnished to the Commission through the offices of the House of Representatives and Senate Supervisors of Clerks. The Commission may meet in the Legislative Building or the Legislative Office Building upon the approval of the Legislative Services Commission. The North Carolina members of the Commission, while in the discharge of official duties, may exercise all the powers provided under the provisions of G.S. 120-19 through G.S. 120-19.4, including the power to request all officers, agents, agencies, and departments of the State to provide any information, data, or documents within their possession, ascertainable from their records, or otherwise available to them, and the power to subpoena witnesses. North Carolina members of the Commission shall receive per diem, subsistence, and travel allowances as follows:

"(1) Commission members who are members of the General Assembly at the rate established in G.S. 120-3.1;

"(2) Commission members who are officials or employees of the State or of local government agencies at the rate established in G.S. 138-6; and

"(3) All other Commission members at the rate established in G.S. 138-5.

"Section 4. The Commission shall report its findings and any recommendations to the Governor and the General Assembly by November 30, 2004, and may make an interim report to the Governor and General Assembly upon the convening of the 2004 Regular Session of the 2003 General Assembly. The Commission shall terminate on November 30, 2004."

"Section 5. From funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds for the expenses of the Interstate High-Speed Rail Commission."

**Editor's Note.** — Session Laws 1993, c. 235, effective June 29, 1993, provides that Caldwell and Catawba Counties and the Cities of Granite Falls, Hudson, Hickory, Lenoir and Sawmills may create the Carolina and Northwestern Railroad Authority by following the procedures set forth therein.

This Article is former Article 11 of Chapter 62, as rewritten and recodified by Session Laws 1998-128, ss. 13-15. Where appropriate, the historical citations to the sections in the former Article have been added to corresponding sections in the Article as rewritten and recodified.

**Legal Periodicals.** — For note on misuse of railroad right-of-way, see 29 N.C.L. Rev. 312 (1951).

For article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

## CASE NOTES

I. Survey and Entry on Land.
II. Eminent Domain.
III. Acquisition of Property.
IV. Grading and Construction of Road.
V. Intersections with Highways, Waterways.
VI. Intersections with Other Railroads.
VII. Transportation of Persons and Property.
VIII. Borrowing of Money and Issuance of Bonds.
IX. Sale.

### I. SURVEY AND ENTRY ON LAND.

**As between two railroad companies, first location belongs to company which first defines and marks its route** and adopts the same for its permanent location by authoritative corporate action. Fayetteville St. Ry. v. Railroad, 142 N.C. 423, 55 S.E. 345 (1906).

### II. EMINENT DOMAIN.

**A railroad corporation has the power of eminent domain.** North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

**When a railroad corporation obtains land in condemnation proceedings, it procures merely an easement,** to be used only for railroad purposes. Condemnation is not to be used as a means of acquiring property for the benefit of the corporation, and the corporation has no right or authority to use or let the property for private or nonrailroad purposes. Such a right-of-way is an easement for railroad purposes and does not deprive the owner of the fee or its use for purposes not inconsistent with its use for railroad purposes. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

**Land May Be Taken from Another Railroad.** — Land acquired by one railroad company under a legislative grant of the right of eminent domain, and not necessary for the exercise of its franchise or the discharge of its duties, is liable to be taken under the law of eminent domain for the use of another railroad company. North Carolina & R. & D.R.R. v. Carolina Cent. Ry., 83 N.C. 489 (1880).

### III. ACQUISITION OF PROPERTY.

**Acquisition of Real Property Generally.** — A railroad corporation cannot acquire and hold lands for any purposes except such as are authorized by statute. The authority must be conferred by legislation or does not exist. It is, however, not necessary that the authority should be expressly conferred. It may be implied. Wallace v. Moore, 178 N.C. 114, 100 S.E. 237 (1919).

**Extending Use of Right-of-Way.** — While a railroad can use only the part of its right-of-way actually occupied, whenever the necessities of the company require it, it can extend its use of the right-of-way to the extent of the statutory right for additional tracks or other railroad purposes. Railroad v. Olive, 142 N.C. 257, 55 S.E. 263 (1906); Atlantic C.L.R.R. v.

Bunting, 168 N.C. 579, 84 S.E. 1009 (1915); Tighe v. Seaboard Air Line R.R., 176 N.C. 239, 97 S.E. 164 (1918).

**A railroad corporation is without power to acquire and hold real estate except by statutory authority,** either expressly conferred or necessarily implied from the powers contained in the charter or arising to it under the general laws. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

**A conveyance of land for use as a railroad right-of-way** by deed in regular form of bargain and sale, reciting a valuable consideration, is presumptively a deed of purchase within the meaning of this section and must be interpreted as an ordinary deed, so that when the granting clause is sufficient in form to convey the fee simple and the habendum and warranties are in harmony therewith, it conveys the fee and not a mere easement. McCotter v. Barnes, 247 N.C. 480, 101 S.E.2d 330 (1958).

## IV. GRADING AND CONSTRUCTION OF ROAD.

**Change of Grade.** — A railroad company has a right to change the grade of its roadbed or to remove it to any point on its right-of-way. Brinkley v. Railroad, 135 N.C. 654, 47 S.E. 791 (1904).

## V. INTERSECTIONS WITH HIGHWAYS, WATERWAYS.

**Duty to Maintain Safe and Convenient Crossing.** — While railroad corporations are given the right and power to construct their roads across streets, highways, etc., they must maintain a safe and convenient crossing there, making it, as far as they can, as safe and convenient to the public as it would have been had the railroad not been built. Raper v. Wilmington & W.R.R., 126 N.C. 563, 36 S.E. 115 (1900).

**Duty When Railroad Changes Grade of Street.** — Where a railroad accepts the benefits of statutory authorization and changes the grade of a street or highway, it must assume and comply with the burden imposed and restore the street to a useful condition. If, to meet the burden so imposed, it becomes necessary to go beyond the railroad right-of-way and change the grade of a street, thereby impairing access of an abutting property owner, compensation must be paid for the diminution in value resulting from the denial of access. Thompson v. Seaboard Air Line R.R., 248 N.C. 577, 104 S.E.2d 181 (1958).

**Whole Street Cannot Be Appropriated.** — It is doubtful whether the statute can be construed to authorize the exclusive appropriation of the street. The sidewalk is a portion of the street appropriated to the use of pedestrians. To construe the grant of the right to construct its road across, along, or upon a street, always of much greater width than a railroad track and the crossties, as a grant of the right to occupy the entire street or sidewalk, is not permissible in the light of the recognized rule of construction of such grants of power. Seaboard Air Line Ry. v. City of Raleigh, 219 F. 573 (E.D.N.C. 1914), aff'd, 242 U.S. 15, 37 S. Ct. 8, 61 L. Ed. 121 (1916).

**Assent of City as Essential Power.** — The assent to the use of the street by a railroad company is often a most essential power, necessary to be used for the benefit of the people of the city. Griffin v. Southern Ry., 150 N.C. 312, 64 S.E. 16 (1909).

**Reviewability of City's Action.** — The action of the board of aldermen in authorizing a railroad company to use a certain street for legitimate railroad purposes, such as the laying and use of tracks, etc., when the statutory power is given, is not reviewable by the courts at the instance of an owner of land on the street, claiming that some other street should have been so used. Griffin v. Southern Ry., 150 N.C. 312, 64 S.E. 16 (1909).

## VI. INTERSECTIONS WITH OTHER RAILROADS.

**Railroad Decides Necessity of Intersection.** — Where a railroad company has a right to condemn a way across the track of another company to manufacturing plants for a spur track to which the other company also has its siding, in competition for freight, the question whether it is necessary for the plaintiff company to build its spur is one in its discretion; and controversies as to whether the defendant could and would shift the plaintiff's cars on its own track advantageously to the plaintiff, and for a reasonable charge, are immaterial. Virginia & C.S.R.R. v. Seaboard Air Line R.R., 161 N.C. 531, 78 S.E. 68 (1913), rehearing denied, 165 N.C. 425, 81 S.E. 617 (1914).

A railroad company having the power of condemnation across the road of another company should exercise this right with regard to the convenience of both parties and with as little interference with the use of the other party of its own track as can be obtained without a great increase in its cost and inconvenience. But the courts cannot restrict this right to be exercised by a railroad to cases in which the courts may approve its reasonableness or expediency. Virginia & C.S.R.R. v. Seaboard Air Line Ry., 165 N.C. 425, 81 S.E. 617 (1914).

**Agreement or Condemnation Necessary for Entry on Right-of-Way of Another Railroad.** — Under this section one road cannot enter on the right-of-way of another for the purpose of connecting therewith without previous agreement or condemnation proceedings. Richmond & D.R.R. v. Durham & N. Ry., 104 N.C. 658, 10 S.E. 659 (1889).

**Effect of Parol Agreement.** — A parol agreement to allow one railroad company to extend its track on the right-of-way of another, for the purpose of connecting therewith, is a mere license, revocable at the will of the licensor, and will not operate as an estoppel although the licensee has entered and made valuable improvements. Richmond & D.S.R.R. v. Durham & N. Ry., 104 N.C. 658, 10 S.E. 659 (1889).

**One railroad company will not be allowed to preclude competition** by another in a particular area by arbitrarily refusing such other railroad reasonable use of its right-of-way and trackage. Seaboard Air Line R.R. v. Atlantic C.L.R.R., 240 N.C. 495, 82 S.E.2d 771 (1954).

**Use of Common Trackage.** — The right of each of two railroads to equal use of common trackage does not mean identical use, and where one of them constructs a spur from its independent line to serve a certain area adjacent to such line, but the common trackage is used by it in its operation serving such spur, the other has the right to construct and use a spur from the common trackage when this is the sole feasible means it has to serve industries in the same area, provided such operations will not impair the use of the common trackage by the other. Seaboard Air Line R.R. v. Atlantic C.L.R.R., 240 N.C. 495, 82 S.E.2d 771 (1954).

Railroad companies forming corporation to provide common trackage held entitled to equal use of such trackage. Seaboard Air Line R.R. v. Atlantic C.L.R.R., 240 N.C. 495, 82 S.E.2d 771 (1954).

**Turnouts, Sidings and Switches.** — In the absence of express statutory or charter authorization, the power to construct a railroad includes authority to construct such spur, industrial, switching and other auxiliary tracks as may be necessary to serve the public needs along or near the main line. Seaboard Air Line R.R. v. Atlantic C.L.R.R., 240 N.C. 495, 82 S.E.2d 771 (1954).

Railroads have authority under this section to provide "turnouts, sidings, and switches" to serve industrial plants along or near their main lines. Seaboard Air Line R.R. v. Atlantic C.L.R.R., 240 N.C. 495, 82 S.E.2d 771 (1954).

### VII. TRANSPORTATION OF PERSONS AND PROPERTY.

**Conferral of Right to Lease by Charter.** — Charter of a railroad company conferring the right to transport passengers and freight and giving the power to "farm out" the right of transportation authorized the company to execute a valid lease of its property and franchises to another railroad company. Hill v. Railroad, 143 N.C. 539, 55 S.E. 854 (1906).

### VIII. BORROWING OF MONEY AND ISSUANCE OF BONDS.

**Power to Issue Bonds.** — A railroad corporation has power to contract debts, and every corporation possessing such power must also have power to acknowledge its indebtedness under its corporate seal, i.e., to make and issue its bonds. Commissioners of Craven v. Atlantic & N.C.R.R., 77 N.C. 289 (1877).

### IX. SALE.

**Power to Sell Property.** — A railroad has the power to sell property which has been acquired for railroad purposes. McLaurin v. Winston-Salem Southbound Ry., 323 N.C. 609, 374 S.E.2d 265 (1988), citing State v. Rives, 27 N.C. 297, 5 Ired. 297 (1844).

Although G.S. 62-220 (recodified at G.S. 136-1190), which lists the powers of a railroad, did not include the power to sell real property, the Department of Transportation had the power, under G.S. 136-44.36B, to acquire property that was or had been part of a railroad corridor by purchase, gift, condemnation, or other method, provided that the Department could not condemn part of an existing, active railroad line. Therefore, a railroad had the power to sell or transfer its right of way, even without an execution sale. City of Charlotte v. BMJ of Charlotte. LLC, — N.C. App. —, 675 S.E.2d 59, 2009 N.C. App. LEXIS 647 (Apr. 7, 2009).

## § 136-191. Intersection with highways.

Whenever the track of a railroad shall cross a highway or turnpike, such highway or turnpike may be carried under or over the track, as may be found most expedient; and in cases where an embankment or cutting shall make a change in the line of such highway or turnpike desirable, then the railroad company may take such additional lands for the construction of the road, highway or turnpike on such new line as may be deemed requisite. Unless the land so taken shall be purchased for the purposes aforesaid, compensation therefor shall be ascertained in the manner prescribed in the Chapter Eminent Domain, and duly made by such corporation to the owners and persons interested in such land. The same when so taken shall become a part of such intersecting highway or turnpike in such manner and by such tenure as the adjacent parts of the same highway or turnpike may be held for highway purposes. (1871-2, c. 138, s. 26; Code, s. 1954; Rev., s. 2568; C.S., s. 3448; 1963, c. 1165, s. 1; 1998-128, s. 14.)

**Cross References.** — As to power of railroads to intersect with highways and waterways, see G.S. 62-220(6). As to obstruction of highways and defective crossings, see G.S. 62-224. As to the power of Utilities Commission to regulate crossings, see G.S. 62-237.

**Legal Periodicals.** — For article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

### CASE NOTES

**Cited** in City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969).

## § 136-192. Obstructing highways; defective crossings; notice; failure to repair after notice misdemeanor.

(a) Whenever, in their construction, the works of any railroad corporation shall cross established roads or ways, the corporation shall so construct its works as not to impede the passage or transportation of persons or property along the same. If any railroad corporation shall so construct its crossings with public streets, thoroughfares or highways, or keep, allow or permit the same at any time to remain in such condition as to impede, obstruct or endanger the passage or transportation of persons or property along, over or across the same, the governing body of the county, city or town, or other public road authority having charge, control or oversight of such roads, streets or thoroughfares may give to such railroad notice, in writing, directing it to place any such crossing in good condition, so that persons may cross and property be safely transported across the same.

(b) The notice may be served upon the agent of the offending railroad located nearest to the defective or dangerous crossing about which the notice is given, or it may be served upon the section master whose section includes such crossing. Such notice may be served by delivering a copy to such agent or section master, or by registered or certified mail addressed to either of such persons.

(c) If the railroad corporation shall fail to put such crossing in a safe condition for the passage of persons and property within 30 days from and after the service of the notice, it shall be guilty of a Class 1 misdemeanor. Each calendar month which shall elapse after the giving of the notice and before the placing of such crossing in repair shall be a separate offense.

(d) This section shall in nowise be construed to abrogate, repeal or otherwise affect any existing law now applicable to railroad corporations with respect to highway and street crossings; but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law. (R.C., c. 61, s. 30; 1874-5, c. 83; Code, s. 1710; Rev., s. 2569; 1915, c. 250, ss. 1, 2; C.S., ss. 3449, 3450; 1963, c. 1165, s. 1; 1993, c. 539, s. 480; 1994, Ex. Sess., c. 24, s. 14(c); 1998-128, s. 14.)

**Cross References.** — As to venue in actions against railroads, see G.S. 1-81. As to the power of Utilities Commission to regulate crossings, see G.S. 62-237. As to duty of railroads to provide drawbridges, see G.S. 136-78.

## CASE NOTES

**This section applies exclusively to established roads and ways.** Harris v. Southern Ry., 100 N.C. App. 373, 396 S.E.2d 623 (1990).

**This Section Held a Safety Statute.** — City ordinance which prescribed that the railroad "do all such . . . things as may be necessary for a smooth, easy and comfortable crossing of track by pedestrians and every kind of vehicle" and this section were designed for the protection of the public and are, consequently, safety statutes. Sellers v. CSX Transp., Inc., 102 N.C. App. 563, 402 S.E.2d 872 (1991).

**A railroad grade crossing is in itself a warning of danger.** Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

**"Negligent Construction" Defined.** — By "negligent construction" is meant such an improper construction of the crossing, whether arising from negligence, indifference, or motives of economy, as unnecessarily increases the danger of using the public highway. Raper v. Wilmington & W.R.R., 126 N.C. 563, 36 S.E. 115 (1900).

**The mere fact that a crossing is dangerous does not necessarily impute negligence** to the railroad company. Edwards v. Atlantic C.L.R.R., 129 N.C. 78, 39 S.E. 730 (1901).

**Duty to Maintain Safe and Convenient Crossing.** — While railroad corporations are given the right and power to construct their roads across streets, highways, etc., they must maintain a safe and convenient crossing there, making it, as far as they can, as safe and convenient to the public as it would have been had the railroad not been built. Raper v. Wilmington & W.R.R., 126 N.C. 563, 36 S.E. 115 (1900).

The duty of a railroad company with respect to the maintenance of a crossing over its track, where its track has been constructed over an established road, whether public or private, is well settled. The duty is prescribed by this section and has been recognized and enforced by the Supreme Court in numerous decisions. Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

**Duty Not Restricted to Public Highways.** — The statute does not restrict the railroad's duty to crossings of "public highways," but uses the broader and generic term "highways," which might include any road used by the public as a mill and church road and in going to town. Goforth v. Southern Ry., 144 N.C. 569, 57 S.E. 209 (1907).

An "established road or way" which a railroad company may not obstruct in crossing it with its tracks includes those whose use is of a private nature, and not necessarily only those dedicated to a public use, and in such instances, where the rights of a railroad and the rights of the public to the use of their roads or ways conflict, the former must give place to the latter. Tate v. Seaboard Air Line Ry., 168 N.C. 523, 84 S.E. 808 (1915).

**Duty When Railroad Changes Grade of Street.** — Where a railroad accepts the benefits of statutory authorization and changes the grade of a street or highway, it must assume and comply with the burden imposed and restore the street to a useful condition. If, to meet the burden so imposed, it becomes necessary to go beyond the railroad right-of-way and change the grade of a street, thereby impairing access of an abutting property owner, compensation must be paid for the diminution in value resulting from the denial of access. Thompson v. Seaboard Air Line R.R., 248 N.C. 577, 104 S.E.2d 181 (1958).

**In approaching a grade crossing, both the trainmen and travelers upon the highway are under a reciprocal duty** to keep a proper lookout and exercise that degree of care which a reasonably prudent person would exercise under the circumstances to avoid an accident at the crossing. Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

**Duty of Traveler to Exercise Due Care.** — A railroad company is under duty to give travelers timely warning of the approach of its train to a public crossing, but its failure to do so does not relieve a traveler of his duty to exercise due care for his own safety, and the failure of a traveler to exercise such care bars recovery when such failure is a proximate cause of the injury. Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

**Right to Assume That Crossing Is Safe.** — One has the right to assume that a railroad company has discharged its duty to the public by keeping the crossing in safe condition. Tankard v. Roanoke R.R. & Lumber Co., 117 N.C. 558, 23 S.E. 46 (1895).

**Yielding Right-of-Way.** — Where a railroad track crosses a public highway, though a traveler and a railroad have equal rights to cross, the traveler must yield the right-of-way to the railroad company in the ordinary course of its business. Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

**As to right of former Highway Commission to require railroad to widen crossings upon the widening of a highway, under former § 60-43,** see Atlantic C.L.R.R. v. State Hwy. Comm'n, 268 N.C. 92, 150 S.E.2d 70 (1966).

**Indictments.** — An indictment charging a railroad company with obstructing a public road by the use of plank at a crossing is fatally defective if it does not charge the manner of the misuse of the plank. State v. Roanoke R.R. & Lumber Co., 109 N.C. 860, 13 S.E. 719 (1891).

It is a fatal variance in an indictment for obstructing a highway at a railroad crossing, to prove that the defendant permitted for some time a dangerous hole to remain in the crossing. State v. Roanoke R.R. & Lumber Co., 109 N.C. 860, 13 S.E. 719 (1891).

**Nonsuit Held Error.** — It was error for the trial court to sustain a motion of nonsuit on competent evidence from which the jury could have found that if defendant's crossing over a neighborhood road had not been negligently left in a dangerous condition, plaintiff would not have been injured by the slipping and falling thereon of the mule upon which he was riding. Goforth v. Southern Ry., 144 N.C. 569, 57 S.E. 209 (1907).

**Applied** in Bundy v. Powell, 229 N.C. 707, 51 S.E.2d 307 (1949).

## § 136-193. Joint construction of railroads having same location.

Whenever two railroad companies shall, for a portion of their respective lines, embrace the same location of line, they may by agreement provide for the construction of so much of said line as is common to both of them, by one of the companies, and for the manner and terms upon which the business thereon shall be performed. (1871-2, c. 138, s. 46; Code, s. 1983; Rev., s. 2602; C.S., s. 3473; 1963, c. 1165, s. 1; 1998-128, s. 14.)

## § 136-194. Cattle guards and private crossings; failure to erect and maintain misdemeanor.

Every company owning, operating or constructing any railroad passing through and over the enclosed land of any person shall, at its own expense, construct and constantly maintain, in good and safe condition, good and sufficient cattle guards at the points of entrance upon and exit from such enclosed land and shall also make and keep in constant repair crossings to any private road thereupon. Every railroad corporation which shall fail to erect and constantly maintain the cattle guards and crossings provided for by this section shall be liable to an action for damages to any party aggrieved, and shall be guilty of a Class 3 misdemeanor and only fined in the discretion of the court. Any cattle guard approved by the Commission shall be deemed a good and sufficient guard under this section. (1883, c. 394, ss. 1, 2, 3; Code, s. 1975; Rev., ss. 2601, 3753; 1915, c. 127; C.S., s. 3454; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1963, c. 1165, s. 1; 1993, c. 539, s. 481; 1994, Ex. Sess., c. 24, s. 14(c); 1998-128, s. 14.)

### CASE NOTES

**Adoption of the stock law did not abrogate former similar section in a locality.** Shepard v. Railroad, 140 N.C. 391, 53 S.E. 137 (1906).

**Applicability to Town Lot.** — The statute requiring railroads to construct cattle guards at the point of entrance upon and exit from enclosed lands applies to a town lot as well as one in the county. Shepard v. Railroad, 140 N.C. 391, 53 S.E. 137 (1906).

**Applicability to Completely Enclosed Land and Actions Involving Cattle Guards or Crossings.** — This section applies only to completely enclosed land and contemplates that the statute be utilized only for actions involving cattle guards or crossings. Harris v. Southern Ry., 100 N.C. App. 373, 396 S.E.2d 623 (1990).

Where a landowner took property with record notice that no road or crossing existed to connect and provide access between the divided portions of the property, summary judgment was properly granted to a railroad company in the landowner's action to compel the construction of a grade crossing between the landowner's two tracts of land because the company was not required to provide the landowner with access under G.S. 136-194 where the property was not fenced or enclosed. Section 136-194 applies only to completely enclosed land and contemplates that the statute can be utilized only for actions involving cattle guards or crossings. Summerlin v. Norfolk S. Ry. Co., 161 N.C. App. 170, 588 S.E.2d 30, 2003 N.C. App. LEXIS 2000 (2003).

**Improper Joinder of Actions.** — Where plaintiff's complaint contained two causes of action, one to recover damages alleged to have been caused by defendant's ponding water back on plaintiff's land and the other to recover damages for a breach of duty on the part of defendant in not putting up sufficient cattle guards, there was an improper joinder of causes of action, the first being for injury to property, a tort, while the second arose "upon contract" for the breach of an implied contract to perform a statutory duty. Hodges v. Wilmington & W.R.R., 105 N.C. 170, 10 S.E. 917 (1890).

**Cited** in Gilliam v. McKnight, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 23865 (M.D.N.C. Dec. 4, 2002).

## § 136-195. To regulate crossings and to abolish grade crossings.

The Department may require the raising or lowering of any tracks or roadway at any grade crossing in a road or street not forming a link in or part of the State highway system and designate who shall pay for the same by partitioning the cost of said work and the maintenance of such crossing among the railroads and municipalities interested in accordance with the formula provided for grade crossing alterations or eliminations on the State highway system in G.S. 136-20(b). (1899, c. 164, s. 2, subsec. 13; Rev., s. 1097; 1907, c. 469, s. 1c; 1911, c. 197, s. 1; C.S., ss. 1041, 1048; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1998-128, ss. 14, 15.)

**Cross References.** — As to intersection with highways, see G.S. 62-223. As to obstructing highways and maintaining defective crossings, see G.S. 62-224. As to cattle guards and private crossings, see G.S. 62-226. As to the power of the Board of Transportation to require the installation of signals and other safety devices, see G.S. 136-20.

### CASE NOTES

**Applicability of Section.** — This section does not apply where "the raising or lowering of any tracks or roadway at any grade crossing in a road or street not forming a link in or part of the State Highway System" is not involved. Southern Ry. v. City of Winston-Salem, 275 N.C. 465, 168 S.E.2d 396 (1969).

**The General Assembly can make the abolition of grade crossings by railroads imperative** instead of leaving it, as now, unexercised in the discretion of the Commission, and can place the cost of doing so upon the corporation whose duty it is to remove them. Northern Pac. Ry. v. Minnesota ex rel. City of Duluth, 208 U.S. 583, 28 S. Ct. 341, 52 L. Ed. 630 (1908); Atlantic C.L.R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911), aff'd, 232 U.S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914).

**Commission's Authority Supplementary to Police Powers.** — The statute authorizing the Commission to require railroads to raise or lower their tracks at a crossing is supplementary to and not in derogation of the exercise by the State, or an incorporated town authorized by it, of such police powers. Atlantic C.L.R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911), aff'd, 232 U.S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914).

**Commission Vested with Full Power.** — The Commission is vested with full and complete power to compel the raising and lowering of the track, to remove all danger to those using the public roads. Gerringer v. North Carolina R.R., 146 N.C. 32, 59 S.E. 152 (1907).

**Authority to Abolish Dangerous or Inconvenient Grade Crossings.** — Authority is conferred by statute upon the Commission to abolish grade crossings by a railroad company when by the operation of the railroad they become dangerous or inconvenient to the public traveling along the highways or private ways. Tate v. Seaboard Air Line Ry., 168 N.C. 523, 84 S.E. 808 (1915).

**State Policy in Allocating Cost of Grade Crossing Improvements.** — Although G.S. 136-20 and this section may indicate a legislative trend in the field of allocating costs of grade crossing improvements, these statutes fall short of establishing a State policy applicable to factual situations other than those to which they relate in express and specific terms. Southern Ry. v. City of Winston-Salem, 275 N.C. 465, 168 S.E.2d 396 (1969).

**As to permissibility of imposing entire expense of change of grade at a railroad crossing on a railroad company,** see Atlantic C.L.R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911), aff'd, 232 U.S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914).

## § 136-196. Injury to passenger while in prohibited place.

If any passenger on any railroad is injured in any portion of a train where passengers are prohibited by notice conspicuously posted in its passenger cars, such railroad shall not be liable for the injury, provided the railroad has furnished sufficient room within its passenger cars for the proper accommodation of all passengers on the train. (1871-2, c. 138, s. 42; Code, s. 1978; Rev., s. 2628; C.S., s. 3509; 1963, c. 1165, s. 1; 1998-128, s. 14.)

### CASE NOTES

**Effect of Posting Notice.** — When notice provision has been complied with, a rule of a railroad company prohibiting passengers from going on the platform while the train is in motion is given the force and effect of a State law, barring a recovery for injuries sustained under such circumstances. Shaw v. Railroad, 143 N.C. 312, 55 S.E. 713 (1906).

**Notice Need Be Only in English.** — This section requires only that the notice to be placed by a railroad company in its coach, relieving the company from liability to a passenger injured while riding on the platform, etc., shall be in English, and the fact that a passenger cannot read that language is immaterial. Bane v. Norfolk S.R.R., 176 N.C. 247, 97 S.E. 11 (1918).

**Inapplicability When Passenger Alighting.** — Former similar section was for the protection of passengers and had no application when the injury complained of was received as the passenger was alighting at a regular station after the train had stopped for that purpose, though he may have ridden in violation of the statute before the train had stopped. Kearney v. Seaboard Air Line Ry., 158 N.C. 521, 74 S.E. 593 (1912).

**Riding on Platform Prima Facie Negligence.** — It is a prima facie negligence for a passenger to voluntarily ride on the platform of a rapidly moving train. Wagner v. Atlantic C.L.R.R., 147 N.C. 315, 61 S.E. 171 (1908).

**Person on Passenger Platform at Station.** — One who is on the passenger platform of a railroad company at its station, with the purpose of becoming a passenger on its expected train, is entitled to the protection due a passenger from dangerous conditions and usage there. Thomas v. Southern Ry., 173 N.C. 494, 92 S.E. 321 (1917).

## § 136-197. Ticket may be refused intoxicated person; penalty for prohibited entry.

The ticket agent of a passenger train shall at all times have the power to refuse to sell a ticket to a person wanting to purchase a ticket who may at the time be intoxicated. The conductor in charge of the train shall at all times have the power to prevent an intoxicated person from boarding the train. An intoxicated person who boards a train after being forbidden by the conductor to do so is guilty of a Class 1 misdemeanor. (1998-128, s. 16.)

**Legal Periodicals.** — See legislative survey, 21 Campbell L. Rev. 323 (1999).

## § 136-198. Passenger refusing to pay fare or violating rules may be ejected.

If a passenger shall refuse to pay the fare, be or become intoxicated, or violate the rules of a passenger train, it shall be lawful for the conductor of the train to stop the train at any station or at any regular stop, and to put the passenger and the passenger's baggage out of the train, using no unnecessary force. (1998-128, s. 16.)

**Legal Periodicals.** — See legislative survey, 21 Campbell L. Rev. 323 (1999).

### CASE NOTES

**Ejection of Passenger Without Making Sufficient Inquiries as Negligence.** — Where plaintiff purchased through transportation to a destination to reach which it was necessary to change, but the conductor on the first train neglected to return plaintiff's ticket, and when the conductor of the second train asked for his fare, plaintiff, having no money, vainly attempted to borrow from men who had been on the first train with him, it was negligence on the conductor's part not to have satisfied himself by inquiring of such men whether plaintiff had been on the train with them prior to reaching the changing point, before ejecting plaintiff. Sawyer v. Norfolk S.R.R., 171 N.C. 13, 86 S.E. 166 (1915).

**Passenger Need Not Pay Additional Fare to Prevent Ejection.** — Where a passenger is about to be wrongfully ejected from a train, having paid his fare thereon, but being unable to produce his ticket, it is not incumbent on him, by paying money which the conductor has no right to exact, to avoid ejection from the train, as he is not required to buy again his right to remain on the train to his destination. Sawyer v. Norfolk S.R.R., 171 N.C. 13, 86 S.E. 166 (1915).

**Right of Action of Ejected Passenger.** — A passenger ejected from a train for failure to pay again fare which he had paid once upon purchasing a ticket has a right of action. Sawyer v. Norfolk S.R.R., 171 N.C. 13, 86 S.E. 166 (1915).

**Ejection of Passenger on Baggage Car.** — A person who got on a blind baggage car, having a ticket, but not having told the conductor that he had it, where the conductor had not seen it, was not entitled to recover as a passenger for injuries received by being pulled off the train by the conductor. McGraw v. Railroad, 135 N.C. 264, 47 S.E. 758 (1904).

## § 136-199: Reserved for future codification purposes.

## ARTICLE 16.

## *Planning.*

## § 136-200. Definitions.

As used in this Article:

(1) "Conformity" means the extent to which transportation plans, programs, and projects conform to federal air quality requirements as specified in 40 Code of Federal Regulations, Part 93, Subpart A (1 July 1998 Edition).

(1a) "Consolidated Metropolitan Planning Organization" means a metropolitan planning organization created on or after January 1, 2001, through a memorandum of understanding by the consolidation of two or more metropolitan planning organizations in existence prior to January 1, 2001, and in accordance with 23 U.S.C. § 134.

(2) "Department" means the North Carolina Department of Transportation.

(3) "Interface" means a relationship between streams of traffic that efficiently and safely maximizes the mobility of people and goods within and through urbanized areas and minimizes transportation-related fuel consumption and air pollution.

(4) "Metropolitan Planning Organization" or "MPO" means an agency that is designated or redesignated by a memorandum of understanding as a Metropolitan Planning Organization in accordance with 23 U.S.C. § 134.

(5) "Regionally significant project" has the same meaning as under 40 Code of Federal Regulations 93.101 (1 July 1998 Edition).

(6) "Regional travel demand model" means a model of a region, defined in the model, that is approved by the Department and each Metropolitan Planning Organization whose boundaries include any part of the

region and that uses socioeconomic data and projections to predict demands on a transportation network. (1999-328, s. 4.10; 2000-80, ss. 1-3.)

**Editor's Note.** — Session Laws 1999-328, s. 5.1 provides that this act shall not be construed to obligate the General Assembly to appropriate any funds to implement the provisions of this act. Every State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency.

## § 136-200.1. Metropolitan planning organizations recognized.

Metropolitan planning organizations established pursuant to the provisions of 23 U.S.C. § 134 are hereby recognized under the law of the State. Metropolitan planning organizations in existence on the effective date of this section continue unaffected until redesignated or restructured in accordance with the provisions of and according to the procedures established by 23 U.S.C. § 134 and this Article. The provisions of this Article are intended to supplement the provisions of 23 U.S.C. § 134. In the event any provision of this Article is deemed inconsistent with the requirements of 23 U.S.C. § 134, the provisions of federal law shall control. (2000-80, s. 4.)

## § 136-200.2. Decennial review of metropolitan planning organization boundaries, structure, and governance.

(a) Evaluation. — Following each decennial census, and more frequently if requested by an individual metropolitan planning organization, the Governor and the Secretary of Transportation, in cooperation with the affected metropolitan planning organization or organizations, shall initiate an evaluation of the boundaries, structure, and governance of each metropolitan planning organization in the State. The goal of the evaluation shall be to examine the need for and to make recommendations for adjustments to metropolitan planning organization boundaries, structure, or governance in order to ensure compliance with the objectives of 23 U.S.C. § 134. The Secretary shall submit a report of the evaluation process to the Governor and to the Joint Legislative Transportation Oversight Committee.

(b) Factors for Evaluation. — The evaluation of the area, structure, and governance of each metropolitan planning organization shall include all of the following factors:

(1) Existing and projected future commuting and travel patterns and urban growth projections.
(2) Integration of planning with existing regional transportation facilities, such as airports, seaports, and major interstate and intrastate road and rail facilities.
(3) Conformity with and support for existing or proposed regional transit and mass transportation programs and initiatives.
(4) Boundaries of existing or proposed federally designated air quality nonattainment areas or air-quality management regions.
(5) Metropolitan Statistical Area boundaries.
(6) Existing or proposed cooperative regional planning structures.
(7) Administrative efficiency, availability of resources, and complexity of management.
(8) Feasibility of the creation of interstate metropolitan planning organizations.
(9) Governance structures, as provided in subsection (c) of this section.

(c) Metropolitan Planning Organization Structures. — The Governor and Secretary of Transportation, in cooperation with existing metropolitan planning organizations and local elected officials, may consider the following changes to the structure of existing metropolitan planning organizations:

(1) Expansion of existing metropolitan planning organization boundaries to include areas specified in 23 U.S.C. § 134(c).

(2) Consolidation of existing contiguous metropolitan planning organizations in accordance with the redesignation procedure specified in 23 U.S.C. § 134(b).

(3) Creation of metropolitan planning organization subcommittees with responsibility for matters that affect a limited number of constituent jurisdictions, as specified in a memorandum of understanding redesignating a metropolitan planning organization in accordance with the provisions of 23 U.S.C. § 134.

(4) Formation of joint committees or working groups among contiguous nonconsolidated metropolitan planning organizations, with such powers and responsibilities as may be delegated to such joint committees pursuant to their respective memoranda of understanding.

(5) Creation of interstate compacts pursuant to 23 U.S.C. § 134(d) to address coordination of planning among metropolitan planning organizations located in this State and contiguous metropolitan planning organizations located in adjoining states.

(6) Delegation by the governing board of a metropolitan planning organization of part or all of its responsibilities to a regional transportation authority created under Article 27 of Chapter 160A of the General Statutes, if the regional transportation authority is eligible to exercise that authority under 23 U.S.C. § 134.

(d) Optional Governance Provisions. — In addition to any other provisions permitted or required pursuant to 23 U.S.C. § 134, the memorandum of understanding, creating, enlarging, modifying, or restructuring a metropolitan planning organization may also include any of the following provisions relating to governance:

(1) Distribution of voting power among the constituent counties, municipal corporations, and other participating organizations on a basis or bases other than population.

(2) Membership and representation of regional transit or transportation authorities or other regional organizations in addition to membership of counties and municipal corporations.

(3) Requirements for weighted voting or supermajority voting on some or all issues.

(4) Provisions authorizing or requiring the delegation of certain decisions or approvals to less than the full-voting membership of the metropolitan planning organization in matters that affect only a limited number of constituent jurisdictions.

(5) Requirements for rotation and sharing of officer positions and committee chair positions in order to protect against concentration of authority within the metropolitan planning organization.

(6) Any other provision agreed to by the requisite majority of jurisdictions constituting the metropolitan planning organization.

(e) Effect of Evaluation. — Upon completion of the evaluation required under this section, a metropolitan planning organization may be restructured in accordance with the procedure contained in 23 U.S.C. § 134(b)(5).

(f) Assistance. — The Department may provide staff assistance to metropolitan planning organizations in existence prior to January 1, 2001, that are considering consolidation on or after January 1, 2001. In addition, the Department may provide funding assistance to metropolitan planning organizations considering consolidation, upon receipt of a letter of intent from jurisdictions representing seventy-five percent (75%) of the affected population, including the central city, in each metropolitan planning organization considering consolidation. (2000-80, s. 5.)

## § 136-200.3. Additional provisions applicable to consolidated metropolitan planning organizations.

(a) Limit on Basis for Project Objection. — Beginning with the 2004 State Transportation Improvement Program, neither the State nor a consolidated metropolitan planning organization shall have a basis to object to a project that is proposed for funding in the Transportation Improvement Program, provided that the project does not affect projects previously programmed, if the project is included in a mutually adopted plan developed pursuant to G.S. 136-66.2, and is consistent with the project selection criteria contained in the memorandum of understanding creating the consolidated metropolitan planning organization.

(b) Project Ranking Priorities. — Beginning with the 2004 State Transportation Improvement Program, and subject to the availability of funding, the Department of Transportation, when developing the Transportation Improvement Program, shall abide by the project ranking priorities approved by a:

(1) Consolidated metropolitan planning organization for any project within its jurisdiction, if the project is not a National Highway System or bridge and Interstate maintenance program project.

(2) Regional transportation authority created pursuant to Article 27 of Chapter 160A of the General Statutes, for any project that all metropolitan planning organizations within the authority's jurisdiction have delegated responsibility, if the project is not a National Highway System or bridge and Interstate maintenance program project. (2000-80, s. 6.)

## § 136-200.4. Additional requirements for metropolitan planning organizations located in nonattainment areas.

(a) Consultation and Single Conformity Plan Required. — When an area of the State is designated as non-attainment under the federal Clean Air Act (42 U.S.C. § 7401, et seq.) all metropolitan planning organizations with at least twenty-five percent (25%) of their area of jurisdiction located within the boundaries of the nonattainment area shall consult on appropriate emissions reduction strategies and shall adopt a single, unified plan for achieving conformity. The strategies set forth in the unified plan shall be incorporated by each affected metropolitan planning organization into its respective long range transportation plan developed pursuant to 23 U.S.C. § 134(g).

(b) Effect of Failure to Adopt Required Plan. — If a metropolitan planning organization does not comply with the provisions of subsection (a) of this section within one year after designation of at least twenty-five percent (25%) of the metropolitan planning organization's area of jurisdiction as nonattainment under the federal Clean Air Act (42 U.S.C. § 7401, et seq.), the Department shall not allocate any of the following funds to projects within the metropolitan planning organization's area of jurisdiction:

(1) One hundred percent (100%) State-funded road construction funds.

(2) State matching funds for any road construction or transit capital project.

(3) Federal congestion mitigation and air quality improvement program funds.

(c) Mandatory Evaluation and Report. — Each metropolitan planning organization located in whole or in part in areas designated as nonattainment under the federal Clean Air Act (42 U.S.C. § 7401 et seq.) shall complete the evaluation process provided for in G.S. 136-200.2 and submit its findings and recommendations to the Department of Transportation within one year of the effective date of designation as nonattainment. A metropolitan planning organization may request and be granted by the Department an extension if the metropolitan planning organization can show cause for the extension. Extensions shall be granted in no more than one year increments. (2000-80, s. 7.)

## § 136-200.5. Matching funds for Metropolitan Planning Organizations located in nonattainment areas or maintenance areas.

(a) Application. — The lead planning agency for any Metropolitan Planning Organization located in an area designated as a nonattainment or maintenance area under the federal Clean Air Act (42 U.S.C. § 7401, et seq.) may apply to the Department of Transportation for funds to avoid a plan conformity lapse.

(b) Matching Required. — Funds provided under this section shall be matched one-for-one by the local applicant agency.

(c) Use of Funds. — Funds provided under this section shall be used by the local applicant agency only to avoid a plan conformity lapse.

(d) Limit on Funds. — The Department shall not provide more than one million dollars ($1,000,000) per fiscal year to any lead planning organization of a Metropolitan Planning Organization pursuant to this section.

(e) Payback Required. — Any funds provided to a lead planning organization of a Metropolitan Planning Organization under this section shall be repaid within five years, either from local sources or as an offset against planning funds that might otherwise have been made available from the Department to the lead planning organization. (2003-284, s. 29.14(b).)

## § 136-200.6. Funds for local transportation planning efforts in areas designated nonattainment areas or maintenance areas.

(a) Application. — A regional transportation planning agency in an area designated as a nonattainment or maintenance area under the federal Clean Air Act (42 U.S.C. § 7401, et seq.) that has policy-setting authority for the entire designated area and that is representative of all local governments within the area, may apply to the Department of Transportation for funds to support local transportation planning efforts in that local government's region.

(b) Matching Required. — Funds provided under this section shall be matched one-for-one by the applicant agency.

(c) Use of Funds. — Funds provided under this section shall only be used by the local applicant agency to support regional transportation planning within the designated area.

(d) Local Staff Required. — Funds shall be provided under this section only if local governments in the designated area support and supply staff to the regional transportation planning agency.

(e) Limit on Funds. — The Department shall not provide more than two hundred fifty thousand dollars ($250,000) in any fiscal year to any agency pursuant to this section. (2003-284, s. 29.14(c).)

## § 136-201. Plan for intermodal interface.

When planning a regionally significant transportation project, the Department shall consider design alternatives that will facilitate the cost-effective interface of the project with other existing or planned transportation projects, including highway, airport, rail, bus, bicycle, and pedestrian facilities. The Department of Transportation shall record its consideration of these design alternatives in the planning documents for the project. (1999-328, s. 4.10.)

## § 136-202. Metropolitan planning organizations.

(a) Each Metropolitan Planning Organization shall base all transportation plans, metropolitan transportation improvement programs, and conformity determinations on the most recently completed regional travel demand model.

(b) Each Metropolitan Planning Organization shall update its transportation plans in accordance with the scheduling requirements stated in 23 Code of Federal Regulations 450.322 (1 April 1999 Edition).

(c) The Department, the metropolitan planning organizations, and the Department of Environment and Natural Resources shall jointly evaluate and adjust the regions defined in each regional travel demand model at least once every five years and no later than October 1 of the year following each decennial federal census. The evaluation and adjustment shall be based on decennial census data and the most recent populations estimates certified by the State Budget Officer. The adjustment of these boundaries shall reflect current and projected patterns of population, employment, travel, congestion, commuting, and public transportation use and the effects of these patterns on air quality.

(d) The Department shall report on the evaluation and adjustment of the boundaries of the area served by each Metropolitan Planning Organization to the Joint Legislative Transportation Oversight Committee and the Environmental Review Commission no later than November 1 of each year in which the regions are evaluated and adjusted. (1999-328, s. 4.10; 2004-203, s. 5(k).)

**§ 136-203:** Repealed by Session Laws 2002-148, s. 1, effective October 9, 2002.

**§§ 136-204 through 136-209:** Reserved for future codification purposes.

### Article 17.

### *Rural Transportation Planning Organizations.*

## § 136-210. Definitions.

As used in this Article, "Rural Transportation Planning Organization" means a voluntary organization of local elected officials or their designees and representatives of local transportation systems formed by a memorandum of understanding with the Department of Transportation to work cooperatively with the Department to plan rural transportation systems and to advise the Department on rural transportation policy. (2000-123, s. 2.)

**Editor's Note.** — Session Laws 2000-123, s. 3, provides that nothing in the act shall require the General Assembly to appropriate funds to implement it and further provides that neither the Department of Transportation nor the General Assembly shall reallocate any road maintenance funds to implement it.

## § 136-211. Department authorized to establish Rural Transportation Planning Organizations.

(a) Authorization. — The Department of Transportation is authorized to form Rural Transportation Planning Organizations.

(b) Area Represented. — Rural Transportation Planning Organizations shall include representatives from contiguous areas in three to fifteen counties, with a total population of the entire area represented of at least 50,000 persons according to the latest population estimate of the Office of State Planning. Noncontiguous counties adjacent to the same Metropolitan Planning Organization may form a Rural Transportation Planning Organization. Areas already included in a Metropolitan Planning Organization shall not be included in the area represented by a Rural Transportation Planning Organization.

(c) Membership. — The Rural Transportation Planning Organization shall consist of local elected officials or their designees and representatives of local transportation systems in the area as agreed to by all parties in a memorandum of understanding.

(d) Formation; Memorandum of Understanding. — The Department shall notify local elected officials and representatives of local transportation systems around the State of the opportunity to form Rural Transportation Planning Organizations. The Department shall work cooperatively with interested local elected officials, their designees, and representatives of local transportation systems to develop a proposed area, membership, functions, and responsibilities of a Rural Transportation Planning Organization. The agreement of all parties shall be included in a memorandum of understanding approved by the membership of a proposed Rural Transportation Planning Organization and the Secretary of the Department of Transportation. (2000-123, s. 2; 2002-170, s. 2.)

## § 136-212. Duties of Rural Transportation Planning Organizations.

The duties of a Rural Transportation Planning Organization shall include, but not be limited to:

(1) Developing, in cooperation with the Department, long-range local and regional multimodal transportation plans.

(2) Providing a forum for public participation in the transportation planning process.

(3) Developing and prioritizing suggestions for transportation projects the organization believes should be included in the State's Transportation Improvement Program.

(4) Providing transportation-related information to local governments and other interested organizations and persons. (2000-123, s. 2.)

## § 136-213. Administration and staff.

(a) Administrative Entity. — Each Rural Transportation Planning Organization, working in cooperation with the Department, shall select an appropriate administrative entity for the organization. Eligible administrative entities include, but are not limited to, regional economic development agencies, regional councils of government, chambers of commerce, and local governments.

(b) Professional Staff. — The Department, each Rural Transportation Planning Organization, and any adjacent Metropolitan Planning Organization shall cooperatively determine the appropriate professional planning staff needs of the organization.

(c) Funding. — If funds are appropriated for that purpose, the Department may make grants to Rural Transportation Planning Organizations to carry out the duties listed in G.S. 136-212. The members of the Rural Transportation Planning Organization shall contribute at least twenty percent (20%) of the cost of any staff resources employed by the organization to carry out the duties listed in G.S. 136-212. The Department may make additional planning grants to economically distressed counties, as designated by the North Carolina Department of Commerce. (2000-123, s. 2; 2002-170, s. 3.)

**§§ 136-214 through 136-219:** Reserved for future codification purposes.

## Article 18.

## *Virginia-North Carolina Interstate High-Speed Rail Compact.*

### § 136-220. Compact established.

Pursuant to the invitation in 49 U.S.C. § 24101 (Interstate Compacts), in which the United States Congress grants consent to states with an interest in a specific form, route, or corridor of intercity passenger rail service (including high-speed rail service) to enter into interstate compacts, there is hereby established the Virginia-North Carolina Interstate High-Speed Rail Compact. (2004-114, s. 1.)

### § 136-221. Agreement.

The Commonwealth of Virginia and the State of North Carolina agree, upon adoption of this compact:

(1) To study, develop, and promote a plan for the design, construction, financing, and operation of interstate high-speed rail service through and between points in the Commonwealth of Virginia and the State of North Carolina, and adjacent states.

(2) To coordinate efforts to establish high-speed rail service at the federal, State, and local governmental levels.

(3) To advocate for federal funding to support the establishment of high-speed interstate rail service within and through Virginia and North Carolina and to receive federal funds made available for rail development.

(4) To provide funding and resources to the Virginia-North Carolina High-Speed Rail Compact Commission from funds that are or may become available and are appropriated for that purpose. (2004-114, s. 1.)

### § 136-222. Commission established; appointment and terms of members; chairman; reports; commission funds; staff.

(a) Commission established. — The Virginia-North Carolina High-Speed Rail Compact Commission is hereby established as a regional instrumentality and a common agency of each signatory party, empowered in a manner hereinafter to carry out the purposes of the Compact.

(b) Members, terms. — The Virginia members of the Commission shall be appointed as follows: three members of the House of Delegates, appointed by the Speaker of the House of Delegates, and two members of the Senate, appointed by the Senate Committee on Rules. The North Carolina members of the Commission shall be composed of five members as follows: two members of the Senate appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate, two members of the House of Representatives appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives, and one appointed by the Governor.

(c) Chair. — The chair of the Commission shall be chosen by the members of the Commission from among its membership for a term of one year and shall alternate between the member states.

(d) Meetings and reports. — The Commission shall meet at least twice each year, at least once in Virginia and once in North Carolina, and shall issue a report of its activities each year.

(e) Funds. — The Commission may utilize, for its operation and expenses, funds appropriated to it therefore by the legislatures of Virginia and North Carolina, or received from federal sources.

(f) Expenses of Members. — Virginia members of the Commission shall receive compensation and reimbursement for expenses in accordance with the applicable laws of that state. North Carolina members of the Commission shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-31, 138-5, or 138-6, as appropriate.

(g) Staff. — Primary staff to the Commission shall be provided by the Virginia Department of Rail and Public Transportation and the North Carolina Department of Transportation. (2004-114, s. 1.)

**§§ 136-223 through 136-249:** Reserved for future codification purposes.

## ARTICLE 19.

## *Congestion Relief and Intermodal 21st Century Transportation Fund.*

### § 136-250. Congestion Relief and Intermodal Transportation 21st Century Fund.

There is established in the State treasury the Congestion Relief and Intermodal Transportation 21st Century Fund, hereinafter referred to as the Fund. The Fund shall consist of all revenues appropriated and allocated to it. Interest on earnings of the Fund shall remain within the Fund. (2009-527, s. 1.)

**Editor's Note.** — Session Laws 2009-527, s. 7, made this Article effective August 27, 2009.

### § 136-251. Findings of fact.

The General Assembly finds that:

(1) Increased use of rail for transport of freight will reduce highway

congestion as well as allow economic expansion in a way that lessens the impact on the State highway system.

(2) Public transportation, in addition to a program of urban loops and toll roads, will enable North Carolina to have a balanced 21st century transportation system.

(3) As part of its initial program of internal improvements, the State capitalized the North Carolina Railroad in the 1840s and invested in other railroads, and those internal improvements led to North Carolina's rapid economic development. The North Carolina Railroad, with a 317-mile corridor from Charlotte to Morehead City, is still owned by the State.

(4) Improved rail facilities and restoration of abandoned rail lines can allow increased access to the North Carolina State ports and military installations located within the State.

(5) Session Law 2005-222 found that expanding and upgrading passenger, freight, commuter, and short-line rail service is important to the economy of North Carolina; and provided that the State would seek to provide matching funds partly so it can leverage the maximum federal and private participation to fund needed rail initiatives, such as the restoration of the rail corridor from Wallace to Castle Hayne and a rail connection between north-south and east-west routes in the vicinity of Pembroke.

(6) Rail freight plays a vital role in economic development throughout the State. Intermodal service depends on partnerships with railroads, trucking companies, seaports, and others in the transportation logistics chain. North Carolina has 3,250 mainline miles of track, with Class I railroads holding seventy-nine percent (79%) of the trackage rights, the remainder controlled by local railroads and switching and terminal railroads. The 2006 Mid-Cycle Update to the North Carolina Statewide Intermodal Transportation Plan identified seven hundred ninety-nine million dollars ($799,000,000) in freight rail needs over the next 25 years, including maintenance and preservation, modernization, and expansion.

(7) North Carolina's short-line railroads play a key role in the State's economic development and transportation service and are needed to provide essential services to other modes of transportation and the North Carolina port system. North Carolina agriculture is dependent upon essential service by short-line railroads. State funds are needed to maintain short-line railroads as viable contributors to economic development, agriculture, and transportation in this State in order to prevent the loss of regional rail service. The Department of Transportation reported that 44,992 rail cars handled by short-lines kept 179,688 trucks off North Carolina highways. Short-line railroads are essential to preserve and develop jobs in rural and small urban areas of North Carolina.

(8) Intermodal facilities and inland ports can greatly reduce freight traffic on North Carolina's highway system, reducing demand, congestion, and damage.

(9) The proposed North Carolina International Terminal will need high-capacity intermodal access.

(10) Most of North Carolina's growth is in its urban regions. According to the State Data Center, during the first decade of the 21st century, sixty-six percent (66%) of the projected 1,270,000 growth in population is in 15 urban counties surrounding Charlotte, Raleigh, and the Triad, while forty percent (40%) is in just six counties: Mecklenburg, Wake, Durham, Orange, Forsyth, and Guilford.

(11) This large urban population growth greatly taxes resources. Despite the visionary creation of the Highway Trust Fund by the 1989 General Assembly and the funding of urban loop highways, congestion continues to worsen. Creation of a special fund to help meet urban transportation needs with alternatives such as rail transit and buses, coupled with land-use planning, will spur and guide economic development in a more economically and environmentally sound manner. Investment in public transportation facilitates economic opportunity to the State through job creation, access to employment, and residential and commercial development. Public transportation also protects the public health by decreasing air pollution and reducing carbon emissions. It reduces traffic congestion, road expenditures, public and private parking costs, and the number of traffic accidents. Charlotte's recent success in opening the first phase of its light rail system, with ridership significantly over projections, shows that North Carolinians are willing to use transportation alternatives.

(12) Significant local revenues are needed to match State funds so that a major portion of the expenses is borne by the localities receiving the majority of the benefits. A local option sales tax for public transportation was approved by a fifty-eight percent (58%) favorable vote in Mecklenburg County in 1998 and reaffirmed by a seventy percent (70%) favorable vote in 2007. Extending this authority to additional jurisdictions, along with other revenue options, will enable localities to demonstrate local support for additional transit options.

(13) Surveys have indicated broad public support for providing additional public transportation options and for allowing localities to generate revenue to match State grants. (2009-527, s. 1.)

## § 136-252. Grants to local governments and transportation authorities.

(a) Eligible Entities. — The following entities are eligible to receive grants under this section from the Fund for public transportation purposes, which includes planning and engineering:

(1) Cities.
(2) Counties.
(3) Public transportation authorities under Article 25 of Chapter 160A of the General Statutes.
(4) Regional public transportation authorities under Article 26 of Chapter 160A of the General Statutes.
(5) Regional transportation authorities under Article 27 of Chapter 160A of the General Statutes.

(b) Requirements. — A grant may be approved from the Fund only if all of the following conditions are met:

(1) The application is approved by all Metropolitan Planning Organizations under Article 16 of this Chapter whose jurisdiction includes any of the service area of the grant applicant.

(2) The applicant has approved a transit plan that includes the following:
    a. Relief of anticipated traffic congestion.
    b. Improvement of air quality.
    c. Reduction in anticipated energy consumption.
    d. Promotion of a pedestrian- and bike-friendly environment around and connected to transit stations.
    e. Promotion of mixed-use and transit-oriented developments and other land-use tools that encourage multimodal mobility.
    f. Coordination with the housing needs assessment and plan provided in subdivision (3) of this subsection.

g. Promotion of access to public transportation for individuals who reside in areas with a disproportionate number of households below the area median income.

h. Coordination and planning with local education agencies to reduce transportation costs.

i. Coordination with local governments with zoning jurisdiction to carry out elements of the plan.

The applicant may also include plans for new public transportation services and public transportation alternatives beyond those required by the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101, et seq.) that assist individuals with disabilities with transportation, including transportation to and from jobs and employment support services.

(3) The applicant has approved a housing needs assessment and plan, or includes with its application such assessment and plan (or assessments and plans) approved by another unit or units of local government within its service area, that includes the following:

a. A housing inventory of market rate, assisted housing units, and vacant residential parcels.

b. An analysis of existing housing conditions, affordable housing needs, and housing needs for specific population groups, such as people who are elderly, are disabled, have special needs, or are homeless.

c. A catalogue of available resources to address housing needs.

d. Identification of potential resources and a strategy to provide replacement housing for low-income residents displaced by transit development and to create incentives for the purpose of increasing the stock of affordable housing to at least fifteen percent (15%) within a one-half mile radius of each transit station and bus hub to be affordable to families with income less than sixty percent (60%) of area median income.

e. Goals, strategies, and actions to address housing needs over a five-year period.

(4) The applicant has an adequate and sustainable source of funding established for its share of project costs.

(5) The applicant agrees to submit to both the Secretary and each Metropolitan Planning Organization that approved the application a periodic update of the implementation of both the transit plan and the housing needs assessment and plan. Each Metropolitan Planning Organization receiving such update shall afford interested parties the opportunity to comment on the update.

(c) Multiyear Allotments. — Grants from the Fund may be committed for a multiyear basis to stabilize the phased implementation of a plan, including multiyear allotments. The Secretary of Transportation, after consultation with the Board of Transportation, shall approve, and amend from time to time, a rolling multiyear projection of up to 15 years for allocation of funds under this section. No applicant is eligible under the 15-year plan projection for more than one-third of the total funds to be granted under this Article during that 15-year period.

(d) Cap; Matching Requirement. — A grant under this section may not exceed twenty-five percent (25%) of the cost of the project and must be matched by an equal or greater amount of funds by the applicant. In evaluating projects, qualification for federal funding shall be considered. (2009-527, s. 1.)

## § 136-253. Grants to other units.

(a) Eligible Entities; Purposes. — State agencies and railroads are eligible to receive grants under this section from the Fund for any of the following purposes:

(1) Assistance to short-line railroads to continue and enhance rail service in the State so as to assist in economic development and access to ports and military installations. This may involve both the Rail Industrial Access Program and the Short Line Infrastructure Access Program, as well as other innovative programs. Grants under this subdivision shall not exceed fifty percent (50%) of the nonfederal share and must be matched by equal or greater funding from the applicant. Total grants under this subdivision may not exceed five million dollars ($5,000,000) per fiscal year.

(2) Assistance to any railroad in the construction of rail improvements, intermodal or multimodal facilities or restorations to (i) serve ports, military installations, inland ports or (ii) improve rail infrastructure to reduce or mitigate truck traffic on the highway system. Grants under this subdivision shall not exceed fifty percent (50%) of the nonfederal share and must be matched by equal or greater funding from the applicant. Total grants under this subdivision may not exceed ten million dollars ($10,000,000) per fiscal year.

(3) Assistance (i) to the State ports in terminal railroad facilities and operations, (ii) to improve access to military installations, and (iii) to the North Carolina International Terminal. Grants under this subdivision shall not exceed fifty percent (50%) of the nonfederal share and must be matched by equal or greater funding from the applicant. Total grants under this subdivision may not exceed ten million dollars ($10,000,000) per fiscal year.

(4) Expansion of intercity passenger rail service, including increased frequency and additional cities serviced. Routes under this subdivision must extend beyond the territorial jurisdiction of a transportation authority.

(b) Commuter Rail Service Grants. — State agencies, railroads, transportation authorities under Article 25 of Chapter 160A of the General Statutes, regional public transportation authorities under Article 26 of Chapter 160A of the General Statutes, and regional transportation authorities under Article 27 of Chapter 160A of the General Statutes are eligible to receive grants under this section from the Fund for the introduction of commuter rail service. Routes under this subsection must extend beyond the territorial jurisdiction of a transportation authority. (2009-527, s. 1.)

## § 136-254. Grant approval.

All grants made under this Article are subject to approval of the Secretary of Transportation after consultation with the Board of Transportation. The Fund may be administered in conjunction with G.S. 136-44.20 and G.S. 136-44.36, but any funds allocated under those sections shall continue to be available as provided therein. (2009-527, s. 1.)

## § 136-255. Expenditure.

No monies shall be expended from the Fund until appropriated by the General Assembly. (2009-527, s. 1.)

**Editor's Note.** — Session Laws 2009-527, s. 1, enacted this section as G.S. 136-254.1. It was recodified as G.S. 136-255 at the direction of the Revisor of Statutes.

## § 136-256. Funds remain available until expended.

Appropriations to the Fund remain available until expended. (2009-527, s. 1.)

**Editor's Note.** — Session Laws 2009-527, s. 1, enacted this section as G.S. 136-255. It was recodified as G.S. 136-256 at the direction of the Revisor of Statutes.

# Chapter 137.

# Rural Rehabilitation.

### Article 1.

### State Rural Rehabilitation Law.

Sec.
137-1 through 137-30. [Repealed.]

### Article 2.

### North Carolina Rural Rehabilitation Corporation.

Sec.
137-31 through 137-43. [Repealed.]

## ARTICLE 1.

## *State Rural Rehabilitation Law.*

**§§ 137-1 through 137-30:** Repealed by Session Laws 1955, c. 190.

## ARTICLE 2.

## *North Carolina Rural Rehabilitation Corporation.*

**§§ 137-31 through 137-43:** Repealed by Session Laws 2001-424, s. 17.2(b), effective September 26, 2001.

**Cross References.** — For transfer of North Carolina Road Rehabilitation Corporation, see G.S. 143A-63.

# Chapter 138.

# Salaries, Fees and Allowances.

Sec.
138-1. Annual salaries payable at periodic intervals.
138-2. Payment of fees; when to be paid in advance.
138-3. Compensation limited to that fixed by law.
138-4. Governor to set salaries of administrative officers; exceptions; longevity pay.
138-5. Per diem and allowances of State boards, etc.
138-6. Travel allowances of State officers and employees.
138-7. Exceptions to §§ 138-5 and 138-6.
138-8. Moving expenses of State employees.

## § 138-1. Annual salaries payable at periodic intervals.

All annual salaries shall be paid at least monthly and may be paid twice a month, every two weeks, or weekly. A unit of State government whose payroll is processed through the central payroll disbursing account of the Office of the State Controller must obtain the approval of the State Controller to pay annual salaries on any basis other than a monthly basis. (Code, s. 3731; 1893, c. 54; Rev., s. 2772; C.S., s. 3847; 1925, c. 230; 1929, c. 100; 1973, c. 1430; 1991, c. 542, s. 3.)

## § 138-2. Payment of fees; when to be paid in advance.

All public officers shall receive the fees prescribed for them respectively, from the persons for whom, or at whose instance, the service shall be performed, except persons suing as paupers, and no officer shall be compelled to perform any service, unless his fee be paid or tendered, except in criminal actions. The said officers shall receive no extra allowance or other compensation whatever, unless the same shall be expressly authorized by statute. In case the service shall be ordered by any proper officer of the State, or of a county, for the benefit of the State or county, the fees need not be paid in advance; but if for the State, shall be paid by the State, as other claims against it are; if for a county, by the board of commissioners, out of the county funds. The fees in criminal cases are not demandable in advance. (Code, ss. 1173, 3758; Rev., s. 2804; C.S., s. 3849.)

**Cross References.** — As to fees, salaries and emoluments of judicial officers, see N.C. Const., Art. IV, § 21. As to liability of defendant in criminal actions for costs, see G.S. 6-47, 6-48. As to liability of a prosecuting witness for costs, see G.S. 6-49 et seq.

### CASE NOTES

**This Section and § 1-305 to Be Construed Together.** — This section and G.S. 1-305, providing that clerks shall issue execution on all judgments rendered in their respective courts within six weeks of the rendition thereof or be amerced in the sum of $100.00, must be construed together; hence, a clerk of the superior court will not incur the penalty prescribed in G.S. 1-305 unless the plaintiff pays or tenders him his fees for that service. Bank of Oxford v. Bobbitt, 111 N.C. 194, 16 S.E. 169 (1892).

**Officers of Court Must Demand Fees.** — Officers of the courts are not compelled to perform their duties unless the fees prescribed by law are paid or tendered them, but they must demand them before laches can be imputed to the litigants. West v. Reynolds, 94 N.C. 333 (1886).

An officer is not "compelled to perform" the required service, but he may perform it and dispense with payment therefor, and if he does not so intend, he should say so at the time, and should not presume that the posting of the notice in his office of an inflexible rule that he had adopted and from which he would not under any circumstances depart would be known to everyone. West v. Reynolds, 94 N.C. 333 (1886).

**Right of Superior Court Clerk to Demand Fees in Advance.** — The clerk had the right, even under the common law, as he has under the statute, to demand his fees in advance. Clerk v. Wagoner, 26 N.C. 131 (1843); Martin v. Chesteen, 75 N.C. 96 (1876); Andrews v. Whisnant, 83 N.C. 446 (1880); West v. Reynolds, 94 N.C. 333 (1886); Long v. Walker, 105 N.C. 90, 10 S.E. 858 (1890); Ballard v. Gay, 108 N.C. 544, 13 S.E. 207 (1891).

**In criminal actions, superior court clerk cannot require costs of transcript upon appeal to be paid in advance,** even where defendant does not appeal in forma pauperis, and a certiorari will issue directing the clerk to send up the transcript which he holds for such prepayment. State v. Nash, 109 N.C. 822, 13 S.E. 733 (1891).

**Refusal of Supreme Court Clerk to Docket Transcript Where Fee Not Paid.** — The appellant's undertaking does not cover the fee of the clerk of the Supreme Court in docketing the case, and the clerk is in the exercise of his right in refusing to docket the transcript where he has demanded the prescribed fee in advance and its payment has been refused. Dunn v. Clerk's Office, 176 N.C. 50, 96 S.E. 738 (1918).

**Right of Register to Refuse Registration of Mortgage until Fees Paid.** — The register has the right to refuse to treat a mortgage as delivered to him for registration until his fees in that respect have been paid. Cunninggim v. Peterson, 109 N.C. 33, 13 S.E. 714 (1891).

**Effect of Unconditional Pardon on Fees Due Officers of Court.** — Fees due officers of the court are rights vested by law, and are not discharged when a defendant receives an unconditional pardon, after conviction and sentence, from the Governor of the State. State v. Mooney, 74 N.C. 98 (1876).

Where a pardon is pleaded after verdict and before judgment, it will discharge defendant from the costs. State v. Underwood, 64 N.C. 599 (1870); State v. Mooney, 74 N.C. 98 (1876).

**Recovery of Improperly Collected Fees.** — Where a person is compelled to pay a public officer fees which he had no right to claim in order to induce him to do his duty, such fees may be recovered back. Robinson v. Ezzell, 72 N.C. 231 (1875).

**Power of Legislature to Reduce or Increase Salaries of Officers.** — The legislature may reduce or increase the salaries of such officers as are not protected by the Constitution during their term of office. Cotten v. Ellis, 52 N.C. 545 (1860).

**Taxation of Salary.** — It was formerly held that the State could not tax the salary of a state officer whose office was created by the Constitution. Purnell v. Page, 133 N.C. 125, 45 S.E. 534 (1903).

## § 138-3. Compensation limited to that fixed by law.

No officer or employee of the State shall receive any compensation other than the salaries fixed by law, except as provided by way of fees or by special appropriation or from any departmental funds. (1907, c. 830, s. 1; c. 994, s. 1; C.S., s. 3850; 1925, c. 128, s. 1.)

## § 138-4. Governor to set salaries of administrative officers; exceptions; longevity pay.

The salaries of all State administrative officers not subject to the State Personnel Act shall be set by the Governor, unless a law provides otherwise.

Whenever by law it is provided that a salary shall be fixed or set by the General Assembly in the Current Operations Appropriations Act, and that office or position is filled by appointment of the Governor, or the appointment is subject to the approval of the Governor, or is made by a commission a majority of whose members are appointed by the Governor, then the Governor may, increase or decrease the salary of a new appointee by a maximum of ten percent (10%) over or under the salary of that position as provided in the Current Operations Appropriations Act, such increased or decreased salary to remain in effect until changed by the General Assembly or until the end of the fiscal year, whichever occurs first. The Governor under this paragraph may not increase the salary of any nonelected official above the level set in the Current Operations Appropriations Act for any member of the Council of State. This section does not apply to any office filled by election by the people, and does not apply to any office in the legislative or judicial branches.

Officials whose salaries are covered by the provisions of this section shall be eligible for longevity pay on the same basis as is provided to employees of the State who are subject to the State Personnel Act. (1947, c. 898; 1957, c. 541, s. 1; 1983, c. 717, s. 49; 1983 (Reg. Sess., 1984), c. 1034, ss. 164, 216; 1985 (Reg. Sess., 1986), c. 955, ss. 51-53; 1987, c. 738, s. 32(a); 1991, c. 542, s. 4; 2006-203, s. 79.)

**Editor's Note.** — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 79, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, deleted the former third paragraph which read: "Prior to taking any action under this section, the Governor may consult with the Advisory Budget Commission."

## § 138-5. Per diem and allowances of State boards, etc.

(a) Except as provided in subsections (c) and (f) of this section, members of State boards, commissions, committees and councils which operate from funds deposited with the State Treasurer shall be compensated for their services at the following rates:

(1) Except as otherwise provided by this subdivision, compensation at the rate of fifteen dollars ($15.00) per diem for each day of service. Members of the North Carolina Vocational Rehabilitation Council, the Statewide Independent Living Council, and the Commission for the Blind who are unemployed or who shall forfeit wages from other employment to attend Council or Commission meetings or to perform related duties, may receive compensation not to exceed fifty dollars ($50.00) per diem for attending these meetings or performing related duties, as authorized by sections 105 and 705 of the Rehabilitation Act of 1973, P.L. 102-569, 42 U.S.C. § 701, et seq., as amended.

(2) Reimbursement of subsistence expenses at the rates allowed to State officers and employees by subdivision (3) of G.S. 138-6(a).

(3) Reimbursement of travel expenses at the rates allowed to State officers and employees by subdivisions (1) and (2) of G.S. 138-6(a).

(4) For convention registration fees, the actual amount expended, as shown by receipt.

(b) Except as provided in subsections (c) and (f) of this section, the schedules of per diem, subsistence, and travel allowances established in this section shall apply to members of all State boards, commissions, committees and councils which operate from funds deposited with the State Treasurer, excluding those boards, commissions, committees and councils the members of which are now serving without compensation and excluding occupational licensing boards as defined in G.S. 93B-1; and all special statutory provisions relating to per diem, subsistence, and travel allowances are hereby amended to conform to this section.

(c) Repealed by Session Laws 1979, 2nd Session, c. 1137, s. 29.

(d) The subsistence reimbursement for actual lodging expenses provided in this section must be documented by a receipt of lodging expenses from a commercial establishment.

(e) Out-of-state travel on official business by members of State boards, commissions, committees and councils which operate from funds deposited with the State Treasurer shall be reimbursed only upon authorization obtained in the manner prescribed by the Director of the Budget.

(f) Members of all State boards, commissions and councils whose salaries or any portion of whose salaries are paid from State funds shall receive no per diem compensation from State funds for their services; provided, however, that members of State boards, commissions and councils who are also members of the General Assembly shall receive, when the General Assembly is not in session, subsistence and travel allowances at the rate set forth in G.S. 120-3.1(a)(2) through (a)(4). (1961, c. 833, s. 5; 1963, c. 1049, s. 1; 1965, c. 169; 1971, c. 1139; 1973, c. 1397; 1979, c. 838, s. 18; 1979, 2nd Sess., c. 1137, s. 29; 1983, c. 761, s. 24; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, s. 185; 1985, c. 757, s. 201(b); 1985 (Reg. Sess., 1986), c. 1014, s. 39(a); 1987, c. 738, s. 58(a), (b); 1999-237, s. 11.49.)

**Cross References.** — As to subsistence and travel allowances of the Advisory Budget Commission, see G.S. 143-4.

**Limitations on Use of State Aircraft.** — Session Laws 2001-424, s. 612, provides: "No airplane or helicopter operated or maintained with State funds may be used to transport any member of a board or commission to or from a meeting of the board or commission to which that member is appointed unless:

"(1) The member is an elected official or head of a principal State department who serves on the board or commission by virtue of his or her office;

"(2) The member is traveling with another member who is an elected official who serves on the board or commission by virtue of his or her office;

"(3) The member is traveling on an airplane or helicopter that is flying to a particular destination for official State business other than a meeting of a board or commission; or

"(4) The Director of the Office of State Budget and Management has approved the use of the State airplane or helicopter as an exceptional circumstance.

"The Director of the Office of State Budget and Management shall report to the Chairs of the Appropriations Committees of the Senate and House of Representatives by December 31 each year on the use of State aircraft in the prior year pursuant to subdivision (4) of this section."

### OPINIONS OF ATTORNEY GENERAL

**Motor Vehicle Dealers' Advisory Board's Per Diem Increased.** — Subsection (b) of this section amended G.S. 20-305.4(d) to increase the per diem paid to members of the Motor Vehicle Dealers' Advisory Board from $7.00 per day of service to $15.00 per day of service. See opinion of Attorney General to Mr. Lester Teal, Controller, — N.C.A.G. — (Nov. 11, 1987).

**This Section Does Not Require Payments to Members of Board of Nursing.** — The payment of members of state boards and commissions as mandated by subsection (a) does not apply to the members of the Board of Nursing. See opinion of Attorney General to Howard A. Kramer, Attorney at Law and General Counsel, North Carolina Board of Nursing, 2001 N.C. AG LEXIS 32 (7/27/01).

### CASE NOTES

**Cited** in N.C. State Bar v. Rogers, 164 N.C. App. 648, 596 S.E.2d 337, 2004 N.C. App. LEXIS 965 (2004).

## § 138-6. Travel allowances of State officers and employees.

(a) Travel on official business by the officers and employees of State departments, institutions and agencies which operate from funds deposited with the State Treasurer shall be reimbursed at the following rates:

(1) For transportation by privately owned automobile, the business standard mileage rate set by the Internal Revenue Service per mile of travel and the actual cost of tolls paid. Any other law which sets a mileage rate by referring to the rate set herein, instead establishes a rate of twenty-five cents (25¢) per mile. No reimbursement shall be made for the use of a personal car in commuting from an employee's

home to his duty station in connection with regularly scheduled work hours.

(2) For bus, railroad, Pullman, or other conveyance, actual fare.

(3) For expenses incurred for subsistence, payment of eighty-one dollars ($81.00) per day when traveling in-state or ninety-three dollars ($93.00) per day when traveling out-of-state. Payment of sales tax, lodging tax, local tax, or service fees applied to the cost of lodging are to be paid in addition to the daily subsistence amount. The employee may exceed the part of the ceiling allocated for lodging without approval for overexpenditure provided that the total lodging and food reimbursement does not exceed the maximum provided by this subdivision. When travel involves less than a full day (24-hour period), a reasonable prorated amount shall be paid in accordance with regulations and criteria which shall be promulgated and published by the Director of the Budget. Reimbursement to State employees for lunches eaten while on official business may be made only in the following circumstances:

a. When an overnight stay is required reimbursement is allowed while an employee is in travel status;

b. When the cost of the lunch is included as part of a registration fee for a formal congress, conference, assembly, or convocation, by whatever name called. Such assembly must involve the active participation of persons other than the employees of a single State department, institution, or agency and must be necessary for conducting official State business; or

c. When the State employee is a member of, or providing staff assistance to, a State board, commission, committee, or council which operates from funds deposited with the State Treasurer, and the lunch is preplanned as part of the meeting for the entire board, commission, committee, or council.

(4) For convention registration fees not to exceed the actual amount expended as shown by a valid receipt or invoice.

(5) Effective July 1, 2001, and effective July 1 of each odd-numbered year thereafter, the Director of the Budget shall revise the amounts of payment of subsistence per day when traveling in-State and out-of-state by an amount equal to the percentage increase in the Consumer Price Index for All Urban Consumers for the most recent 24-month period.

(b) Out-of-state travel on official business by the officers and employees of State departments, institutions, and agencies which operate from funds deposited with the State Treasurer shall be reimbursed only upon authorization obtained in the manner prescribed by the Director of the Budget.

(c) Reimbursement of actual costs of overnight lodging, whether in-state or out-of-state, must be documented by a receipt of actual lodging expenses from a commercial establishment. This documentation shall be attached to the reimbursement request. All reimbursement requests shall be filed for approval and payment within 30 days after the travel period for which the reimbursement is being requested. (1961, c. 833, s. 6; 1963, c. 1049, s. 2; 1965, c. 1089; 1969, c. 1153; 1971, c. 881, ss. 1, 2; 1973, c. 595, s. 1; c. 1456; 1975, c. 892, s. 1; 1977, c. 928; 1977, 2nd Sess., c. 1136, s. 38.1; c. 1237, ss. 1, 2; 1979, c. 34, s. 1; c. 1002, s. 1; c. 1050, s. 1; 1979, 2nd Sess., c. 1137, s. 26; 1981, c. 859, ss. 57-59; 1983, c. 761, s. 22; c. 913, s. 27; c. 923, s. 217; 1985, c. 757, s. 201(a); 1985 (Reg. Sess., 1986), c. 1014, s. 39(b); 1987, c. 738, ss. 58(c), 58(d), 60; 1987 (Reg. Sess., 1988), c. 1086, s. 30(a); c. 1100, s. 38(a); 1993, c. 321, s. 24(a); 1993 (Reg. Sess., 1994), c. 769, s. 7.27A; 1998-212, s. 28.20(a); 1999-237, s. 28.20; 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2007-322, s. 8.)

**Cross References.** — For provision that notwithstanding this section, a magistrate may not be reimbursed by the State for travel expenses incurred on official business within the county in which the magistrate resides, see G.S. 7A-171.1(b). For provisions authorizing the Commissioner of Insurance to pay examiners an amount in lieu of traveling expenses, see G.S. 58-6-5(3). As to travel expenses incurred by Department of Agriculture employees while testing a manufacturer's weighing or measuring device, see G.S. 81A-10.

**Editor's Note.** — Session Laws 2009-451, s. 15.7, provides: "Notwithstanding the provisions of G.S. 138-6(a)(1), the Judicial Department, during the 2009-2011 fiscal biennium, may elect to establish a per-mile reimbursement rate for transportation by privately owned vehicles at a rate less than the business standard mileage rate set by the Internal Revenue Service."

For similar prior provisions, see Session Laws 2005-276, s. 14.21, and Session Laws 2007-323, s. 14.10.

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

### OPINIONS OF ATTORNEY GENERAL

**Reimbursement of State Officers and Employees Traveling in Privately Owned Automobiles on Official Business.** — State officers and employees are entitled to be reimbursed at a rate of 15¢ (now 25¢) per mile traveled when privately owned automobiles are used in pursuance of official State business, regardless of the number of miles traveled. See opinion of Attorney General to Honorable Donald L. Smith, 45 N.C.A.G. 168 (1975).

**Proration of the daily subsistence allowance** as promulgated pursuant to subdivision (a)(3) of this section by the Division of State Budget, for the reimbursement of state employees for expenses incurred for lodging and meals when travel involves less than a 24-hour period, is applicable to occupational licensing board members. See opinion of Attorney General to Mr. Henry L. Bridges, State Auditor, 49 N.C.A.G. 74 (1979).

## § 138-7. Exceptions to §§ 138-5 and 138-6.

Expenditures in excess of the maximum amounts set forth in G.S. 138-5 and 138-6 for travel and subsistence may be reimbursed if the prior approval of the department head is obtained. The Director of the Budget shall establish and publish uniform standards and criteria under which actual expenses in excess of the travel and subsistence allowances and convention registration fees as prescribed in G.S. 138-5 and 138-6 may be authorized by department heads for extraordinary charges for hotel, meals, and registration, whenever such charges are the result of required official business. (1961, c. 833, s. 6.1; 1965, c. 1089; 1969, c. 1153; 1971, c. 881, s. 3; 1973, c. 595, s. 2; 1979, c. 838, s. 17.)

### OPINIONS OF ATTORNEY GENERAL

**Director of the budget has authority to authorize payment of actual expenses** in excess of statutory maximum. See opinion of Attorney General to Mr. G. Andrew Jones, State Budget Office, Department of Administration, 40 N.C.A.G. 742 (1970).

**Travel Expenses of Members of Occupational Licensing Boards.** — This section does not authorize the payment of actual travel expenses to members of occupational licensing boards over and above the amounts provided in the schedule in G.S. 138-6(a)(3) for officers and employees of state departments. See opinion of Attorney General to Mr. Henry L. Bridges, State Auditor, 49 N.C.A.G. 40 (1979).

## § 138-8. Moving expenses of State employees.

Subject to the rules and regulations promulgated by the Office of State Budget and Management and approved by the Director of the Budget, any department, institution or agency of the State is hereby authorized to pay, from funds available to it, reasonable expenses for transporting the household goods of an employee and members of his household when the transfer of the employee is considered by the Director of the Budget to be in the best interests of the State. (1977, c. 802, s. 15; 1979, 2nd Sess., c. 1137, s. 27; 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

# Chapter 138A.

# State Government Ethics Act.

### Article 1.

### General Provisions.

Sec.
138A-1. Title.
138A-2. Purpose.
138A-3. Definitions.
138A-4. Application to Lieutenant Governor.
138A-5. [Reserved.]

### Article 2.

### State Ethics Commission.

138A-6. State Ethics Commission established.
138A-7. Membership.
138A-8. Meetings and quorum.
138A-9. Staff and offices.
138A-10. Powers and duties.
138A-11. Identify and publish names of covered persons and legislative employees.
138A-12. Inquiries by the Commission.
138A-13. Request for advice.
138A-14. Ethics education program.
138A-15. Duties of heads of State agencies.
138A-16 through 138A-20. [Reserved.]

### Article 3.

### Public Disclosure of Economic Interests.

138A-21. Purpose.
138A-22. Statement of economic interest; filing required.
138A-23. Statements of economic interest as public records.
Sec.
138A-24. Contents of statement.
138A-25. Failure to file.
138A-26. Concealing or failing to disclose material information.
138A-27. Penalty for false information.
138A-28 through 138A-30. [Reserved.]

### Article 4.

### Ethical Standards for Covered Persons.

138A-31. Use of public position for private gain.
138A-32. Gifts.
138A-33. Other compensation.
138A-34. Use of information for private gain.
138A-35. Other rules of conduct.
138A-36. Public servant participation in official actions.
138A-37. Legislator participation in official actions.
138A-38. Permitted participation exception.
138A-39. Disqualification to serve.
138A-40. Employment and supervision of members of covered person's or legislative employee's extended family.
138A-41. Other ethics standards.
138A-42 through 138A-44. [Reserved.]

### Article 5.

### Violation Consequences.

138A-45. Violation consequences.

## ARTICLE 1.

## *General Provisions.*

## § 138A-1. Title.

This Chapter shall be known and may be cited as the "State Government Ethics Act". (2006-201, s. 1.)

**Editor's Note.** — Session Laws 2006-201, s. 25, made this Chapter effective October 1, 2006, and applicable to covered persons and legislative employees, to gifts received, to acts and conflicts of interest that arise, and to offenses committed, on or after January 1, 2007. Prosecutions for offenses or ethics violations committed before January 1, 2007, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

The preamble to Session Laws 2006-201 reads as follows: "Whereas, the people of North Carolina entrust public power to elected and appointed officials for the purpose of furthering the public, not private or personal, interest; and

"Whereas, to maintain the public trust, it is essential that government function honestly and fairly, free from all forms of impropriety, threats, favoritism, and undue influence; and

"Whereas, elected and appointed officials must maintain and exercise the highest standards of duty to the public in carrying out the responsibilities and functions of their positions; and

"Whereas, acceptance of authority granted by the people to elected and appointed officials imposes a commitment of fidelity to the public interest, and the power so entrusted should not be used to advance narrow interests for oneself or others; and

"Whereas, self-interest, partiality, and prejudice have no place in decisionmaking for the public good; and

"Whereas, public officials must exercise their duties responsibly with skillful judgment and energetic dedication; and

"Whereas, public officials must exercise discretion with sensitive information pertaining to public and private persons and activities; and

"Whereas, to maintain the integrity of North Carolina's State government, those citizens entrusted with authority must exercise it for the good of the public and treat every citizen with courtesy, attentiveness, and respect; and

"Whereas, because many public officials serve on a part-time basis, it is inevitable that conflicts of interest and appearances of conflicts will occur. Often these conflicts are unintentional and slight, but at every turn those public officials who represent the people of this State must ensure that it is the interests of the people, and not their own, that are being served. Officials should be prepared to remove themselves immediately from decisions, votes, or processes where a conflict of interest exists;

"Now, therefore, The General Assembly of North Carolina enacts:"

Session Laws 2006-201, s. 22, provides: "The authority, powers, duties and functions, records, personnel, property, unexpended balances of appropriations, allocations, or other funds, including the functions of budgeting and purchasing, of the North Carolina Board of Ethics of the Office of the Governor are transferred to the State Ethics Commission created in Section 1 of this act. The Director of the Budget shall resolve any disputes arising out of this transfer."

Session Laws 2006-201, s. 23(a), provides: "(a) Persons holding covered positions on January 1, 2007, shall file statements of economic interest under Article 3 of Chapter 138A of the General Statutes by March 15, 2007."

Session Laws 2006-201, s. 23(b), as amended by Session Laws 2007-347, s. 16, provides: "Public servants holding positions on January 1, 2007, shall participate in ethics education presentations under G.S. 138A-14 and lobbying education programs under G.S. 120C-103 on or before January 1, 2008."

Session Laws 2006-201, s. 24, is a severability clause.

## § 138A-2. Purpose.

The purpose of this Chapter is to ensure that elected and appointed State agency officials exercise their authority honestly and fairly, free from impropriety, threats, favoritism, and undue influence. To this end, it is the intent of the General Assembly in this Chapter to ensure that standards of ethical conduct and standards regarding conflicts of interest are clearly established for elected and appointed State agency officials, that the State continually educates these officials on matters of ethical conduct and conflicts of interest, that potential and actual conflicts of interests are identified and resolved, and that violations of standards of ethical conduct and conflicts of interest are investigated and properly addressed. (2006-201, s. 1.)

## § 138A-3. Definitions.

The following definitions apply in this Chapter:

(1) Blind trust. — A trust established by or for the benefit of a covered person or a member of the covered person's immediate family for the purpose of divestiture of all control and knowledge of assets. A trust qualifies as a blind trust under this subdivision if the covered person or a member of the covered person's immediate family has no knowledge of the holdings and sources of income of the trust, the trustee of the trust is independent of and not associated with or employed by the covered person or a member of the covered person's immediate family and is not a member of the covered person's extended family, and the trustee has sole discretion as to the management of the trust assets.

(1c) Board. — Any State board, commission, council, committee, task force, authority, or similar public body, however denominated, created by statute or executive order, as determined and designated by the Commission, except for those public bodies that have only advisory authority.

(2) Business. — Any of the following organized for profit:
  a. Association.
  b. Business trust.
  c. Corporation.
  d. Enterprise.
  e. Joint venture.
  f. Organization.
  g. Partnership.
  h. Proprietorship.
  i. Vested trust.
  j. Every other business interest, including ownership or use of land for income.

(3) Business with which associated. — A business in which the covered person or filing person or any member of that covered person's or filing person's immediate family does any of the following:
  a. Is an employee.
  b. Holds a position as a director, officer, partner, proprietor, or member or manager of a limited liability company, irrespective of the amount of compensation received or the amount of the interest owned.
  c. Owns a legal, equitable, or beneficial interest of ten thousand dollars ($10,000) or more in the business or five percent (5%) of the business, whichever is less, other than as a trustee on a deed of trust.
  d. Is a lobbyist registered under Chapter 120C of the General Statutes.

For purposes of this subdivision, the term "business" shall not include a widely held investment fund, including a mutual fund, regulated investment company, or pension or deferred compensation plan, if all of the following apply:
  1. The covered person, filing person, or a member of the covered person's or filing person's immediate family neither exercises nor has the ability to exercise control over the financial interests held by the fund.
  2. The fund is publicly traded, or the fund's assets are widely diversified.

(4) Commission. — The State Ethics Commission.

(5) Committee. — The Legislative Ethics Committee as created in Part 3 of Article 14 of Chapter 120 of the General Statutes.

(6) Compensation. — Any money, thing of value, or economic benefit conferred on or received by any covered person or filing person in return for services rendered or to be rendered by that covered person or filing person or another. This term does not include campaign contributions properly received and, reported as required by Article 22A of Chapter 163 of the General Statutes.

(7) Confidential information. — Information defined as confidential by the law.

(8) Constitutional officers of the State. — Officers whose offices are established by Article III of the North Carolina Constitution.

(9) Contract. — Any agreement, including sales and conveyances of real and personal property, and agreements for the performance of services.

(10) Covered person. — A legislator, public servant, or judicial officer, as identified by the Commission under G.S. 138A-11.

(11) Repealed by Session Laws 2008-213, s. 84(c), effective August 15, 2008.

(12) Employing entity. — For public servants, any of the following bodies of State government of which the public servant is an employee or a member, or over which the public servant exercises supervision: agencies, authorities, boards, commissions, committees, councils, departments, offices, institutions and their subdivisions, and constitutional offices of the State. For legislators, it is the house of which the legislator is a member. For legislative employees, it is the authority that hired the individual. For judicial employees, it is the Chief Justice.

(13) Extended family. — Spouse, lineal descendant, lineal ascendant, sibling, spouse's lineal descendant, spouse's lineal ascendant, spouse's sibling, and the spouse of any of these individuals.

(14) Filing person. — An individual required to file a statement of economic interest under G.S. 138A-22.

(14a), (14b) Reserved for future codification purposes.

(14c) Financial benefit. — A direct pecuniary gain or loss to the legislator, the public servant, or a person with which the legislator or public servant is associated, or a direct pecuniary loss to a business competitor of the legislator, the public servant, or a person with which the legislator or public servant is associated.

(15) Gift. — Anything of monetary value given or received without valuable consideration by or from a lobbyist, lobbyist principal, liaison personnel, or a person described under G.S. 138A-32(d)(1), (2), or (3). The following shall not be considered gifts under this subdivision:

a. Anything for which fair market value, or face value if shown, is paid by the covered person or legislative employee.

b. Commercially available loans made on terms not more favorable than generally available to the general public in the normal course of business if not made for the purpose of lobbying.

c. Contractual arrangements or commercial relationships or arrangements made in the normal course of business if not made for the purpose of lobbying.

d. Academic or athletic scholarships based on the same criteria as applied to the public.

e. Campaign contributions properly received and reported as required under Article 22A of Chapter 163 of the General Statutes.

f. Expressions of condolence related to a death of an individual, sent within a reasonable time of the death, if the expression is one of the following:

1. A sympathy card, letter, or note.
2. Flowers.
3. Food or beverages for immediate consumption.
4. Donations to a religious organization, charity, the State or a political subdivision of the State, not to exceed a total of two hundred dollars ($200.00) per death per donor.

(15a) through (15c) Reserved for future codification purposes.

(15d) Governmental unit. — A political subdivision of the State, and any other entity or organization created by a political subdivision of the State.

(16) Honorarium. — Payment for services for which fees are not legally or traditionally required.

(17) Immediate family. — An unemancipated child of the covered person residing in the household and the covered person's spouse, if not

legally separated. A member of a covered person's extended family shall also be considered a member of the immediate family if actually residing in the covered person's household.

(18) Judicial employee. — The director and assistant director of the Administrative Office of the Courts and any other individual, designated by the Chief Justice, employed in the Judicial Department whose annual compensation from the State is sixty thousand dollars ($60,000) or more.

(19) Judicial officer. — Justice or judge of the General Court of Justice, district attorney, clerk of court, or any individual elected or appointed to any of these positions prior to taking office.

(20) Legislative action. — As the term is defined in G.S. 120C-100.

(21) Legislative employee. — As the term is defined in G.S. 120C-100.

(22) Legislator. — A member or presiding officer of the General Assembly, or an individual elected or appointed a member or presiding officer of the General Assembly before taking office.

(23) Lobbying. — As the term is defined in G.S. 120C-100.

(24) Nonprofit corporation or organization with which associated. — Any not for profit corporation, organization, or association, incorporated or otherwise, that is organized or operating in the State primarily for religious, charitable, scientific, literary, public health and safety, or educational purposes and of which the covered person, filing person, or any member of the covered person's or filing person's immediate family is a director, officer, governing board member, employee, lobbyist registered under Chapter 120C of the General Statutes, or independent contractor. Nonprofit corporation or organization with which associated shall not include any board, entity, or other organization created by this State or by any political subdivision of this State.

(25) Official action. — Any decision, including administration, approval, disapproval, preparation, recommendation, the rendering of advice, and investigation, made or contemplated in any proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, investigation, charge, or rule making.

(26) Participate. — To take part in, influence, or attempt to influence, including acting through an agent or proxy.

(26c) Permanent designee. — An individual designated by a public servant to serve and vote in the absence of the public servant on a regular basis on a board on which the public servant serves.

(27) Person. — Any individual, firm, partnership, committee, association, corporation, business, or any other organization or group of persons acting together. The term "person" does not include the State, a political subdivision of the State, a board, or any other entity or organization created by the State or a political subdivision of the State.

(27a), (27b) Reserved for future codification purposes.

(27c) Person with which the legislator is associated. — Any of the following:

a. A member of the legislator's extended family.

b. A client of the legislator.

c. A business with which the legislator or a member of the legislator's immediate family is associated.

d. A nonprofit corporation or association with which the legislator or a member of the legislator's immediate family is associated.

e. The State, a political subdivision of the State, a board, or any other entity or organization created by the State or a political subdivision of the State that employs the legislator or a member of the legislator's immediate family.

(27d) Person with which the public servant is associated. — Any of the following:

a. A member of the public servant's extended family.

b. A client of the public servant.

c. A business with which the public servant or a member of the public servant's immediate family is associated.

d. A nonprofit corporation or association with which the public servant or a member of the public servant's immediate family is associated.

e. The State, a political subdivision of the State, a board, or any other entity or organization created by the State or a political subdivision of the State that employs the public servant or a member of the public servant's immediate family.

(28) Political party. — Either of the two largest political parties in the State based on statewide voter registration at the applicable time.

(29) Repealed by Session Laws 2008-213, s. 49, effective August 15, 2008.

(30) Public servants. — All of the following:

a. Constitutional officers of the State and individuals elected or appointed as constitutional officers of the State prior to taking office.

b. Employees of the Office of the Governor.

c. Heads of all principal State departments, as set forth in G.S. 143B-6, who are appointed by the Governor.

d. The chief deputy and chief administrative assistant of each individual designated under sub-subdivision a. or c. of this subdivision.

e. Confidential assistants and secretaries as defined in G.S. 126-5(c)(2), to individuals designated under sub-subdivision a., c., or d. of this subdivision.

f. Employees in exempt positions designated in accordance with G.S. 126-5(d)(1), (2), or (2a) and confidential secretaries to these individuals.

g. Any other employees or appointees in the principal State departments as may be designated by the Governor to the extent that the designation does not conflict with the State Personnel Act.

h. Judicial employees.

i. All voting members of boards, including ex officio members, permanent designees of any voting member, and members serving by executive, legislative, or judicial branch appointment.

j. For The University of North Carolina, the voting members of the Board of Governors of The University of North Carolina, the president, the vice-presidents, and the chancellors, the vice-chancellors, and voting members of the boards of trustees of the constituent institutions.

k. For the Community College System, the voting members of the State Board of Community Colleges, the President and the chief financial officer of the Community College System, the president, chief financial officer, and chief administrative officer of each community college, and voting members of the boards of trustees of each community college.

*l*. Members of the Commission.

m. Individuals under contract with the State working in or against a position included under this subdivision.

(30a) through (30*l*) Reserved for future codification purposes.

(30k) State agency. — An agency in the executive branch of the government of this State, including the Governor's Office, a board, a department, a division, and any other unit of government in the executive branch.

(31) Vested trust. — A trust, annuity, or other funds held by a trustee or other third party for the benefit of the covered person or a member of the covered person's immediate family, except a blind trust. A vested trust shall not include a widely held investment fund, including a mutual fund, regulated investment company, or pension or deferred compensation plan, if:

a. The covered person or a member of the covered person's immediate family neither exercises nor has the ability to exercise control over the financial interests held by the fund; and

b. The fund is publicly traded, or the fund's assets are widely diversified. (2006-201, s. 1; 2007-347, ss. 7, 8; 2007-348, ss. 19-26; 2008-187, s. 44; 2008-213, ss. 40-54, 84(c).)

**Editor's Note.** — Session Laws 2007-348, s. 44, as amended by Session Laws 2008-187, s. 32 and Session Laws 2008-213, s. 91, provides: "Sections 17, 23, 39, 40 and 41 of this act are effective January 1, 2007. Section 9 of this act is effective July 1, 2007. Sections 8, 11, 15, 20, 22, 25, and 42 of this act become effective October 1, 2007. Section 18 of this act becomes effective December 1, 2007. Section 34 of this act becomes effective January 1, 2008. The remainder of this act is effective when this act becomes law."

**Effect of Amendments.** — Session Laws 2007-348, ss. 19-26, added present subdivision (1), and redesignated former subdivision (1) as subdivision (1c); added subdivision (3)d; in subdivision (15), inserted "liaison personnel" in the introductory language and added subdivision (15)f; added subdivision (26c); added the second sentence in subdivision (27); rewrote subdivision (29); in subdivision (30)i, inserted "permanent designees of any voting member" and made a minor punctuation change; and in subdivision (31), added "except a blind trust" at the end of the first sentence. For effective dates, see Editor's note.

Session Laws 2008-187, s. 44, effective August 7, 2008, substituted "lobbyist registered under" for "lobbyist registered as under" in the first sentence of subdivision (24).

Session Laws 2008-213, ss. 40 through 54 and 84(c), effective August 15, 2008, substituted "covered person or filing person" for "person," or a variation, in subdivisions (3), (6), and (24); substituted "individual" for "person," or a variation, in subdivisions (13), (14), (18), (19), (22), and (30); redesignated former subdivisions (3)d.a. and (3)d.b. as subdivisions (3)d.1. and (3)d.2., respectively; in subdivision (3), inserted "covered person or filing" in the introductory language; deleted subsection (11), which defined "Economic interest"; added subdivisions (14c), (15d), (27c), (27d) and (30k); and repealed subdivision (29), which defined "Public event."

## § 138A-4. Application to Lieutenant Governor.

For purposes of this Chapter, the Lieutenant Governor shall be considered a legislator when carrying out the Lieutenant Governor's duties under Sec. 13 of Article II of the Constitution, and a public servant for all other purposes. (2006-201, s. 1.)

**§ 138A-5:** Reserved for future codification purposes.

## Article 2.

## *State Ethics Commission.*

## § 138A-6. State Ethics Commission established.

There is established the State Ethics Commission. (2006-201, s. 1.)

**Editor's Note.** — For effective date and applicability of this Chapter, see Editor's note at G.S. 138A-1.

Session Laws 2008-181, s. 15.1, provides: "The State Ethics Commission shall conduct a study of the implementation and effectiveness of Session Laws 2006-201, the State Government Ethics Act The study shall examine issues related to the administration of the laws created under this act by the State Ethics Commission, the Secretary of State, the State Board of Elections, and any applicable State agency. The study shall identify the areas of the ethics and lobbying process in which public input is needed the need for notice to the public of interpretations of the law the effectiveness of the ethics and lobbying education process, the volume of requests for advice, the adequacy of staffing to timely meet the needs of the act, and the general perception of the community affected by the State Government Ethics Act. The State Ethics Commission shall consult with the Legislative Ethics Committee as part of this study. The study shall assess and identify proposed legislative changes in the governmental process and the law needed to promote and continue high ethical behavior by governmental officers and employees. The report shall include recommendations on changes to Chapter 138A and Chapter 120C of the General Statutes. The State Ethics Commission shall report its findings and recommendations in writing to the Legislative Ethics Committee on or before by March 1, 2009."

## § 138A-7. Membership.

(a) The Commission shall consist of eight members. Four members shall be appointed by the Governor, of whom no more than two shall be of the same political party. Four members shall be appointed by the General Assembly, two upon the recommendation of the Speaker of the House of Representatives, neither of whom shall be of the same political party, and two upon the recommendation of the President Pro Tempore of the Senate, neither of whom shall be of the same political party. Members shall serve for four-year terms, beginning January 1, 2007, except for the initial terms that shall be as follows:

(1) Two members appointed by the Governor shall serve an initial term of one year.

(2) Two members appointed by the General Assembly, one upon the recommendation of the Speaker of the House of Representatives and one upon the recommendation of the President Pro Tempore of the Senate, shall serve initial terms of two years.

(3) Two members appointed by the Governor shall serve initial terms of three years.

(4) Two members appointed by the General Assembly, one upon the recommendation of the Speaker of the House of Representatives and one member upon the recommendation of the President Pro Tempore of the Senate, shall serve initial terms of four years.

(b) Members shall be removed from the Commission only for misfeasance, malfeasance, or nonfeasance. Members appointed by the Governor may be removed by the Governor. Members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives shall be removed by the Governor upon the recommendation of the Speaker. Members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate shall be removed by the Governor upon the recommendation of the President Pro Tempore.

(c) Vacancies in appointments made by the Governor shall be filled by the Governor for the remainder of any unfulfilled term. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122 for the remainder of any unfulfilled term.

(d) No member while serving on the Commission or employee while employed by the Commission shall:

(1) Hold or be a candidate for any other office or place of trust or profit under the United States, the State, or a political subdivision of the State.

(2) Hold office in any political party above the precinct level.

(3) Participate in or contribute to the political campaign of any covered person or any candidate for a public office as a covered person over which the Commission would have jurisdiction or authority.
(4) Otherwise be an employee of the State, a community college, or a local school system, or serve as a member of any other State board.

(e) The Governor shall annually appoint a member of the Commission to serve as chair of the Commission. The Commission shall elect a vice-chair annually from its membership. The vice-chair shall act as the chair in the chair's absence or if there is a vacancy in that position.

(f) Members of the Commission shall receive no compensation for service on the Commission but shall be reimbursed for subsistence, travel, and convention registration fees as provided under G.S. 138-5 or 138-7, as applicable. (2006-201, s. 1.)

## § 138A-8. Meetings and quorum.

The Commission shall meet at least quarterly and at other times as called by its chair or by four of its members. In the case of a vacancy in the chair, meetings may be called by the vice-chair. Five members of the Commission constitute a quorum. (2006-201, s. 1.)

## § 138A-9. Staff and offices.

The Commission may employ professional and clerical staff, including an executive director. The Commission shall be located within the Department of Administration for administrative purposes only, but shall exercise all of its powers, including the power to employ, direct, and supervise all personnel, independently of the Secretary of Administration, and is subject to the direction and supervision of the Secretary of Administration only with respect to the management functions of coordinating and reporting. (2006-201, s. 1.)

## § 138A-10. Powers and duties.

(a) In addition to other powers and duties specified in this Chapter, the Commission shall:
(1) Provide reasonable assistance to covered persons in complying with this Chapter.
(2) Develop readily understandable forms, policies, and procedures to accomplish the purposes of the Chapter.
(3) Identify and publish the following:
  a. A list of nonadvisory boards.
  b. The names of individuals subject to this Chapter as covered persons and legislative employees under G.S. 138A-11.
(4) Receive and review all statements of economic interests filed with the Commission by prospective and actual covered persons and evaluate whether (i) the statements conform to the law and the rules of the Commission, and (ii) the financial interests and other information reported reveals actual or potential conflicts of interest. Pursuant to G.S. 138A-24(e), this subdivision does not apply to statements of economic interest of legislators and judicial officers.
(5) Conduct inquiries of alleged violations against judicial officers, legislators, and legislative employees in accordance with G.S. 138A-12.
(6) Conduct inquiries into alleged violations against public servants in accordance with G.S. 138A-12.
(7) Render advisory opinions in accordance with G.S. 138A-13 and G.S. 120C-102.

(8) Initiate and maintain oversight of ethics educational programs for public servants and their staffs, and legislators and legislative employees, consistent with G.S. 138A-14.

(9) Conduct a continuing study of governmental ethics in the State and propose changes to the General Assembly in the government process and the law as are conducive to promoting and continuing high ethical behavior by governmental officers and employees.

(10) Adopt procedures and guidelines to implement this Chapter.

(11) Report annually to the General Assembly and the Governor on the Commission's activities and generally on the subject of public disclosure, ethics, and conflicts of interest, including recommendations for administrative and legislative action, as the Commission deems appropriate.

(12) Publish annually statistics on complaints filed with or considered by the Commission, including the number of complaints filed, the number of complaints referred under G.S. 138A-12(b), the number of complaints dismissed under G.S. 138A-12(c)(4), the number of complaints dismissed under G.S. 138A-12(f), the number of complaints referred for criminal prosecution under G.S. 138A-12, the number of complaints dismissed under G.S. 138A-12(h), the number of complaints referred for appropriate action under G.S. 138A-12(h) or G.S. 138A-12(k)(3), and the number and age of complaints pending action by the Commission.

(13) Perform other duties as may be necessary to accomplish the purposes of this Chapter.

(b) The Commission may authorize the Executive Director and other staff of the Commission to evaluate statements of economic interest on behalf of the Commission as authorized under subdivision (a)(4) of this section.

(c) Except as otherwise provided in this Chapter, the Commission shall be the sole State agency with authority to determine compliance with or violations of this Chapter and to issue interpretations and advisory opinions under this Chapter. Decisions and advisory opinions by the Commission under this Chapter shall be binding on all other State agencies. (2006-201, s. 1; 2008-213, s. 55; 2008-215, s. 7; 2009-549, s. 8.)

**Editor's Note.** — Session Laws 2008-181, s. 15.1, provides: "The State Ethics Commission shall conduct a study of the implementation and effectiveness of S.L. 2006-201, the State Government Ethics Act. The study shall examine issues related to the administration of the laws created under this act by the State Ethics Commission, the Secretary of State, the State Board of Elections, and any applicable State agency. The study shall identify the areas of the ethics and lobbying process in which public input is needed, the need for notice to the public of interpretations of the law, the effectiveness of the ethics and lobbying education process, the volume of requests for advice, the adequacy of staffing to timely meet the needs of the act, and the general perception of the community affected by the State Government Ethics Act. The State Ethics Commission shall consult with the Legislative Ethics Committee as part of this study. The study shall assess and identify proposed legislative changes in the governmental process and the law needed to promote and continue high ethical behavior by governmental officers and employees. The report shall include recommendations on changes to Chapter 138A and Chapter 120C of the General Statutes. The State Ethics Commission shall report its findings and recommendations in writing to the Legislative Ethics Committee on or before by March 1, 2009."

Session Laws 2008-215, which added subsection (c), in s. 9 provides: "This act is effective when it becomes law [August 15, 2008] and applies to all information received or collected by the State Auditor concerning alleged violations of Chapters 138A or 120C of the General Statutes or Article 14 of Chapter 120 of the General Statutes on or after January 1, 2007."

Session Laws 2009-549, s. 6, provides: "The Joint Legislative Ethics Committee and the State Ethics Commission shall jointly study the process for issuing, reviewing, and revising formal advisory opinions, and the process for publishing formal and informal advisory opinions, applicable to all persons covered under Chapters 120, 120C, and 138A of the General Statutes. The joint study shall review the redacted opinions of both the Legislative Ethics Committee and the State Ethics Commission, with a specific focus on all opinions related to indirect gifts. The Joint Legislative Ethics Committee and the State Ethics Commission may each make recommendations to the 2010 Regular Session of the 2009 General Assembly."

**Effect of Amendments.** — Session Laws 2008-213, s. 55, effective August 15, 2008, substituted "individuals" for "persons" in subdivision (a)(3)b.

Session Laws 2008-215, s. 7, effective August 15, 2008, added subsection (c). See Editor's note for applicability.

Session Laws 2009-549, s. 8, effective August 28, 2009, added the last sentence in subdivision (a)(4); and inserted "and age" near the end of subdivision (a)(12).

## § 138A-11. Identify and publish names of covered persons and legislative employees.

The Commission shall identify and publish at least quarterly a listing of the names and positions of all individuals subject to this Chapter as covered persons or legislative employees. The Commission shall also identify and publish at least annually a listing of all boards to which this Chapter applies. This listing may be published electronically on a public Internet Web site maintained by the Commission. (2006-201, s. 1; 2008-213, s. 56.)

**Effect of Amendments.** — Session Laws 2008-213, s. 56, effective August 15, 2008, substituted "individuals" for "persons" in the first sentence.

## § 138A-12. Inquiries by the Commission.

(a) Jurisdiction. — The Commission may receive complaints alleging unethical conduct by covered persons and legislative employees and shall conduct inquiries of complaints alleging unethical conduct by covered persons and legislative employees, as set forth in this section.

(a1) Notice of Allegation. — Upon receipt by the Commission of a written allegation of unethical conduct by a covered person or legislative employee, or the initiation by the Commission of an inquiry into unethical conduct under subsection (b) of this section, the Commission shall immediately notify the covered person or legislative employee subject to the allegation or inquiry in writing.

(b) Institution of Proceedings. — On its own motion, in response to a signed and sworn complaint of any individual filed with the Commission, or upon the written request of any public servant or those responsible for the hiring, appointing, or supervising of a public servant, the Commission shall conduct an inquiry into any of the following:

(1) The application or alleged violation of this Chapter.
(2) For legislators, the application of alleged violations of Part 1 of Article 14 of Chapter 120 of the General Statutes.
(3) An alleged violation of the criminal law by a covered person in the performance of that individual's official duties.
(4) An alleged violation of G.S. 126-14.

Upon receipt of a referral under G.S. 147-64.6B or a report under G.S. 147-64.6(c)(19), the Commission may conduct an inquiry under this section on its own motion. Allegations of violations of the Code of Judicial Conduct shall be referred to the Judicial Standards Commission without investigation.

(b1) Complaints on Its Own Motion. — An investigation initiated by the Commission on its own motion or upon written request of any public servant or those responsible for the hiring, appointing, or supervising of a public servant instituted under subsection (b) of this section shall be treated as a complaint for purposes of this section and need not be sworn or verified.

(c) Complaint. —

(1) A sworn complaint filed under this Chapter shall state the name, address, and telephone number of the individual filing the complaint,

the name and job title or appointive position of the covered person or legislative employee against whom the complaint is filed, and a concise statement of the nature of the complaint and specific facts indicating that a violation of this Chapter or Chapter 120 of the General Statutes has occurred, the date the alleged violation occurred, and either (i) that the contents of the complaint are within the knowledge of the individual verifying the complaint, or (ii) the basis upon which the individual verifying the complaint believes the allegations to be true.

(2) Except as provided in subsection (d) of this section, a complaint filed under this Chapter must be filed within two years of the date the complainant knew or should have known of the conduct upon which the complaint is based.

(3) The Commission may decline to accept, refer, or conduct an inquiry into any complaint that does not meet all of the requirements set forth in subdivision (1) of this subsection, or the Commission may, in its sole discretion, request additional information to be provided by the complainant within a specified period of time of no less than seven business days.

(4) In addition to subdivision (3) of this subsection, the Commission may decline to accept, refer, or conduct an inquiry into a complaint if it determines that any of the following apply:

a. The complaint is frivolous or brought in bad faith.

b. The covered person or legislative employee and conduct complained of have already been the subject of a prior complaint.

c. The conduct complained of is primarily a matter more appropriately and adequately addressed and handled by other federal, State, or local agencies or authorities, including law enforcement authorities. If other agencies or authorities are conducting an investigation of the same actions or conduct involved in a complaint filed under this section, the Commission may stay its complaint inquiry pending final resolution of the other investigation.

(5) The Commission shall send a copy of the complaint to the covered person or legislative employee who is the subject of the complaint and the employing entity, within 30 days of the filing.

(d) Conduct of Inquiry of Complaints by the Commission. — The Commission shall conduct an inquiry into all complaints properly before the Commission in a timely manner. The Commission shall initiate an inquiry into a complaint within 60 days of the filing of the complaint. The Commission is authorized to initiate inquiries upon request of any member of the Commission if there is reason to believe that a covered person or legislative employee has or may have violated this Chapter. Commission-initiated complaint inquiries under this section shall be initiated within two years of the date the Commission knew of the conduct upon which the complaint is based, except when the conduct is material to the continuing conduct of the duties in office. In determining whether there is reason to believe that a violation has or may have occurred, a member of the Commission may take general notice of available information even if not formally provided to the Commission in the form of a complaint. The Commission may utilize the services of a hired investigator when conducting inquiries.

(e) Covered Person and Legislative Employees Cooperation With Inquiry. — Covered persons and legislative employees shall promptly and fully cooperate with the Commission in any Commission-related inquiry. Failure to cooperate fully with the Commission in any inquiry shall be grounds for sanctions as set forth in G.S. 138A-45.

(f) Dismissal of Complaint After Preliminary Inquiry. — If the Commission determines at the end of its preliminary inquiry that (i) the individual who is the subject of the complaint is not a covered person or legislative employee subject to the Commission's jurisdiction and authority under this Chapter, or (ii) the complaint does not allege facts sufficient to constitute a violation within the jurisdiction of the Commission under subsection (b) of this section, the Commission shall dismiss the complaint.

(g) Commission Inquiries. — If at the end of its preliminary inquiry, the Commission determines to proceed with further inquiry into the conduct of a covered person or legislative employee, the Commission shall provide written notice to the individual who filed the complaint and the covered person or legislative employee as to the fact of the inquiry and the charges against the covered person or legislative employee. The covered person or legislative employee shall be given an opportunity to file a written response with the Commission.

(h) Action on Inquiries. — The Commission shall conduct inquiries into complaints to the extent necessary to either dismiss the complaint for lack of probable cause of a violation under this section, or:

(1) For public servants, decide to proceed with a hearing under subsection (i) of this section.

(2) For legislators, except the Lieutenant Governor, refer the complaint to the Committee.

(3) For judicial officers, refer the complaint to the Judicial Standards Commission for complaints against justices and judges, to the senior resident superior court judge of the district or county for complaints against district attorneys, or to the chief district court judge for the district or county for complaints against clerks of court.

(4) For legislative employees, refer the complaint to the employing entity.

(i) Hearing. —

(1) The Commission shall give full and fair consideration to all complaints received against a public servant. If the Commission determines that the complaint cannot be resolved without a hearing, or if the public servant requests a hearing, a hearing shall be held.

(2) The Commission shall send a notice of the hearing to the complainant, and the public servant. The notice shall contain the time and place for a hearing on the matter, which shall begin no less than 30 days and no more than 90 days after the date of the notice.

(3) The Commission shall make available to the public servant or that public servant's private legal counsel all documents or other evidence which are intended to be presented at the hearing to the Commission or which a reasonable person would believe might exculpate the accused public servant at least 30 days prior to the date of the hearing held in connection with the investigation of a complaint. Any documents or other evidence discovered within less than 30 days of the hearing shall be furnished as soon as possible after discovery but prior to the hearing.

(4) At any hearing held by the Commission:

a. Oral evidence shall be taken only on oath or affirmation.

b. The hearing shall be open to the public, except for matters involving minors, personnel records, or matters that could otherwise be considered in closed session under G.S. 143-318.11. In any event, the deliberations by the Commission on a complaint may be held in closed session.

c. The public servant being investigated shall have the right to present evidence, call and examine witnesses, cross-examine witnesses, introduce exhibits, and be represented by counsel.

(j) Settlement of Inquiries. — The public servant who is the subject of the complaint and the staff of the Commission may meet by mutual consent before the hearing to discuss the possibility of settlement of the inquiry or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the inquiry is subject to the approval of the Commission.

(k) Disposition of Inquiries. — After hearing, the Commission shall dispose of the matter in one or more of the following ways:

(1) If the Commission finds substantial evidence of an alleged violation of a criminal statute, the Commission shall refer the matter to the Attorney General for investigation and referral to the district attorney for possible prosecution.

(2) If the Commission finds that the alleged violation is not established by clear and convincing evidence, the Commission shall dismiss the complaint.

(3) If the Commission finds that the alleged violation of this Chapter is established by clear and convincing evidence, the Commission shall do one or more of the following:

a. Issue a private admonishment to the public servant and notify the employing entity, if applicable. Such notification shall be treated as part of the personnel record of the public servant.

b. Refer the matter for appropriate action to the Governor and the employing entity that appointed or employed the public servant or of which the public servant is a member.

c. Refer the matter for appropriate action to the Chief Justice for judicial employees.

d. Refer the matter to the Principal Clerks of the House of Representatives and Senate of the General Assembly for constitutional officers of the State.

e. Refer the matter for appropriate action to the principal clerk of the house of the General Assembly that elected the public servant for members of the Board of Governors and the State Board of Community Colleges.

(*l*) Notice of Dismissal. — Upon the dismissal of a complaint under this section, the Commission shall provide written notice of the dismissal to the individual who filed the complaint and the covered person or legislative employee against whom the complaint was filed. The Commission shall forward copies of complaints and notices of dismissal of complaints against legislators to the Committee, against legislative employees to the employing entity for legislative employees, and against judicial officers to the Judicial Standards Commission for complaints against justices and judges, and the senior resident superior court judge of the district or county for complaints against district attorneys, or the chief district court judge of the district or county for complaints against clerks of court. The Commission shall also forward a copy of the notice of dismissal to the employing entity of the covered person against whom a complaint was filed if the employing entity received a copy of the complaint under subdivision (5) of subsection (c) of this section. Except as provided in subsection (n) of this section, the complaint and notice of dismissal are confidential and not public records.

(m) Reports and Records. — The Commission shall render the results of its inquiry in writing. When a matter is referred under subdivision (h)(2) and (3), or subsection (k) of this section, the Commission's report shall consist of the complaint, response, and detailed results of its inquiry in support of the Commission's finding of a violation under this Chapter.

(n) Confidentiality. — Complaints and responses filed with the Commission and reports and other investigative documents and records of the Commission connected to an inquiry under this section, including information provided pursuant to G.S. 147-64.6B or G.S. 147-64.6(c)(19), shall be confidential and not matters of public record, except as otherwise provided in this section or when the covered person or legislative employee under inquiry requests in writing that the complaint, response, and findings be made public. Once a hearing under this section commences, the complaint, response, and all other documents offered at the hearing in conjunction with the complaint, not otherwise privileged or confidential under law, shall be public records. If no hearing is held at such time as the Commission reports to the employing entity a recommendation of sanctions, the complaint and response shall be made public.

(o) Recommendations of Sanctions. — After referring a matter under subsection (k) of this section, if requested by the entity to which the matter was referred, the Commission may recommend sanctions or issue rulings as it deems necessary or appropriate to protect the public interest and ensure compliance with this Chapter. In recommending appropriate sanctions, the Commission may consider the following factors:

(1) The public servant's prior experience in an agency or on a board and prior opportunities to learn the ethical standards for a public servant as set forth in Article 4 of this Chapter, including those dealing with conflicts of interest.
(2) The number of ethics violations.
(3) The severity of the ethics violations.
(4) Whether the ethics violations involve the public servant's financial interest.
(5) Whether the ethics violations were inadvertent or intentional.
(6) Whether the public servant knew or should have known that the improper conduct was a violation of this Chapter.
(7) Whether the public servant has previously been advised or warned by the Commission.
(8) Whether the conduct or situation giving rise to the ethics violation was pointed out to the public servant in the Commission's Statement of Economic Interest evaluation letter issued under G.S. 138A-24(e).
(9) The public servant's motivation or reason for the improper conduct or action, including whether the action was for personal financial gain versus protection of the public interest.

In making recommendations under this subsection, if the Commission determines, after proper review and investigation, that sanctions are appropriate, the Commission may recommend any action it deems necessary to properly address and rectify any violation of this Chapter by a public servant, including removal of the public servant from the public servant's State position. Nothing in this subsection is intended, and shall not be construed, to give the Commission any independent civil, criminal, or administrative investigative or enforcement authority over covered persons, or other State employees or appointees.

(p) Authority of Employing Entity. — Any action or failure to act by the Commission under this Chapter, except G.S. 138A-13, shall not limit any authority of any of the applicable employing entities to discipline the covered person or legislative employee.

(q) Continuing Jurisdiction. — The Commission shall have continuing jurisdiction to investigate possible criminal violations of this Chapter for a period of one year following the date an individual, who was formerly a public servant or legislative employee, ceases to be a public servant or legislative employee for any investigation that commenced prior to the date the public servant or legislative employee ceases to be a public servant or legislative employee.

(r) Subpoena Authority. — The Commission may petition the Superior Court of Wake County for the approval to issue subpoenas and subpoenas duces tecum as necessary to conduct investigations of alleged violations of this Chapter. The court shall authorize subpoenas under this subsection when the court determines the subpoenas are necessary for the enforcement of this Chapter. Subpoenas issued under this subsection shall be enforceable by the court through contempt powers. Venue shall be with the Superior Court of Wake County for any person or governmental unit covered by this Chapter, and personal jurisdiction may be asserted under G.S. 1-75.4.

(s) Reports. — The number of complaints referred under this section shall be reported under G.S. 138A-10(a)(12).

(t) Concurrent Jurisdiction. — Nothing in this section shall limit the jurisdiction of the Committee or the Judicial Standards Commission with regards to legislative or judicial misconduct, and jurisdiction under this section shall be concurrent with the jurisdiction of the Committee and the Judicial Standards Commission. (2006-201, s. 1; 2007-348, ss. 27-30; 2008-187, s. 21; 2008-213, ss. 1(b), 57; 2008-215, ss. 4, 5; 2009-549, ss. 9, 10, 11.)

**Editor's Note.** — The bracketed word "[of]" was added in subsection (f) at the direction of the Revisor of Statutes. The error that precipitated the addition was corrected by Session Laws 2008-187, s. 21, and Session Laws 2008-213, s. 57.

Session Laws 2008-215, s. 9, provides: "This act is effective when it becomes law [August 15, 2008] and applies to all information received or collected by the State Auditor concerning alleged violations of Chapters 138A or 120C of the General Statutes or Article 14 of Chapter 120 of the General Statutes on or after January 1, 2007."

**Effect of Amendments.** — Session Laws 2008-187, s. 21, effective August 7, 2008, substituted "subsection (b) of this section" for "subsection (b) if this section" in subsection (f).

Session Laws 2008-213, ss. 1(b) and 57, effective August 15, 2008, added subsection (a1); in subsection (b), substituted "those responsible" for "any person responsible"; added subsection (b1); in subdivision (c)(1), substituted "individual" for "person" and "covered person or legislative employee" for "person"; in subdivision (c)(4)b, substituted "covered person or legislative employee" for "individuals"; in subsection (f), substituted "of" for "if" near the end; in subsection *(l)*, substituted "covered person or legislative employee" for "person"; in subsection (q), substituted "an individual" for "a person"; and in subsection (r), inserted "or governmental unit" near the end.

Session Laws 2008-215, ss. 4 and 5, effective August 15, 2008, added the first sentence in the concluding paragraph of subsection (b); and inserted "including information provided pursuant to G.S. 147-64.6B or G.S. 147-64.6(c)(19)" in the first sentence of subsection (n). See Editor's note for applicability.

Session Laws 2009-549, ss. 9-11, effective August 28, 2009, substituted "a written allegation" for "an written allegation" in subsection (a1); rewrote subdivision (i)(3); and added the last two sentences in subsection *(l)*.

## § 138A-13. Request for advice.

(a) At the request of any public servant or legislative employee, any individual who is responsible for the supervision or appointment of a public servant or legislative employee, legal counsel for any public servant or legislative employee, any ethics liaison under G.S. 138A-14, or any member of the Commission, the Commission shall render advice on specific questions involving the meaning and application of this Chapter and the public servant's or legislative employee's compliance therewith. Requests for advice and advice rendered in response to those requests shall relate prospectively to real or reasonably anticipated fact settings or circumstances.

(a1) On its own motion, the Commission may render advisory opinions on specific questions involving the meaning and application of this Chapter.

(a2) A request for a formal advisory opinion under subsection (a) of this section shall be in writing, electronic or otherwise. The Commission shall issue formal advisory opinions having prospective application only. A public servant or legislative employee who relies upon the advice provided to that public servant or legislative employee on a specific matter addressed by the requested formal advisory opinion shall be immune from all of the following:

(1) Investigation by the Commission, except for an inquiry under G.S. 138A-12(b)(3).
(2) Any adverse action by the employing entity.
(3) Investigation by the Secretary of State.

(b) At the request of a legislator, the Commission shall render advice on specific questions involving the meaning and application of this Chapter and Part 1 of Article 14 of Chapter 120 of the General Statutes, and the legislator's compliance therewith. Requests for advice and advice rendered in response to those requests shall relate prospectively to real or reasonably anticipated fact settings or circumstances.

(b1) A request by a legislator for a recommended formal advisory opinion shall be in writing, electronic or otherwise. The Commission shall issue recommended formal advisory opinions having prospective application only. Until action is taken by the Committee under G.S. 120-104, a legislator who relies upon the advice provided to that legislator on a specific matter addressed by the requested recommended formal advisory opinion shall be immune from all of the following:

(1) Investigation by the Committee or Commission, except for an inquiry under G.S. 138A-12(b)(3).
(2) Any adverse action by the house of which the legislator is a member.
(3) Investigation by the Secretary of State.

Any recommended formal advisory opinion issued to a legislator under this subsection shall immediately be delivered to the chairs of the Committee, together with a copy of the request. Except for the Lieutenant Governor, the immunity granted under this subsection shall not apply after the time the Committee modifies or overturns the advisory opinion of the Commission in accordance with G.S. 120-104.

(b2) At the request of the Auditor, the Commission shall render advisory opinions on specific questions involving the meaning and application of this Chapter, Article 14 of Chapter 120 of the General Statutes, and Chapter 120C of the General Statutes and an affected person's compliance therewith. The request shall be in writing, electronic or otherwise, and relate to real fact settings and circumstances. Except when the question involves a question governed by subsection (b) or (b1) of this section, the Commission shall issue an advisory opinion under this subsection within 60 days of the receipt of all information deemed necessary by the Commission to render an opinion. If the question involves a question governed by subsection (b) or (b1) of this section, the Commission shall comply with the provisions of that section prior to responding to the Auditor by delivering the recommended advisory opinion to the Committee within 60 days of the receipt of all information deemed necessary by the Commission to render an opinion. The Committee shall act on the opinion within 30 days of receipt and the Commission shall deliver the opinion to the Auditor. If the Committee fails to act on a recommended advisory opinion under this subsection with 30 days of receipt, the Commission shall deliver its recommended advisory opinion to the Auditor. Notwithstanding G.S. 138A-13(e), the Auditor may only release those portions of the advisory opinion necessary to comply with the requirements of G.S. 147-64.6(c)(1).

(c) Staff to the Commission may issue advice, but not formal or recommended formal advisory opinions, under procedures adopted by the Commission.

(d) The Commission shall publish its formal advisory opinions within 30 days of issuance. These formal advisory opinions shall be edited for publication purposes as necessary to protect the identities of the individuals requesting formal advisory opinions. When the Commission issues a recommended formal advisory opinion to a legislator under subsection (b1) of this section, the Commission shall publish only the edited formal advisory opinion of the Committee within 30 days of receipt of the edited opinion from the Committee.

(e) Except as provided under subsections (b2), (d) and (e1) of this section, a request for advice, any advice provided by Commission staff, any formal or recommended formal advisory opinions, any supporting documents submitted or caused to be submitted to the Commission or Commission staff, and any documents prepared or collected by the Commission or Commission staff in connection with a request for advice are confidential. The identity of the individual making the request for advice, the existence of the request, and any information related to the request may not be revealed without the consent of the requestor. An individual who requests advice or receives advice, including a formal or recommended formal advisory opinion, may authorize the release to any other person, the State, or any governmental unit of the request, the advice, or any supporting documents.

For purposes of this section, "document" is as defined in G.S. 120-129. Requests for advice, any advice, and any documents related to requests for advice are not "public records" as defined in G.S. 132-1.

(e1) Staff to the Commission may share all information and documents related to requests for advice, made by legislators under this section with staff to the Committee. The information and documents in the possession of staff to the Committee are confidential and are not public records.

(f) This section shall apply to judicial officers only for the purpose of advice related to Article 3 of this Chapter.

(g) Requests for advice may be withdrawn by the requestor at any time prior to the issuance of the advice. (2006-201, s. 1; 2007-348, s. 31; 2008-213, ss. 2(b), 91.5; 2008-215, s. 6; 2009-570, s. 17.)

**Editor's Note.** — This section was amended by Session Laws 2008-213, s. 2(b), in the coded bill drafting format provided by G.S. 120-20.1. The act rewrote subsection (e), but the words "for" and "and advisory opinions issued under" were not set out as struck through in the act. Subsection (e) has been set out in the form above at the direction of the Revisor of Statutes. Session Laws 2009-570, s. 17, corrected the oversight.

Session Laws 2008-215, s. 9, provides: "This act is effective when it becomes law [August 15, 2008] and applies to all information received or collected by the State Auditor concerning alleged violations of Chapters 138A or 120C of the General Statutes or Article 14 of Chapter 120 of the General Statutes on or after January 1, 2007."

Session Laws 2008-213, s. 91.5, was contingent on Section 6 of Senate Bill 1875, 2007 Regular Session (Session Laws 2008-215, s. 6) becoming law, which it did.

**Effect of Amendments.** — Session Laws 2008-213, s. 2(b), effective January 1, 2007, and applicable to requests made on and after that date, rewrote the section.

Session Laws 2008-213, s. 91.5, effective August 15, 2008, redesignated subsection (b1) as added by Session Laws 2008-215, s. 6, as subsection (b2), and in subsection (b2), inserted "or (b1)" twice and added the last sentence.

Session Laws 2008-215, s. 6, effective August 15, 2008, added subsection (b1). See Editor's note for applicability.

Session Laws 2009-570, s. 17, effective August 28, 2009, deleted "for and advisory opinions issued under" at the end of subsection (e).

## § 138A-14. Ethics education program.

(a) The Commission shall develop and implement an ethics education and awareness program designed to instill in all covered persons and their immediate staffs, and legislative employees, a keen and continuing awareness of their ethical obligations and a sensitivity to situations that might result in real or potential conflicts of interest.

(b) The Commission shall make basic ethics education and awareness presentations to all public servants and their immediate staffs, upon their election, appointment, or employment, and shall offer periodic refresher presentations as the Commission deems appropriate. Every public servant shall participate in an ethics presentation approved by the Commission within six months of the public servant's election, reelection, appointment, or employment, and shall attend refresher ethics education presentations at least every two years thereafter in a manner as the Commission deems appropriate.

(b1) A public servant appointed to a board determined and designated as nonadvisory under G.S. 138A-10(a)(3) shall attend an ethics presentation approved by the Commission within six months of notification of the designation by the Commission and at least every two years thereafter in a manner as the Commission deems appropriate.

(c) The Commission, jointly with the Committee, shall make basic ethics education and awareness presentations to all legislators and legislative employees upon their election, reelection, appointment, or employment and shall offer periodic refresher presentations as the Commission and the Committee deem appropriate. Every legislator shall participate in an ethics presentation approved by the Commission and Committee within two months of either the convening of the General Assembly to which the legislator is elected or within two months of the legislator's appointment, whichever is later. Every legislative employee shall participate in an ethics presentation approved by the Commission and Committee within three months of employment, and shall attend refresher ethics education presentations at least every two years thereafter, in a manner as the Commission and Committee deem appropriate.

(d) Upon request, the Commission shall assist each agency in developing in-house education programs and procedures necessary or desirable to meet the agency's particular needs for ethics education, conflict identification, and conflict avoidance.

(e) Each agency head shall designate an ethics liaison who shall maintain active communication with the Commission on all agency ethical issues. The ethics liaison shall attend ethics education and awareness programs as provided under this section and lobbying education and awareness programs as provided under G.S. 120C-103 and continuously assess and advise the Commission of any issues or conduct which might reasonably be expected to result in a conflict of interest and seek advice and rulings from the Commission as to their appropriate resolution.

(f) The Commission shall publish a newsletter containing summaries of the Commission's opinions, policies, procedures, and interpretive bulletins as issued from time to time. The newsletter shall be distributed to all covered persons and legislative employees. Publication under this subsection may be done electronically.

(g) The Commission shall assemble and maintain a collection of relevant State laws, rules, and regulations that set forth ethical standards applicable to covered persons. This collection shall be made available electronically as resource material to public servants, and ethics liaisons, upon request.

(h) Repealed by Session Laws 2009-549, s. 12, effective August 28, 2009.

(i) This section shall not apply to judicial officers. (2006-201, s. 1; 2007-347, s. 9(a); 2008-213, ss. 59, 60; 2009-10, s. 4; 2009-549, s. 12.)

**Effect of Amendments.** — Session Laws 2008-213, ss. 59 and 60, effective August 15, 2008, in subsection (b), substituted "public servant's" for "person's" in the last sentence; and in subsection (c), substituted "legislator or legislative employee's" for "person's" in the last sentence.

Session Laws 2009-10, s. 4, effective March 26, 2009, rewrote subsection (c).

Session Laws 2009-549, s. 12, effective August 28, 2009, deleted "and the immediate staff of every public servant" following "Every public servant" in the last sentence of subsection (b); added subsection (b1); inserted "attend ethics education and awareness programs as provided under this section and lobbying education and awareness programs as provided under G.S. 120C-103 and" in the second sentence of subsection (e); and deleted former subsection (h), which read: "As used in this section, 'immediate staff' means those individuals who report directly to the public servant."

## § 138A-15. Duties of heads of State agencies.

(a) The head of each State agency, including the chair of each board subject to this Chapter, shall take an active role in furthering ethics in public service and ensuring compliance with this Chapter. The head of each State agency and the chair of each board shall make a conscientious, good-faith effort to assist public servants within the agency or on the board in monitoring their personal, financial, and professional affairs to avoid taking any action that results in a conflict of interest.

(b) The head of each State agency, including the chair of each board subject to this Chapter, shall maintain familiarity with and stay knowledgeable of the reports, opinions, newsletters, and other communications from the Commission regarding ethics in general and the interpretation and enforcement of this Chapter. The head of each State agency and the chair of each board shall also maintain familiarity with and stay knowledgeable of the Commission's reports, evaluations, opinions, or findings regarding individual public servants in that individual's agency or on that individual's board, or under that individual's supervision or control, including all reports, evaluations, opinions, or findings pertaining to actual or potential conflicts of interest.

(c) When an actual or potential conflict of interest is cited by the Commission under G.S. 138A-24(e) with regard to a public servant sitting on a board, the conflict shall be recorded in the minutes of the applicable board and duly brought to the attention of the membership by the board's chair as often as necessary to remind all members of the conflict and to help ensure compliance with this Chapter.

(d) The head of each State agency, including the chair of each board subject to this Chapter, shall periodically remind public servants under that individual's authority of the public servant's duties to the public under the ethical standards and rules of conduct in this Chapter, including the duty of each public servant to continually monitor, evaluate, and manage the public servant's personal, financial, and professional affairs to ensure the absence of conflicts of interest.

(e) At the beginning of any meeting of a board, the chair shall remind all members of their duty to avoid conflicts of interest under this Chapter. The chair also shall inquire as to whether there is any known conflict of interest with respect to any matters coming before the board at that time.

(f) The head of each State agency, including the chair of each board subject to this Chapter, shall ensure that legal counsel employed by or assigned to their agency or board are familiar with the provisions of this Chapter, including the Ethical Standards for Covered Persons set forth in Article 4 of this Chapter, and are available to advise public servants on the ethical considerations involved in carrying out their public duties in the best interest of the public. Legal counsel so engaged may consult with the Commission, seek the Commission's assistance or advice, and refer public servants and others to the Commission as appropriate.

(g) Taking into consideration the individual autonomy, needs, and circumstances of each agency and board, the head of each State agency, including the chair of each board subject to this Chapter, shall consider the need for the development and implementation of in-house educational programs, procedures, or policies tailored to meet the agency's or board's particular needs for ethics education, conflict identification, and conflict avoidance. This includes the periodic presentation to all agency heads, their chief deputies or assistants, other public servants under their supervision or control, and members of boards, of the basic ethics education and awareness presentation outlined in G.S. 138A-14 and any other workshop or seminar program the agency head or board chair deems necessary in implementing this Chapter. Agency heads and board chairs may request reasonable assistance from the Commission in complying with the requirements of this subsection.

(h) As soon as reasonably practicable after the designation, hiring, or promotion of their chief deputies, assistants, or other public servants under their supervision or control, or learning of the appointment or election of other public servants to a board covered under this Chapter, all agency heads and board chairs shall (i) notify the Commission of such designation, hiring, promotion, appointment, or election and (ii) provide these public servants with copies of this Chapter and all applicable financial disclosure forms, if these materials and forms have not been previously provided to these public servants in connection with their designation, hiring, promotion, appointment, or election. In order to avoid duplication of effort, agency heads and board chairs shall coordinate this effort with the Commission's staff. (2006-201, s. 1; 2007-347, s. 9(b); 2008-213, ss. 61, 62.)

**Effect of Amendments.** — Session Laws 2008-213, ss. 61 and 62, effective August 15, 2008, in subsections (b) and (d), substituted "individual's" for "person's" four times.

## §§ 138A-16 through 138A-20: Reserved for future codification purposes.

## Article 3.

## *Public Disclosure of Economic Interests.*

## § 138A-21. Purpose.

The purpose of disclosure of the financial and personal interests by covered persons is to assist covered persons and those who appoint, elect, hire, supervise, or advise them identify and avoid conflicts of interest and potential conflicts of interest between the covered person's private interests and the covered person's public duties. It is critical to this process that current and prospective covered persons examine, evaluate, and disclose those personal and financial interests that could be or cause a conflict of interest or potential conflict of interest between the covered person's private interests and the covered person's public duties. Covered persons must take an active, thorough, and conscientious role in the disclosure and review process, including having a complete knowledge of how the covered person's public position or duties might impact the covered person's private interests. Covered persons have an affirmative duty to provide any and all information that a reasonable person would conclude is necessary to carry out the purposes of this Chapter and to fully disclose any conflict of interest or potential conflict of interest between the covered person's public and private interests, but the disclosure, review, and evaluation process is not intended to result in the disclosure of unnecessary or irrelevant personal information. (2006-201, s. 1; 2008-213, s. 63.)

**Editor's Note.** — For effective date and applicability of this Chapter, see Editor's note at G.S. 138A-1.

**Effect of Amendments.** — Session Laws 2008-213, s. 63, effective August 15, 2008, deleted "persons" preceding "who appoint, elect" in the first sentence.

## § 138A-22. Statement of economic interest; filing required.

(a) Every covered person subject to this Chapter who is elected, appointed, or employed, including one appointed to fill a vacancy in elective office, except for public servants (i) included under G.S. 138A-3(30)b., e., f., or g. whose annual compensation from the State is less than sixty thousand dollars ($60,000), or (ii) who are ex officio student members under Chapters 115D and 116 of the General Statutes, shall file a statement of economic interest with the Commission prior to the covered person's initial appointment, election, or employment and no later than April 15 of every year thereafter, except as otherwise filed under subsections (c1) and (d) of this section. A prospective covered person required to file a statement under this Chapter shall not be appointed, employed, or receive a certificate of election, prior to submission by the Commission of the Commission's evaluation of the statement in accordance with this Article. The requirement for an annual filing under this subsection also shall apply to covered persons whose terms have expired but who continue to serve until the covered person's replacement is appointed. Once a statement of economic interest is properly completed and filed under this Article, the statement of economic interest does not need to be supplemented or refiled prior to the next due date set forth in this subsection.

(b) Notwithstanding subsection (a) of this section, individuals hired by, and appointees of, constitutional officers of the State may file a statement of economic interest within 30 days after their appointments or employment when the appointment or employment is made during the first 60 days of the constitutional officer's initial term in that constitutional office.

(c) Notwithstanding subsection (a) of this section, public servants, under G.S. 138A-3(30)j. and k., who have submitted a statement of economic interest under subsection (a) of this section, may be hired, appointed, or elected provisionally prior to submission by the Commission of the Commission's evaluation of the statement in accordance with this Article, subject to dismissal or removal based on the Commission's evaluation.

(c1) A public servant reappointed to a board between January 1 and April 15 shall file a current statement of economic interest prior to the reappointment.

(d) A candidate for an office subject to this Article shall file the statement of economic interest at the same place and in the same manner as the notice of candidacy for that office is required to be filed under G.S. 163-106 or G.S. 163-323 within 10 days of the filing deadline for the office the candidate seeks. An individual who is nominated under G.S. 163-114 after the primary and before the general election, and an individual who qualifies under G.S. 163-122 as an unaffiliated candidate in a general election, shall file a statement of economic interest with the county board of elections of each county in the senatorial or representative district. An individual nominated under G.S. 163-114 shall file the statement within three days following the individual's nomination, or not later than the day preceding the general election, whichever occurs first. An individual seeking to qualify as an unaffiliated candidate under G.S. 163-122 shall file the statement of economic interest with the petition filed under that section. An individual seeking to have write-in votes counted for that individual in a general election shall file a statement of economic interest at the same time the candidate files a declaration of intent under G.S. 163-123. A candidate of a new party chosen by convention shall file a statement of economic interest at the same time that the president of the convention certifies the names of its candidates to the State Board of Elections under G.S. 163-98.

(e) The State Board of Elections shall provide for notification of the statement of economic interest requirements of this Article to be given to any candidate filing for nomination or election to those offices subject to this Article at the time of the filing of candidacy.

(f) Within 10 days of the filing deadline for office of a covered person, the executive director of the State Board of Elections shall send to the State Ethics Commission a list of the names and addresses of each candidate who have filed as a candidate for office as a covered person. A county board of election shall forward any statements of economic interest filed with the board under this section to the State Board of Elections. The executive director of the State Board of Elections shall forward a certified copy of the statements of economic interest to the Commission for evaluation upon its filing with the State Board of Elections under this section.

(g) The Commission shall issue forms to be used for the statement of economic interest and shall revise the forms from time to time as necessary to carry out the purposes of this Chapter. Except as otherwise set forth in this section and in G.S. 138A-15(h), upon notification by the employing entity, the Commission shall furnish to all other covered persons the appropriate forms needed to comply with this Article. (2006-201, s. 1; 2007-29, s. 2; 2007-348, ss. 32, 33; 2008-213, s. 64; 2009-549, s. 13.)

**Effect of Amendments.** — Session Laws 2008-213, s. 64, effective August 15, 2008, in subsection (a), inserted "covered" in the third sentence; in subsection (b), substituted "individuals" for "persons"; and in subsection (d), substituted "an individual" for "a person," "individual's" for "person's," and "that individual" for "the person" throughout.

Session Laws 2009-549, s. 13, effective August 28, 2009, in subsection (a), inserted the clause (i) and (ii) designations in the first sentence and made a related change; and inserted "who are ex officio student members under Chapters 115D and 116 of the General Statutes," at the beginning of present clause (ii) in the first sentence.

## § 138A-23. Statements of economic interest as public records.

(a) The statements of economic interest filed by prospective public servants under this Article for appointed or employed positions and written evaluations by the Commission of these statements are not public records until the prospective public servant is appointed or employed by the State. All other statements of economic interest and all other written evaluations by the Commission of those statements are public records.

(b) The statements of economic interest filed by prospective public servants, and the written evaluations by the Commission of those statements, for individuals elected by the General Assembly shall be provided to the chair of the standing committee handling the legislation regarding the election and made available to all members of the General Assembly. The statements of economic interest filed by public servants elected to positions by the General Assembly, and written evaluations by the Commission of those statements, are not public records until the prospective public servant is sworn into office.

(c) The statements of economic interest filed by prospective public servants, and the written evaluations by the Commission of those statements, for individuals confirmed for appointment as a public servant by the General Assembly shall be provided to the chair of the standing committee handling the legislation regarding the appointment. The statements of economic interest filed by prospective public servants for confirmation for appointment by the General Assembly, and written evaluations by the Commission of those statements, are public records at the time of the announcement of the appointment. (2006-201, s. 1; 2007-347, s. 10; 2008-213, ss. 65, 66.)

**Effect of Amendments.** — Session Laws 2007-347, s. 10, effective August 9, 2007, designated the existing provisions as subsection (a), and added subsections (b) and (c).

Session Laws 2008-213, ss. 65 and 66, effective August 15, 2008, substituted "individuals" for "persons" in the first sentences of subsections (b) and (c).

## § 138A-24. Contents of statement.

(a) Any statement of economic interest filed under this Article shall be on a form prescribed by the Commission and sworn to by the filing person. Answers must be provided to all questions. The form shall include the following information about the filing person and the filing person's immediate family:

(1) Except as otherwise provided in this subdivision, the name, current mailing address, occupation, employer, and business of the filing person. Any individual holding or seeking elected office for which residence is a qualification for office shall include a home address. A judicial officer may use a current mailing address instead of the home address on the form required in this subsection. The judicial officer may also use the initials instead of the name of any unemancipated child of the judicial officer who also resides in the household of the judicial officer. If the judicial officer provides the initials of an unemancipated child, the judicial officer shall concurrently provide the name of the unemancipated child to the Commission. The name of an unemancipated child provided by the judicial officer to the Commission shall not be a public record under Chapter 132 of the General Statutes and is privileged and confidential.

(2) A list of each asset and liability included in this subdivision of whatever nature (including legal, equitable, or beneficial interest) with a value of at least ten thousand dollars ($10,000) owned by the filing person and the filing person's immediate family, except assets or liabilities held in a blind trust. This list shall include the following:

a. All real estate located in the State owned wholly or in part by the filing person or the filing person's immediate family, including descriptions adequate to determine the location by city and county of each parcel.

b. Real estate that is currently leased or rented to or from the State.

c. Personal property sold to or bought from the State within the preceding two years.

d. Personal property currently leased or rented to or from the State.

e. The name of each publicly owned company. For purposes of this sub-subdivision, the term "publicly owned company" shall not include a widely held investment fund, including a mutual fund, regulated investment company, or pension or deferred compensation plan, if all of the following apply:

1. The filing person or a member of the filing person's immediate family neither exercises nor has the ability to exercise control over the financial interests held by the fund.

2. The fund is publicly traded, or the fund's assets are widely diversified.

f. The name of each nonpublicly owned company or business entity, including interests in partnerships, limited partnerships, joint ventures, limited liability companies, limited liability partnerships, and closely held corporations.

g. For each company or business entity listed under sub-subdivision f. of this subdivision, if known, a list of any other companies or business entities in which the company or business entity owns securities or equity interests exceeding a value of ten thousand dollars ($10,000).

h. A list of all nonpublicly owned businesses of which the filing person and the filing person's immediate family is an officer, employee, director, partner, owner, or member or manager of a limited liability company.

i. For any company or business entity listed under sub-subdivisions f., g., and h. of this subdivision, if known, any company or business entity that has any material business dealings, contracts, or other involvement with the State, or is regulated by the State, including a brief description of the business activity.

j. For a vested trust created, established, or controlled by the filing person of which the filing person or the members of the filing person's immediate family are the beneficiaries, excluding a blind trust, the name and address of the trustee, a description of the trust, and the filing person's relationship to the trust.

k. A list of all liabilities, excluding indebtedness on the filing person's primary personal residence, by type of creditor and debtor.

l. Repealed by Session Laws 2007-348, s. 34. See Editor's note for effective date.

m. A list of all stock options in a company or business not otherwise disclosed on this statement.

(3) The name of each source (not specific amounts) of income of more than five thousand dollars ($5,000) received during the previous year by business or industry type, if that source is not listed under subdivision (2) of this subsection. Income shall include salary, wages, professional fees, honoraria, interest, dividends, rental income, and business income from any source other than capital gains, federal government retirement, military retirement, or social security income.

(4) If the filing person is a practicing attorney, an indication of whether the filing person, or the law firm with which the filing person is affiliated, earned legal fees during the past year in excess of ten thousand dollars ($10,000) from any of the following categories of legal representation:

a. Administrative law.
b. Admiralty law.
c. Corporate law.
d. Criminal law.
e. Decedents' estates law.
f. Environmental law.
g. Insurance law.
h. Labor law.
i. Local government law.
j. Negligence or other tort litigation law.
k. Real property law.
l. Securities law.
m. Taxation law.
n. Utilities regulation law.

(5) Except for a filing person in compliance under subdivision (4) of this subsection, if the filing person is a licensed professional or provides consulting services, either individually or as a member of a professional association, a list of categories of business and the nature of services rendered, for which payment for services were charged or paid during the past year in excess of ten thousand dollars ($10,000).

(6) An indication of whether the filing person, the filing person's employer, a member of the filing person's immediate family, or the immediate family member's employer is licensed or regulated by, or has a business relationship with, the board or employing entity with which the filing person is or will be associated. This subdivision does not apply to a legislator, a judicial officer, or that legislator's or judicial officer's immediate family.

(7) A list of societies, organizations, or advocacy groups, pertaining to subject matter areas over which the public servant's agency or board

may have jurisdiction, in which the public servant or a member of the public servant's immediate family is a director, officer, or governing board member. This subdivision does not apply to a legislator, a judicial officer, or that legislator's or judicial officer's immediate family.

(8) A list of all things with a total value of over two hundred dollars ($200.00) per calendar quarter given and received without valuable consideration and under circumstances that a reasonable person would conclude that the thing was given for the purpose of lobbying, if such things were given by a person not required to report under Chapter 120C of the General Statutes, excluding things given by a member of the filing person's extended family. The list shall include only those things received during the 12 months preceding the reporting period under subsection (d) of this section, and shall include the source of those things. The list required by this subdivision shall not apply to things of monetary value received by the filing person prior to the time the filing person filed or was nominated as a candidate for office, as described in G.S. 138A-22, or was appointed or employed as a covered person.

(9) A list of any felony convictions of the filing person, excluding any felony convictions for which a pardon of innocence or order of expungement has been granted.

(10) Any other information that the filing person believes may assist the Commission in advising the filing person with regards to compliance with this Chapter.

(11) A list of any nonprofit corporation or organization with which associated during the preceding calendar year, including a list of which of those nonprofit corporations or organizations with which associated do business with the State or receive State funds and a brief description of the nature of the business, if known or with which due diligence could reasonably be known.

(12) A statement of whether the filing person or the filing person's immediate family is or has been a lobbyist or lobbyist principal registered under Chapter 120C of the General Statutes within the preceding 12 months.

(b) The Supreme Court, the Committee, constitutional officers of the State, heads of principal departments, the Board of Governors of The University of North Carolina, the State Board of Community Colleges, other boards, and the appointing authority or employing entity may require a filing person to file supplemental information in conjunction with the filing of that filing person's statement of economic interest. These supplemental filings requirements shall be filed with the Commission and included on the forms to be filed with the Commission. The Commission shall evaluate the supplemental forms as part of the statement of economic interest. The failure to file supplemental forms shall be subject to the provisions of G.S. 138A-25.

(c) Each statement of economic interest shall contain sworn certification by the filing person that the filing person has read the statement and that, to the best of the filing person's knowledge and belief, the statement is true, correct, and complete. The filing person's sworn certification also shall provide that the filing person has not transferred, and will not transfer, any asset, interest, or other property for the purpose of concealing it from disclosure while retaining an equitable interest therein.

(c1) Reserved for future codification purposes.

(c2) A public servant appointed to a board determined and designated as nonadvisory under G.S. 138A-10(a)(3) shall file the initial statement of economic interest within 60 days of notification of the designation by the Commission and as provided in this section thereafter.

(d) All information provided in the statement of economic interest shall be current as of the last day of December of the year preceding the date the statement of economic interest was due.

(e) The Commission shall prepare a written evaluation of each statement of economic interest relative to conflicts of interest and potential conflicts of interest. This subsection does not apply to statements of economic interest of legislators and judicial officers. The Commission shall submit the evaluation to all of the following:

(1) The filing person who submitted the statement.
(2) The head of the agency in which the filing person serves.
(3) The Governor for gubernatorial appointees and employees in agencies under the Governor's authority.
(4) Repealed by Session Laws 2008-213, s. 74, effective August 15, 2008.
(5) The appointing or hiring authority for those public servants not under the Governor's authority.
(6) The State Board of Elections for those filing persons who are elected.
(7) Repealed by Session Laws 2008-213, s. 74, effective August 15, 2008.

(f) The Commission shall prepare a written evaluation of each statement of economic interest for nominees of the Board of Governors of The University of North Carolina elected pursuant to G.S. 116-6, and nominees of the State Board of Community Colleges elected pursuant to G.S. 115D-2.1 within seven days of the submission of the completed statement of economic interest to the Commission. (2006-201, s. 1; 2007-29, s. 1; 2007-348, s. 34; 2008-187, s. 32; 2008-213, ss. 67-72(a), 73, 74, 74.5, 91; 2009-549, s. 14; 2009-570, s. 45.)

**Editor's Note.** — Session Laws 2007-348, s. 44, as amended by Session Laws 2008-187, s. 32, and Session Laws 2008-213, s. 91, made the amendment by Session Laws 2007-348, s. 34, effective January 1, 2008.

**Effect of Amendments.** — Session Laws 2008-213, ss. 67 through 71 and 73 through 74.5, effective August 15, 2008, in subdivision (a)(1), inserted "filing" near the end of the first sentence, and substituted "individual" for "person" in the second sentence; in subdivision (a)(2)h, substituted "filing person and the filing person's immediate family" for "person"; in subdivision (a)(6), substituted "legislator, a judicial officer, or that legislator's or judicial officer's immediate family" for "legislator or a judicial officer"; in subdivision (a)(7), substituted "legislator's or judicial officer's" for "person's"; in subdivision (a)(8), inserted "filing" near the end of the first sentence; in subsection (b), inserted "filing" in the first sentence; in subsection (e), added the second sentence; deleted subdivisions (e)(4) and (e)(7), relating to the Chief Justice and the Committee; and added subsection (f).

Session Laws 2008-213, s. 72(a), effective January 1, 2007, and applicable to statements of economic interest filed on or after that date, rewrote subdivision (a)(10).

Session Laws 2009-549, s. 14, effective August 28, 2009, added subsection (c2).

Session Laws 2009-570, s. 45, effective August 28, 2009, substituted "G.S. 115D-2.1" for "G.S. 115D-2" in subsection (f).

## § 138A-25. Failure to file.

(a) Within 30 days after the date due under G.S. 138A-22, the Commission shall notify filing persons who have failed to file or filing persons whose statement has been deemed incomplete. For a filing person currently serving as a covered person, the Commission shall notify the filing person and the ethics liaison that if the statement of economic interest is not filed or completed within 30 days of receipt of the notice of failure to file or complete, the filing person shall be subject to a fine as provided for in this section.

(b) Any filing person who fails to file or complete a statement of economic interest within 30 days of the receipt of the notice, required under subsection (a) of this section, shall be subject to a fine of two hundred fifty dollars ($250.00), to be imposed by the Commission.

(c) Failure by any filing person to file or complete a statement of economic interest within 60 days of the receipt of the notice, required under subsection

(a) of this section, shall be deemed to be a violation of this Chapter and shall be grounds for disciplinary action under G.S. 138A-45. (2006-201, s. 1; 2008-213, s. 75; 2009-549, s. 15.)

**Effect of Amendments.** — Session Laws 2008-213, s. 75, effective August 15, 2008, inserted "filing" four times in subsection (a).

Session Laws 2009-549, s. 15, effective August 28, 2009, inserted "and the ethics liaison" in the second sentence of subsection (a).

## § 138A-26. Concealing or failing to disclose material information.

A filing person who knowingly conceals or knowingly fails to disclose information that is required to be disclosed on a statement of economic interest under this Article shall be guilty of a Class 1 misdemeanor and shall be subject to disciplinary action under G.S. 138A-45. (2006-201, s. 1.)

## § 138A-27. Penalty for false information.

A filing person who provides false information on a statement of economic interest as required under this Article knowing that the information is false is guilty of a Class H felony and shall be subject to disciplinary action under G.S. 138A-45. (2006-201, s. 1.)

**§§ 138A-28 through 138A-30:** Reserved for future codification purposes.

## Article 4.

## *Ethical Standards for Covered Persons.*

## § 138A-31. Use of public position for private gain.

(a) Except as permitted under G.S. 138A-38, a covered person or legislative employee shall not knowingly use the covered person's or legislative employee's public position in an official action or legislative action that will result in financial benefit to the covered person or legislative employee, a member of the covered person's or legislative employee's extended family, or business with which the covered person or legislative employee is associated. This subsection shall not apply to financial or other benefits derived by a covered person or legislative employee that the covered person or legislative employee would enjoy to an extent no greater than that which other citizens of the State would or could enjoy, or that are so remote, tenuous, insignificant, or speculative that a reasonable person would conclude under the circumstances that the covered person's or legislative employee's ability to protect the public interest and perform the covered person's or legislative employee's official duties would not be compromised.

(b) A covered person shall not mention or permit another person to mention the covered person's public position in nongovernmental advertising that advances the private interest of the covered person or others. The prohibition in this subsection shall not apply to political advertising, news stories, news articles, the inclusion of a covered person's position in a directory or biographical listing, or the charitable solicitation for a nonprofit business entity qualifying under 26 U.S.C. § 501(c)(3). Disclosure of a covered person's position to an existing or prospective customer, supplier, or client is not considered advertising for purposes of this subsection when the disclosure could reasonably be considered material by the customer, supplier, or client.

(c) Notwithstanding G.S. 163-278.16A, no covered person shall use or permit the use of State funds for any advertisement or public service announcement in a newspaper, on radio, television, magazines, or billboards, that contains that covered person's name, picture, or voice, except in case of State or national emergency and only if the announcement is reasonably necessary to the covered person's official function. This subsection shall not apply to fund-raising on behalf of and aired on public radio or public television. (2006-201, s. 1; 2009-549, s. 16.)

**Editor's Note.** — For effective date and applicability of this Chapter, see Editor's note at G.S. 138A-1.

**Effect of Amendments.** — Session Laws 2009-549, s. 16, effective August 28, 2009, deleted "direct or indirect" following "financial benefit" in the first sentence of subsection (a).

## § 138A-32. Gifts.

(a) A covered person or a legislative employee shall not knowingly, directly or indirectly, ask, accept, demand, exact, solicit, seek, assign, receive, or agree to receive anything of value for the covered person or legislative employee, or for another person, in return for being influenced in the discharge of the covered person's or legislative employee's official responsibilities, other than that which is received by the covered person or the legislative employee from the State for acting in the covered person's or legislative employee's official capacity.

(b) A covered person may not solicit for a charitable purpose any thing of monetary value from any subordinate State employee. This subsection shall not apply to generic written solicitations to all members of a class of subordinates. Nothing in this subsection shall prohibit a covered person from serving as the honorary head of the State Employees Combined Campaign.

(c) No public servant, legislator, or legislative employee shall knowingly accept a gift from a lobbyist or lobbyist principal registered under Chapter 120C of the General Statutes. No legislator or legislative employee shall knowingly accept a gift from liaison personnel designated under Chapter 120C of the General Statutes. No public servant, legislator, or legislative employee shall accept a gift knowing all of the following:

(1) The gift was obtained indirectly from a lobbyist, lobbyist principal, or liaison personnel registered under Chapter 120C of the General Statutes.

(2) The lobbyist, lobbyist principal, or liaison personnel registered under Chapter 120C of the General Statutes intended for the ultimate recipient of the gift to be a public servant, legislator, or legislative employee as provided in G.S. 120C-303.

(d) No public servant shall knowingly accept a gift from a person whom the public servant knows or has reason to know any of the following:

(1) Is doing or is seeking to do business of any kind with the public servant's employing entity.

(2) Is engaged in activities that are regulated or controlled by the public servant's employing entity.

(3) Has financial interests that may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the public servant's official duties.

(d1) No public servant shall accept a gift knowing all of the following:

(1) The gift was obtained indirectly from a person described under subdivisions (d)(1), (2), and (3) of this section.

(2) The person described under subdivisions (d)(1), (2), and (3) of this section intended for the ultimate recipient of the gift to be a public servant.

(e) Subsections (c), (d), and (d1) of this section shall not apply to any of the following:

(1) Food and beverages for immediate consumption in connection with any of the following:

a. An open meeting of a public body, provided that the open meeting is properly noticed under Article 33C of Chapter 143 of the General Statutes.

b. A gathering of a person or governmental unit with at least 10 or more individuals in attendance open to the general public, provided that a sign or other communication containing a message that is reasonably designed to convey to the general public that the gathering is open to the general public is displayed at the gathering.

c. A gathering of a person or governmental unit to which the entire board of which a public servant is a member, at least 10 public servants, all the members of the House of Representatives, all the members of the Senate, all the members of a county or municipal legislative delegation, all the members of a recognized legislative caucus with regular meetings other than meetings with one or more lobbyists, all the members of a committee, a standing subcommittee, a joint committee or joint commission of the House of Representatives, the Senate, or the General Assembly, or all legislative employees are invited, and one of the following applies:

1. At least 10 individuals associated with the person or governmental unit actually attend, other than the covered person or legislative employee, or the immediate family of the covered person or legislative employee.

2. All shareholders, employees, board members, officers, members, or subscribers of the person or governmental unit located in North Carolina are notified and invited to attend.

For purposes of this sub-subdivision only, the term "invited" shall mean written notice from at least one host or sponsor of the gathering containing the date, time, and location of the gathering given at least 24 hours in advance of the gathering to the specific qualifying group listed in this sub-subdivision. If it is known at the time of the written notice that at least one sponsor is a lobbyist or lobbyist principal, the written notice shall also state whether or not the gathering is permitted under this section.

(2) Informational materials relevant to the duties of the covered person or legislative employee.

(3) Reasonable actual expenditures of the legislator, public servant, or legislative employee for food, beverages, registration, travel, lodging, other incidental items of nominal value, and entertainment, in connection with (i) a legislator's, public servant's, or legislative employee's attendance at an educational meeting for purposes primarily related to the public duties and responsibilities of the legislator, public servant, or legislative employee; (ii) a legislator's, public servant's, or legislative employee's participation as a speaker or member of a panel at a meeting; (iii) a legislator's or legislative employee's attendance and participation in meetings of a nonpartisan state, regional, national, or international legislative organization of which the General Assembly is a member or that the legislator or legislative employee is a member or participant of by virtue of that

legislator's or legislative employee's public position, or as a member of a board, agency, or committee of such organization; or (iv) a public servant's attendance and participation in meetings as a member of a board, agency, or committee of a nonpartisan state, regional, national, or international organization of which the public servant's agency is a member or the public servant is a member by virtue of that public servant's public position, provided the following conditions are met:

- a. The reasonable actual expenditures shall be made by a lobbyist principal, and not a lobbyist.
- b. Any meeting must be attended by at least 10 or more participants, have a formal agenda, and notice of the meeting has been given at least 10 days in advance.
- c. Any food, beverages, transportation, or entertainment must be provided to all attendees or defined groups of 10 or more attendees as part of the meeting or in conjunction with the meeting.
- d. Any entertainment must be incidental to the principal agenda of the meeting.
- e. If the legislator, public servant, or legislative employee is participating as a speaker or member of a panel, then that legislator, public servant, or legislative employee must be a bona fide speaker or participant.

(4) A plaque or similar nonmonetary memento recognizing individual services in a field or specialty or to a charitable cause.

(5) Gifts accepted on behalf of the State for use by the State or for the benefit of the State.

(6) Anything generally made available or distributed to the general public or all other State employees by lobbyists or lobbyist principals, or persons described in subdivisions (d)(1), (2), or (3) of this section.

(7) Gifts from the covered person's or legislative employee's extended family, or a member of the same household of the covered person or legislative employee.

(8) Gifts given to a public servant not otherwise subject to an exception under this subsection, where the gift is food and beverages, transportation, lodging, entertainment or related expenses associated with the public business of industry recruitment, promotion of international trade, or the promotion of travel and tourism, and the public servant is responsible for conducting the business on behalf of the State, provided all the following conditions apply:

- a. The public servant did not solicit the gift, and the public servant did not accept the gift in exchange for the performance of the public servant's official duties.
- b. The public servant reports electronically to the Commission within 30 days of receipt of the gift or of the date set for disclosure of public records under G.S. 132-6(d), if applicable. The report shall include a description and value of the gift and a description how the gift contributed to the public business of industry recruitment, promotion of international trade, or the promotion of travel and tourism. This report shall be posted to the Commission's public Web site.
- c. A tangible gift, other than food or beverages, not otherwise subject to an exception under this subsection shall be turned over as State property to the Department of Commerce within 30 days of receipt, except as permitted under subsection (f) of this section.

(9) Gifts of personal property valued at less than one hundred dollars ($100.00) given to a public servant in the commission of the public servant's official duties if the gift is given to the public servant as a

personal gift in another country as part of an overseas trade mission, and the giving and receiving of such personal gifts is considered a customary protocol in the other country.

(10) Gifts given or received as part of a business, civic, religious, fraternal, personal, or commercial relationship provided all of the following conditions are met:

a. The relationship is not related to the public servant's, legislator's, or legislative employee's public service or position.

b. The gift is made under circumstances that a reasonable person would conclude that the gift was not given for the purpose of lobbying.

(11) Food and beverages for immediate consumption and related transportation provided all of the following conditions are met:

a. The food, beverage, or transportation is given by a lobbyist principal and not a lobbyist.

b. The food, beverage, or transportation is provided during a conference, meeting, or similar event and is available to all attendees of the same class as the recipient.

c. The recipient of the food, beverage, or transportation is a director, officer, governing board member, employee, or independent contractor of one of the following:

1. The lobbyist principal giving the food, beverage, or transportation.

2. A third party that received the funds to purchase the food, beverages, or transportation.

(12) Food and beverages for immediate consumption at an organized gathering of a person, the State, or a governmental unit to which a public servant is invited to attend for purposes primarily related to the public servant's public service or position, and to which at least 10 individuals, other than the public servant, or the public servant's immediate family, actually attend, or to which all shareholders, employees, board members, officers, members, or subscribers of the person or governmental unit who are located in a specific North Carolina office or county are notified and invited to attend.

(f) A prohibited gift that would constitute an expense appropriate for reimbursement by the public servant's employing entity if it had been incurred by the public servant personally shall be considered a gift accepted by or donated to the State, provided the public servant has been approved by the public servant's employing entity to accept or receive such things of value on behalf of the State. The fact that the employing entity's reimbursement rate for the type of expense is less than the value of a particular gift shall not render the gift prohibited.

(g) A prohibited gift shall be, and a permissible gift may be, promptly declined, returned, paid for at fair market value, or donated to charity or the State.

(h) A covered person or legislative employee shall not accept an honorarium from a source other than the employing entity for conducting any activity where any of the following apply:

(1) The employing entity reimburses the covered person or legislative employee for travel, subsistence, and registration expenses.

(2) The employing entity's work time or resources are used.

(3) The activity would be considered official duty or would bear a reasonably close relationship to the covered person's or legislative employee's official duties.

An outside source may reimburse the employing entity for actual expenses incurred by a covered person or legislative employee in conducting an activity within the duties of the covered person or legislative employee, or may pay a fee to the employing entity, in lieu of an honorarium, for the services of the covered person or legislative employee. An honorarium permissible under this subsection shall not be considered a gift for purposes of subsection (c) of this section.

(i) Acceptance or solicitation of a gift in compliance with this section without corrupt intent shall not constitute a violation of the statutes related to bribery under G.S. 14-217, 14-218, or 120-86. (2006-201, s. 1; 2007-347, s. 11; 2007-348, ss. 15(b), 35-41(a); 2008-213, ss. 77(a), 78(a), 79-82, 90; 2009-549, s. 17.)

**Editor's Note.** — Session Laws 2007-348, s. 44, as amended by Session Laws 2008-187, s. 32, and Session Laws 2008-213, s. 91, provides: "Sections 17, 23, 39, 40 and 41 of this act are effective January 1, 2007. Section 9 of this act is effective July 1, 2007. Sections 8, 11, 15, 20, 22, 25, and 42 of this act become effective October 1, 2007. Section 18 of this act becomes effective December 1, 2007. Section 34 of this act becomes effective January 1, 2008. The remainder of this act is effective when this act becomes law."

**Effect of Amendments.** — Session Laws 2007-348, ss. 15(b), and 35-41(a), rewrote subsection (c); in subsection (d), deleted "directly or indirectly" following "gift" in the introductory language; added subsection (d1); in subsection (e), in the introductory language, substituted "Subsections (c), (d), and (d1)" for "Subsections (c) and (d)"; rewrote subdivision (e)(3); in subdivision (e)(6), added "or persons described in subdivisions (d)(1), (2), or (3) of this section" at the end; rewrote subdivision (e)(10); added subdivisions (e)(11) and (e)(12); and, in subsection (g), substituted "be, and a permissible gift may be, promptly" for "be" and deleted "immediately" following "donated." For effective dates, see Editor's note.

Session Laws 2008-213, ss. 77(a) and 78(a), effective December 1, 2008, in subsection (c), in the introductory language, added the second sentence, and deleted "from a third party" following "shall accept a gift" near the end; in subdivision (c)(1), substituted "gift was obtained indirectly from a lobbyist, lobbyist principal, or liaison personnel" for "third party obtained the gift from a lobbyist or lobbyist principal"; in subdivision (c)(2), substituted "lobbyist, lobbyist principal, or liaison personnel" for "lobbyist or lobbyist principal"; in subsection (d1), deleted "from a third party" following "shall accept a gift" in the introductory language; in subdivision (d1)(1), substituted "gift was obtained indirectly" for "third party obtained the gift"; and in subdivision (d1)(2), substituted "ultimate recipient of the gift to be a" for "gift to benefit the."

Session Laws 2008-213, ss. 79 through 82, effective August 15, 2008, rewrote subdivision (e)(1); in subdivision (e)(3), substituted "legislator's or legislative employee's" for "person's" in clause (iii), substituted "public servant's" for "person's" in clause (iv); in subdivision (e)(5), inserted "use by the State or for"; in subdivision (e)(10)a, substituted "public servant's, legislator's, or legislative employee's" for "person's"; and in subdivision (e)(12), inserted "the State, or a governmental unit" and "or governmental unit."

Session Laws 2008-213, s. 90, effective August 15, 2008, in subdivisions (c)(1) and (e)(3)a, substituted "lobbyist principal" for "lobbyist's principal"; and substituted "lobbyist principals" for "lobbyist's principals" in subdivision (e)(6).

Session Laws 2009-549, s. 17, effective August 28, 2009, substituted "a person or governmental unit" for "an organization" in subdivision (e)(1)b.

## § 138A-33. Other compensation.

A public servant or legislative employee shall not solicit or receive personal financial gain, other than that received by the public servant or legislative employee from the State, or with the approval of the employing entity, for acting in the public servant's or legislative employee's official capacity, or for advice or assistance given in the course of carrying out the public servant's or legislative employee's duties. (2006-201, s. 1.)

## § 138A-34. Use of information for private gain.

A public servant or legislative employee shall not use or disclose nonpublic information gained in the course of, or by reason of, the public servant's or legislative employee's official responsibilities in a way that would affect a personal financial interest of the public servant or legislative employee, a member of the public servant's or legislative employee's extended family, or a person or governmental unit with whom or business with which the public servant or legislative employee is associated. A public servant or legislative employee shall not improperly use or improperly disclose any confidential information. (2006-201, s. 1; 2008-213, s. 83.)

**Effect of Amendments.** — Session Laws 2008-213, s. 83, effective August 15, 2008, inserted "or governmental unit" in the first sentence.

## § 138A-35. Other rules of conduct.

(a) A public servant shall make a due and diligent effort before taking any action, including voting or participating in discussions with other public servants on a board on which the public servant also serves, to determine whether the public servant has a conflict of interest. If the public servant is unable to determine whether or not a conflict of interest may exist, the public servant has a duty to inquire of the Commission as to that conflict.

(b) A public servant shall continually monitor, evaluate, and manage the public servant's personal, financial, and professional affairs to ensure the absence of conflicts of interest.

(c) A public servant shall obey all other civil laws, administrative requirements, and criminal statutes governing conduct of State government applicable to appointees and employees. (2006-201, s. 1.)

## § 138A-36. Public servant participation in official actions.

(a) Except as permitted by subsection (d) of this section and under G.S. 138A-38, no public servant acting in that capacity, authorized to perform an official action requiring the exercise of discretion, shall participate in an official action by the employing entity if the public servant knows the public servant or a person with which the public servant is associated may incur a reasonably foreseeable financial benefit from the matter under consideration, which financial benefit would impair the public servant's independence of judgment or from which it could reasonably be inferred that the financial benefit would influence the public servant's participation in the official action.

(b) A public servant described in subsection (a) of this section shall abstain from taking any verbal or written action in furtherance of the official action. The public servant shall submit in writing to the employing entity the reasons for the abstention. When the employing entity is a board, the abstention shall be recorded in the employing entity's minutes.

(c) A public servant shall take appropriate steps, under the particular circumstances and considering the type of proceeding involved, to remove himself or herself to the extent necessary, to protect the public interest and comply with this Chapter, from any proceeding in which the public servant's impartiality might reasonably be questioned due to the public servant's familial, personal, or financial relationship with a participant in the proceeding. A participant includes (i) an owner, shareholder, partner, member or manager of a limited liability company, employee, agent, officer, or director of a business, organization, or group involved in the proceeding, or (ii) an organization or group that has petitioned for rule making or has some specific, unique, and substantial interest in the proceeding. Proceedings include quasi-judicial proceedings and quasi-legislative proceedings. A personal relationship includes one in a leadership or policy-making position in a business, organization, or group.

(d) If a public servant is uncertain about whether the relationship described in subsection (c) of this section justifies removing the public servant from the proceeding under subsection (c) of this section, the public servant shall disclose the relationship to the individual presiding over the proceeding and seek appropriate guidance. The presiding officer, in consultation with legal counsel if necessary, shall then determine the extent to which the public servant will be permitted to participate. If the affected public servant is the individual presiding, then the vice-chair or any other substitute presiding officer shall make the determination. A good-faith determination under this subsection of the allowable degree of participation by a public servant is presumptively valid and only subject to review under G.S. 138A-12 upon a clear and convincing showing of mistake, fraud, abuse of discretion, or willful disregard of this Chapter.

(e) This section shall not allow participation in an official action prohibited by G.S. 14-234. (2006-201, s. 1; 2007-347, s. 12; 2007-348, s. 42; 2008-213, s. 84(a).)

**Effect of Amendments.** — Session Laws 2008-213, s. 84(a), effective August 15, 2008, rewrote subsection (a); and in subsection (d), inserted "about" in the first sentence and substituted "individual" for "person" twice.

## § 138A-37. Legislator participation in official actions.

(a) Except as permitted under G.S. 138A-38, no legislator shall participate in a legislative action if the legislator knows the legislator or a person with which the legislator is associated may incur a reasonably foreseeable financial benefit from the action, and if after considering whether the legislator's judgment would be substantially influenced by the financial benefit and considering the need for the legislator's particular contribution, including special knowledge of the subject matter to the effective functioning of the legislature, the legislator concludes that an actual financial benefit does exist which would impair the legislator's independence of judgment.

(a1) The legislator shall submit in writing to the principal clerk of the house of which the legislator is a member the reasons for the abstention from participation in the legislative matter.

(b) If the legislator has a material doubt as to whether the legislator should act, the legislator may submit the question for an advisory opinion to the State Ethics Commission in accordance with G.S. 138A-13 or the Legislative Ethics Committee in accordance with G.S. 120-104. (2006-201, s. 1; 2007-347, s. 13; 2008-213, s. 84(b).)

**Effect of Amendments.** — Session Laws 2008-213, s. 84(b), effective August 15, 2008, rewrote subsection (a) and inserted the subsection (a1) designator.

## § 138A-38. Permitted participation exception.

(a) Notwithstanding G.S. 138A-36 and G.S. 138A-37, a covered person may participate in an official action or legislative action under any of the following circumstances except as specifically limited:

(1) The only interest or reasonably foreseeable benefit or detriment that accrues to the covered person, the covered person's extended family, business with which the covered person is associated, or nonprofit corporation or organization with which the covered person is associated as a member of a profession, occupation, or general class is no greater than that which could reasonably be foreseen to accrue to all members of that profession, occupation, or general class.

(2) When an official or legislative action affects or would affect the covered person's compensation and allowances as a covered person.

(3) Before the covered person participated in the official or legislative action, the covered person requested and received from the Commission or Committee a written advisory opinion that authorized the participation. In authorizing the participation under this subdivision, the Commission or Committee shall consider the need for the legislator's particular contribution, such as special knowledge of the subject matter, to the effective functioning of the General Assembly.

(4) Before participating in an official action, a public servant made full written disclosure to the public servant's employing entity which then made a written determination that the interest or benefit would neither impair the public servant's independence of judgment nor influence the public servant's participation in the official action. The employing entity shall file a copy of that written determination with the Commission.

(5) When action is ministerial only and does not require the exercise of discretion.

(6) When a public or legislative body records in its minutes that it cannot obtain a quorum in order to take the official or legislative action because the covered person is disqualified from acting under G.S. 130-36, G.S. 138A-37, or this section, the covered person may be counted for purposes of a quorum, but shall otherwise abstain from taking any further action.

(7) When a public servant notifies the Commission in writing that the public servant judicial employee, or someone whom the public servant appoints to act in the public servant's stead, or both, are the only individuals having legal authority to take an official action, and the public servant discloses in writing the circumstances and nature of the conflict of interest.

(b) This section shall not allow participation in an official action prohibited by G.S. 14-234.

(c) Notwithstanding G.S. 138A-37, if a legislator is employed or retained by, or is an independent contractor of, a governmental unit, and the legislator is the only member of the house elected from the district where that governmental unit is located, then the legislator may take legislative action on behalf of that governmental unit provided the legislator discloses in writing to the principal clerk the nature of the relationship with the governmental unit prior to, or at the time of, taking the legislative action.

(d) Notwithstanding G.S. 138A-36, service by the president, chief financial officer, chief administrative officer, or voting member of the board of trustees of a community college as an officer, employee, or member of the board of directors of a nonprofit corporation established under G.S. 115D-20(9) to support the community college shall not constitute a conflict of interest under G.S. 138A-36, provided that the majority of the nonprofit corporation's board of directors is not comprised of the president, chief financial officer, and chief administrative officer, or voting members of the board of trustees of the community college which the nonprofit corporation was created to support. (2006-201, s. 1; 2007-347, s. 14; 2008-213, s. 85.)

**Effect of Amendments.** — Session Laws 2008-213, s. 85, effective August 15, 2008, added subsections (c) and (d).

## § 138A-39. Disqualification to serve.

(a) Within 30 days of notice of the Commission's determination that a public servant has a disqualifying conflict of interest, the public servant shall eliminate the interest that constitutes the disqualifying conflict of interest or resign from the public position.

(b) Failure by a public servant to comply with subsection (a) of this section is a violation of this Chapter for purposes of G.S. 138A-45.

(c) A decision under this section shall be considered a final decision for contested case purposes under Article 3 of Chapter 150B of the General Statutes.

(d) As used in this section, a disqualifying conflict of interest is a conflict of interest of such significance that the conflict of interest would prevent a public servant from fulfilling a substantial function or portion of the public servant's public duties. (2006-201, s. 1.)

### § 138A-40. Employment and supervision of members of covered person's or legislative employee's extended family.

A covered person or legislative employee shall not cause the employment, appointment, promotion, transfer, or advancement of an extended family member of the covered person or legislative employee to a State office, or a position to which the covered person or legislative employee supervises or manages, except for positions at the General Assembly as permitted under G.S. 120-32(2). A public servant or legislative employee shall not supervise, manage, or participate in an action relating to the discipline of a member of the public servant's or legislative employee's extended family, except as specifically authorized by the public servant's or legislative employee's employing entity. (2006-201, s. 1; 2007-347, s. 15.)

### § 138A-41. Other ethics standards.

Nothing in this Chapter shall prevent the Supreme Court, the Committee, the Legislative Services Commission, constitutional officers of the State, heads of principal departments, the Board of Governors of The University of North Carolina, the State Board of Community Colleges, or other boards from adopting additional or supplemental ethics standards applicable to that public agency's operations. (2006-201, s. 1.)

**§§ 138A-42 through 138A-44:** Reserved for future codification purposes.

## Article 5.

## *Violation Consequences.*

### § 138A-45. Violation consequences.

(a) Violation of this Chapter by any covered person or legislative employee is grounds for disciplinary action. Except as specifically provided in this Chapter and for perjury under G.S. 138A-12 and G.S. 138A-24, no criminal penalty shall attach for any violation of this Chapter.

(b) The willful failure of any public servant serving on a board to comply with this Chapter is misfeasance, malfeasance, or nonfeasance. In the event of misfeasance, malfeasance, or nonfeasance, the offending public servant serving on a board is subject to removal from the board of which the public servant is a member. For appointees of the Governor and members of the Council of State, the appointing authority may remove the offending public servant. For appointees of the Speaker of the House of Representatives, the Speaker of the House of Representatives may remove the offending public servant. For appointees of the General Assembly made upon the recommendation of the Speaker of the House of Representatives, the Governor at the recommendation of the Speaker of the House of Representatives may remove the offending public servant. For appointees of the President Pro Tempore of the Senate, the President Pro Tempore of the Senate may remove the offending public servant. For appointees of the General Assembly made upon the recommendation of the President Pro Tempore of the Senate, the Governor at the recommendation of the President Pro Tempore of the Senate may remove the offending public servant. For public servants elected to a board by either the Senate or House of Representatives, the electing house of the General Assembly shall exercise the discretion of whether to remove the offending public servant. For all other appointees, the Commission shall exercise the discretion of whether to remove the offending public servant.

(c) The willful failure of any public servant serving as a State employee to comply with this Chapter is a violation of a written work order, thereby permitting disciplinary action as allowed by the law, including termination from employment. For employees of State departments headed by a member of the Council of State, the appropriate member of the Council of State shall make all final decisions on the manner in which the offending public servant shall be disciplined. For public servants who are judicial employees, the Chief Justice shall make all final decisions on the matter in which the offending judicial employee shall be disciplined. For legislative employees, the Legislative Services Commission shall make or refer to the hiring authority all final decisions on the matter in which the offending legislative employee shall be disciplined. For public servants appointed or elected for The University of North Carolina or the Community Colleges System, the appointing or electing authority shall make all final decisions on the matter in which the offending public servant shall be disciplined. For any other public servant serving as a State employee, the Governor shall make all final decisions on the manner in which the offending public servant shall be disciplined.

(d) The willful failure of any constitutional officer of the State to comply with this Chapter is malfeasance in office for purposes of G.S. 123-5.

(e) The willful failure of a legislator, other than the Lieutenant Governor, to comply with this Chapter is grounds for sanctions under G.S. 120-103.1.

(f) Nothing in this Chapter affects the power of the State to prosecute any person for any violation of the criminal law.

(g) The Commission may seek to enjoin violations of G.S. 138A-34. (2006-201, s. 1.)

**Editor's Note.** — For effective date and applicability for this Chapter, see Editor's note at G.S. 138A-1.

# Chapter 139.

# Soil and Water Conservation Districts.

### Article 1.

### General Provisions.

Sec.
139-1. Title of Chapter.
139-2. Legislative determinations, and declaration of policy.
139-3. Definitions.
139-3.1. [Repealed.]
139-4. Powers and duties of Soil and Water Conservation Commission generally.
139-5. Creation of soil and water conservation districts.
139-6. District board of supervisors — elective members; certain duties.
139-7. District board of supervisors — appointive members; organization of board; certain powers and duties.
139-8. Powers of districts and supervisors.
139-8.1. Purposes of Chapter.
139-9. Adoption of land-use regulations.
139-10. Enforcement of land-use regulations.
139-11. Nonobservance of prescribed regulations; performance of work under the regulations by the supervisors.
139-12. Cooperation between districts.
139-13. Discontinuance of districts.
139-14. Dividing large districts.
139-15. "County committeeman" construed to mean "county supervisor"; powers and duties.

### Article 2.

### Watershed Improvement Districts.

139-16 through 139-20. [Repealed.]
139-20.1. Validation of creation of certain districts.
139-21 through 139-36. [Repealed.]
139-37, 139-37.1. [Recodified.]
139-38. [Repealed.]

### Article 3.

### Watershed Improvement Programs; Expenditure by Counties.

Sec.
139-39. Alternative method of financing watershed improvement programs by special county tax.
139-40. Conduct of election.
139-41. Powers of county commissioners.
139-41.1. Powers of counties that are not authorized to levy watershed improvement taxes.
139-41.2. Review of watershed work plans.
139-41.3. Liability of owners of land associated with watershed improvement projects.
139-42. Article intended as supplementary.
139-43. [Repealed.]
139-44. Power of eminent domain conferred on counties.
139-45. Extraterritorial powers of counties.
139-46. Recreational and related aspects of watershed improvement programs.
139-47. [Repealed.]
139-48. Participation by cities, counties, industries and others.
139-49. Borrowing by local units for anticipated water supplies.
139-50 through 139-52. [Reserved.]

### Article 4.

### Grants for Small Watershed Projects.

139-53. State Soil and Water Conservation Commission authorized to accept applications.
139-54. Purposes for which grants may be requested.
139-55. Review of applications.
139-56. Recommendation of priorities and disbursal of grant funds.
139-57. Availability of funds.

## ARTICLE 1.

## *General Provisions.*

## § 139-1. Title of Chapter.

This Chapter may be known and cited as the Soil Conservation Districts Law. (1937, c. 393, s. 1.)

**Legal Periodicals.** — For article, "Introduction to Water Use Law in North Carolina," see 46 N.C.L. Rev. 1 (1967).

For note on disposition of diffused surface waters in North Carolina, see 47 N.C.L. Rev. 205 (1968).

For article, "The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation," see 29 Campbell L. Rev. 535 (2007).

## § 139-2. Legislative determinations, and declaration of policy.

(a) Legislative Determinations. — It is hereby declared, as a matter of legislative determination:

(1) The Condition. — The farm, forest and grazing lands of the State of North Carolina are among the basic assets of the State and the preservation of these lands is necessary to protect and promote the health, safety, and general welfare of its people; improper land-use practices have caused and have contributed to, and are now causing and contributing to, a progressively more serious erosion of the farm and grazing lands of this State by wind and water; the breaking of natural grass, plant, and forest cover has interfered with the natural factors of soil stabilization, causing loosening of soil and exhaustion of humus, and developing a soil condition that favors erosion; the topsoil is being blown and washed out of fields and pastures; there has been an accelerated washing of sloping fields; these processes of erosion by wind and water speed up with removal of absorptive topsoil, causing exposure of less absorptive and less protective but more erosive subsoil; failure by any land occupier to conserve the soil and control erosion upon his lands causes a washing and blowing of soil and water from his lands onto other lands and makes the conservation of soil and control of erosion on such other lands difficult or impossible.

(2) The Consequences. — The consequences of such soil erosion in the form of soil-blowing and soil-washing are the silting and sedimentation of stream channels, reservoirs, dams, ditches, and harbors; the loss of fertile soil material in dust storms; the piling up of soil on lower slopes, and its deposit over alluvial plains; the reduction in productivity or outright ruin of rich bottomlands by overwash of poor subsoil material, sand, and gravel swept out of the hills; deterioration of soil and its fertility, deterioration of crops grown thereon, and declining acre yields despite development of scientific processes for increasing such yields; loss of soil and water which causes destruction of food and cover for wildlife; a blowing and washing of soil into streams which silts over spawning beds, and destroys water plants, diminishing the food supply of fish; a diminishing of the underground water reserve, which causes water shortages, intensifies periods of drought, and causes crop failures; an increase in the speed and volume of rainfall runoff, causing severe and increasing floods, which bring suffering, disease, and death; impoverishment of families attempting to farm eroding and eroded lands; damage to roads, highways, railways, farm buildings, and other property from floods and from dust storms; and losses in navigation, hydroelectric power, municipal water supply, drainage developments, farming, and grazing.

(3) The Appropriate Corrective Methods. — To conserve soil resources and control and prevent soil erosion and prevent floodwater and sediment damages, and further the conservation, utilization, and disposal of water, and the development of water resources it is necessary that land-use practices contributing to soil wastage and soil erosion be discouraged and discontinued, and appropriate soil-conserving land-use practices and works of improvement for flood prevention or the conservation, utilization, and disposal of water and the development

of water resources be adopted and carried out. Among the procedures necessary for widespread adoption, are the carrying on of engineering operations such as the construction of terraces, terrace outlets, check-dams, desilting basins, floodwater retarding structures, channel improvements, floodways, dikes, ponds, ditches, and the like; the utilization of strip cropping, lister furrowing, contour cultivating, contour furrowing, farm drainage, land irrigation; seeding and planting of waste, sloping, abandoned, or eroded lands with water-conserving and erosion-preventing plants, trees, and grasses; forestation and reforestation; rotation of crops; soil stabilization with trees, grasses, legumes, and other thick-growing, soil-holding crops; the addition of soil amendments, manurial materials, and fertilizers for the correction of soil deficiencies and to promote increased growth of soil-protecting crops; retardation of runoff by increasing absorption of rainfall; and retirement from cultivation of steep, highly erosive areas and areas now badly gullied or otherwise eroded.

(b) Declaration of Policy. — It is hereby declared to be the policy of the legislature to provide for the conservation of the soil and soil resources of this State, and for the control and prevention of soil erosion, and for the prevention of floodwater and sediment damages, and for furthering the conservation, utilization, and disposal of water, and the development of water resources and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist in maintaining the navigability of rivers and harbors, preserve wildlife, protect the tax base, protect public lands, and protect and promote the health, safety and general welfare of the people of this State. (1937, c. 393, s. 2; 1947, c. 131, s. 1; 1959, c. 781, ss. 2, 3.)

### CASE NOTES

**Applied** in Baucom's Nursery Co. v. Mecklenburg County, 62 N.C. App. 396, 303 S.E.2d 236 (1983).

## § 139-3. Definitions.

Wherever used or referred to in this Chapter, unless a different meaning clearly appears from the context:

(1) "Agency of this State" includes the government of this State and any subdivision, agency, or instrumentality, corporate or otherwise, of the government of the State.

(2) "A qualified voter" includes any person qualified to vote in elections by the people under the Constitution of this State.

(3) "Environmental Management Commission" or "State Environmental Management Commission" means the Environmental Management Commission of the State of North Carolina, or the board, body or commission succeeding to its principal functions, or in whom shall be vested by law the powers herein granted to the said Environmental Management Commission.

(4) "Commission" or "Soil and Water Conservation Commission" means the Soil and Water Conservation Commission created by G.S. 143B-294.

(5) "District" or "soil and water conservation district" means a governmental subdivision of this State, and a public body corporate and politic, organized in accordance with the provisions of this Chapter, for the purposes, with the powers, and subject to the restrictions hereinafter set forth.

(6) "Due notice" means notice given by posting the same at the courthouse door and at three other public places in the county, including those where it may be customary to post notices concerning county or municipal affairs generally, not less than 10 days before the date of the event of which notice is being given. At any hearing held pursuant to such a notice at the time and place designated in such a notice, adjournment may be made from time to time without the necessity of renewing such notice for such adjourned dates.

(7) "Government" or "governmental" includes the government of this State, the government of the United States, and any subdivision, agency, or instrumentality, corporate or otherwise, of either of them.

(8) The terms "land occupier" or "occupier of land," and "landowner" or "owner of land" include any person, firm or corporation who shall hold title to or shall have contracted to purchase any lands lying within a soil and water conservation district organized under the provisions of this Chapter.

(9) "Nominating petition" means a petition filed under the provisions of G.S. 139-6 to nominate candidates for the office of supervisor of a soil and water conservation district.

(10) Repealed by Session Laws 1993, c. 391, s. 1.

(11) "Petition" means a petition filed under the provisions of Article 1 of this Chapter for the creation of a soil and water conservation district.

(12) "State" means the State of North Carolina.

(13) "Supervisor" means one of the members of the governing body of a district, elected or appointed in accordance with the provisions of this Chapter.

(14) Repealed by Session Laws 1993, c. 391, s. 1.

(15) "United States" or "agencies of the United States" includes the United States of America, the Soil Conservation Service of the United States Department of Agriculture, and any other agency or instrumentality, corporate or otherwise, of the United States of America.

(16) Repealed by Session Laws 1993, c. 391, s. 1.

(17) A "watershed improvement project" means a project of watershed improvement (whether involving flood prevention, drainage improvement, water supply, soil and water conservation, recreation facilities, fish and wildlife habitat, or other related purposes, singly or in combination) which is undertaken:

  a. Repealed by Session Laws 1993, c. 391, s. 1.
  b. By a soil and water conservation district under the provisions of Article 1 of Chapter 139 of the General Statutes or any local act granting similar powers.
  c. By a drainage district under the provisions of Chapter 156 of the General Statutes or any local act granting similar powers.
  d. By a county that is carrying out a county watershed improvement program under the provisions of Article 3 of Chapter 139 of the General Statutes or any local act granting similar powers.
  e. By any combination of the foregoing, acting as joint sponsors of a watershed improvement program.
  f. By any watershed, drainage or flood control project planned or carried out by the Soil Conservation Service, Tennessee Valley Authority or the Army Corps of Engineers.

(18) A "watershed improvement work" means a single feature or facility or portion of a watershed improvement project, such as a water retarding or impoundment structure for one or more authorized watershed purposes or a section of improved stream channel or the land treatment measures associated with a water retarding structure.

(1937, c. 393, s. 3; 1947, c. 131, s. 2; 1959, c. 781, s. 4; 1965, c. 582, s. 1; 1967, c. 987, s. 1; 1971, c. 1138, s. 1A; 1973, c. 1262, s. 38; 1993, c. 391, s. 1; 1995, c. 519, s. 5.)

**Cross References.** — As to the Environmental Management Commission, see G.S. 143B-282 through 143B-285. As to the Soil and Water Conservation Commission, see G.S. 143B-294 through 143B-297.

**Editor's Note.** — Session Laws 1967, c. 987, which amended or added various sections in this Chapter, provides in part:

"Sec. 11. Nothing contained in this act shall authorize or allow the withdrawal of water from a watershed or stream except to the extent and degree now permissible under the existing common and statute law of this State; nor to change or modify such existing common or statute law with respect to the relative rights of riparian owners or others concerning the use or disposal of water in the streams of this State; nor to authorize a district, its officers or governing body or any other person, firm, corporation (public or private), body politic or governmental agency to utilize or dispose of water except in the manner and to the extent permitted by the existing common and statute law of this State.

Sec. 12. The authority granted hereinabove is supplemental and additional to any other authority granted by law relating to watershed improvement programs, whether by general or special law."

## § 139-3.1: Repealed by Session Laws 1998-217, s. 14(a), effective October 31, 1998.

**Editor's Note.** — Session Laws 1998-217, which repealed this section, in s. 14(b) provides: "The repeal of this section shall not be construed to affect any language currently in the General Statutes."

## § 139-4. Powers and duties of Soil and Water Conservation Commission generally.

(a) through (c) Repealed by Session Laws 1973, c. 1262, s. 38.

(d) In addition to the duties and powers hereinafter conferred upon the Soil and Water Conservation Commission, it shall have the following duties and powers:

(1) To offer such assistance as may be appropriate to the supervisors of soil and water conservation districts, organized as provided hereinafter, in the carrying out of any of their powers and programs.

(2) To keep the supervisors of each of the several districts organized under the provisions of this Chapter informed of the activities and experience of all other districts organized hereunder, and to facilitate an interchange of advice and experience between such districts and cooperation between them.

(3) To coordinate the programs of the several soil and water conservation districts organized hereunder so far as this may be done by advice and consultation.

(4) To secure the cooperation and assistance of the United States and any of its agencies, and of agencies of this State, in the work of such districts.

(5) To disseminate information throughout the State concerning the activities and programs of the soil and water conservation districts organized hereunder, and to encourage the formation of such districts in areas where their organization is desirable.

(6) Upon the filing of a petition signed by all of the district supervisors of any one or more districts requesting a change in the boundary lines of said district or districts, the Commission may change such lines in such manner as in its judgment would best serve the interests of the occupiers of land in the area affected thereby.

(7) To receive, review and approve or disapprove applications for planning assistance under the provisions of Public Law 566 (83rd Congress, as amended), and recommend priorities on such applications.

(8) To supervise and review small watershed work plans pursuant to G.S. 139-41.2 and 139-47.

(9) To create, implement, and supervise the Agriculture Cost Share Program for Nonpoint Source Pollution Control created pursuant to Part 9 of Article 21 of Chapter 143 of the General Statutes and the Community Conservation Assistance Program created pursuant to Part 11 of Article 21 of Chapter 143 of the General Statutes.

(10) To review and approve or disapprove the application of a district supervisor for a grant under the Agriculture Cost Share Program for Nonpoint Source Pollution Control or the Community Conservation Assistance Program as provided by G.S. 139-8(b).

(11) To develop and implement a program for the approval of water quality and animal waste management systems technical specialists.

(12) To develop and approve best management practices for use in the water quality protection programs of the Department of Environment and Natural Resources and to adopt rules that establish criteria governing approval of these best management practices.

(e) A member of the Commission may apply for and receive a grant under the Agriculture Cost Share Program for Nonpoint Source Pollution Control and the Community Conservation Assistance Program if:

(1) The member does not vote on the application or attempt to influence the outcome of any action on the application; and

(2) The application is approved by the Secretary of Environment and Natural Resources. (1937, c. 393, s. 4; 1947, c. 131, s. 3; 1953, c. 255; 1957, c. 1374, s. 1; 1959, c. 781, s. 5; 1961, c. 746, s. 2; 1965, c. 582, s. 2; c. 932; 1971, c. 396; 1973, c. 1262, s. 38; 1981, c. 326, s. 1; 1995, c. 519, s. 1; 1997-443, s. 11A.119(a); 2001-284, s. 1; 2006-78, s. 3.)

**Editor's Note.** — Session Laws 2001-355, ss. 1 to 6 provide for the implementation of the Tar-Pamlico River Basin-Nutrient Sensitive Waters Management Strategy: Agricultural Nutrient Control Strategy, as adopted by the Environmental Management Commission on 12 October 2000 and approved by the Rules Review Commission on 20 November 2000, to become effective on 1 September 2001. A Local Advisory Committee is to be appointed in each county or watershed, as specified in the Basin Oversight Committee, within the Tar-Pamlico River Basin; these committees terminate upon a finding by the Environmental Management Commission that the long-term maintenance of nutrient loads is assured. Under the act, the Soil and Water Commission is to approve best management practices for pasture-based production or management of livestock, including a point system applicable thereto. Harvesting of trees is also addressed. Furthermore, the Basin Oversight Committee is to develop a nutrient loading accounting methodology, to be approved by the Environmental Management Commission no later than 1 March 2003. The Environmental Management Commission may adopt and revise a temporary rule incorporating the provisions of the act until a permanent rule can be adopted. Session Laws 2001-355, s. 7, provides that ss. 2 and 3 of the act expire when the temporary rule becomes effective, and s. 4 expires upon a finding that the long-term maintenance of nutrient loads in the Tar-Pamlico River Basin is assured.

**State Government Reorganization.** — The Soil and Water Conservation Committee (now the Soil and Water Conservation Commission) was transferred to the Department of Natural and Economic Resources (now the Department of Environment and Natural Resources) by former G.S. 143A-124, enacted by Session Laws 1971, c. 864 and repealed by Session Laws 1973, c. 1262, and remains a part of the Department under G.S. 143B-279.3(b)(21).

## § 139-5. Creation of soil and water conservation districts.

(a) Any 25 occupiers of land lying within the limits of the territory proposed to be organized into a district may file a petition with the Soil and Water

Conservation Commission asking that a soil and water conservation district be organized to function in the territory described in the petition. Such petition shall set forth:

(1) The proposed name of said district.

(2) That there is need, in the interest of the public health, safety, and welfare, for a soil and water conservation district to function in the territory described in the petition.

(3) A description of the territory proposed to be organized as a district, which description shall not be required to be given by metes and bounds or by legal subdivisions, but shall be deemed sufficient if generally accurate.

(4) A request that the Soil and Water Conservation Commission duly define the boundaries for such districts; that a referendum be held within the territory so defined on the question of the creation of a soil and water conservation district in such territory; and that the Commission determine that such a district be created.

Where more than one petition is filed covering parts of the same territory, the Soil and Water Conservation Commission may consolidate all or any such petitions.

Town or village lots or government-owned or controlled lands may be included within the boundaries of any district. As used in this subsection: The term "government-owned or controlled land" includes land owned or controlled by any governmental agency or subdivision, federal, State or local; and the term "town and village lots" means parcels or tracts on which no agricultural operations are conducted, or (being less than three acres in extent) whose production of agricultural products for home use or for sale during the immediately preceding calendar year was of less than two hundred and fifty dollars ($250.00) in value. This section applies to existing soil and water conservation districts as well as districts that may hereafter be formed. Insofar as it applies to existing districts it is intended to be declaratory of the present boundaries of such districts as defined by other charters.

(b) Within 30 days after such a petition has been filed with the Soil and Water Conservation Commission, it shall cause due notice to be given of a proposed hearing upon the question of the desirability and necessity, in the interest of the public health, safety, and welfare, of the creation of such districts, upon the question of the appropriate boundaries to be assigned to such district, upon the propriety of the petition and other proceedings taken under this Chapter, and upon all questions relevant to such inquiries. All occupiers of land within the limits of the territory described in the petition, and of lands within any territory considered for addition to such described territory, and all other interested parties, shall have the right to attend such hearings and to be heard. If it shall appear upon the hearing that it may be desirable to include within the proposed district territory outside the area within which due notice of the hearing has been given, the hearing shall be adjourned and due notice of further hearing shall be given throughout the entire area considered for the inclusion of the district, and such further hearing held. After such hearing, if the Commission shall determine, upon the facts presented at such hearing and upon such other relevant facts and information as may be available, that there is need, in the interest of the public health, safety and welfare, for a soil and water conservation district to function in the territory considered at the hearing, it shall make and record such determination, and shall define, by metes and bounds or by legal subdivisions, the boundaries of such district. In making such determination and in defining such boundaries, the Commission shall give due weight and consideration to the topography or the area considered and of the state and composition of soils therein, the distribution of erosion, the prevailing land-use practices, the desirability and necessity of including within the boundaries the particular lands under consideration and the benefits such lands may receive from being included within such boundaries, the relation of the proposed area to existing watersheds and agricultural regions, and to other soil and water conservation districts already organized or proposed for organization under the provisions of this Chapter, and such other physical, geographical and economic factors as are relevant, having due regard to the legislative determination set forth in G.S. 139-2. The territory to be included within such boundaries need not be contiguous. If the Commission shall determine after such hearing after due consideration of the said relevant facts, that there is no need for a soil and water conservation district to function in the territory considered at the hearing, it shall make and record such determination and shall deny the petition. After six months shall have expired from the date of the denial of any such petition, subsequent petitions covering the same or substantially the same territory may be filed as aforesaid and new hearings held and determinations made thereon.

(c) After the Commission has made and recorded a determination that there is need, in the interest of the public health, safety and welfare for the organization of a district in a particular territory and has defined the boundaries thereof, it shall consider the question whether the operation of a district within such boundaries with the powers conferred upon soil and water conservation districts in this Chapter is administratively practicable and feasible. To assist the Commission in the determination of such administrative practicability and feasibility, it shall be the duty of the Commission, within a reasonable time after entry of the finding that there is need for the organization of the proposed district and the determination of the boundaries thereof, to hold a referendum within the proposed district upon the proposition of the creation of the district, and to cause due notice of such referendum to be given. The question shall be submitted by ballots upon which the words "For creation of a soil and water conservation district of the lands below described and lying in the county(ies) of ________, ________ and ________." and "Against creation of a soil and water conservation district of the lands below described and lying in the county(ies) of ________________ and ________________." shall appear with a square before each proposition and a direction to insert an X mark in the square before one or the other of said propositions as the voter may favor or oppose creation of such district. The ballot shall set forth the boundaries of such proposed district as determined by the Commission. All occupiers of land lying within the boundaries of the territory, as determined by the Soil and Water Conservation Commission, shall be eligible to vote in such referendum. Only such land occupiers shall be eligible to vote.

(d) The Department of Environment and Natural Resources shall pay all expenses for the issuance of such notices and the conduct of such hearings and referenda, and shall supervise the conduct of such hearings and referenda. It shall issue appropriate regulations governing the conduct of such hearings and referenda, and providing for the registration prior to the date of the referendum of all eligible voters, or prescribing some other appropriate procedure for the determination of those eligible as voters in such referendum. No informality in the conduct of such referendum or in any matters relating thereto shall invalidate said referendum or the result thereof if notice thereof shall have been given substantially as herein provided and said referendum shall have been fairly conducted.

(e) The Department of Environment and Natural Resources shall publish the results of such referendum and shall thereafter consider and determine whether the operation of the district within the defined boundaries is administratively practicable and feasible. If the Commission shall determine that the operation of such district is not administratively practicable and feasible, it shall record such determination and deny the petition. If the Commission shall determine that the operation of such district is administratively practicable and feasible, it shall record such in the manner hereinafter provided. In making such determination the Commission shall give due regard and weight to the attitudes of the occupiers of lands lying within the defined boundaries, the number of land occupiers eligible to vote in such referendum who shall have voted, the proportion of the votes cast in such referendum in favor of the creation of the district to the total number of votes cast, the approximate wealth and income of the land occupiers of the proposed district, the probable expense of carrying on erosion control operations within such district, and such other economic and social factors as may be relevant to such determination, having due regard to the legislative determination set forth in G.S. 139-2: Provided, however, that the Commission shall not have authority to determine that the operations of the proposed district within the defined boundaries is administratively practicable and feasible unless at least a majority of the votes cast in the referendum upon the proposition of creation of the district shall have been cast in favor of the creation of such district.

(f) If the Commission shall determine that the operation of the proposed district within the defined boundaries is administratively practicable and feasible, it shall appoint two temporary supervisors to act as the governing body of the district, who shall serve until supervisors are elected or appointed and qualify as provided in G.S. 139-6 and 139-7. Such district shall be a governmental subdivision of this State and a public body corporate and politic, upon the taking of the following proceedings:

The two appointed temporary supervisors shall present to the Secretary of State an application signed by them which shall set forth (and such application need contain no detail other than the mere recitals):

(1) That a petition for the creation of the district was filed with the Soil and Water Conservation Commission pursuant to the provisions of this Chapter and that the proceedings specified in this Chapter were taken pursuant to such petition; that the application is being filed in order to complete the organization of the district as a governmental subdivision and public body, corporate and politic under this Chapter; and that the Commission has appointed them as supervisors;

(2) The name and official residence of each of the temporary supervisors, together with a certified copy of the appointment evidencing their right to office;

(3) The name which is proposed for the district; and

(4) The location of the principal office of the supervisors of the district.

The application shall be subscribed and sworn to by each of the said temporary supervisors before an officer authorized by the laws of this State to take and certify oaths, who shall certify upon the application that he personally knows the temporary supervisors and knows them to be the officers as affirmed in the application, and that each has subscribed thereto in the officer's presence. The application shall be accompanied by a statement by the Soil and Water Conservation Commission, which shall certify (and such statement need contain no detail other than the mere recitals) that a petition was filed, notice issued, and hearing held as aforesaid, that the Commission did duly determine that there is need, in the interest of the public health, safety and welfare, for a soil and water conservation district to function in the proposed territory and did define the boundaries thereof; that notice was given and a referendum held on the question of the creation of such district, and that the result of such referendum showed a majority of the votes cast in such referendum to be in favor of the creation of the district; that thereafter the Commission did duly determine that the operation of the proposed district is administratively practicable and feasible. The said statement shall set forth the boundaries of the district as they have been defined by the Commission.

The Secretary of State shall examine the application and statement and, if he finds that the name proposed for the district is not identical with that of any other soil and water conservation district of this State or so nearly similar as to lead to confusion or uncertainty, he shall receive and file them and shall record them in an appropriate book of record in his office. If the Secretary of State shall find that the name proposed for the district is identical with that of any other soil and water conservation district of this State, or so nearly similar as to lead to confusion and uncertainty, he shall certify such fact to the Soil and Water Conservation Commission, which shall thereupon submit to the Secretary of State a new name for the said district, which shall not be subject to such defects. Upon receipt of such new name, free of such defects, the Secretary of State shall record the application and statement, with the name so modified, in an appropriate book of record in his office. When the application and statement have been made, filed and recorded, as herein provided, the district shall constitute a governmental subdivision of this State and a public body corporate and politic. The Secretary of State shall make and issue to the said supervisors a certificate, under the seal of the State, of the due organization of the said district, and shall record such certificate with the application and statement. The boundaries of such district shall include the territory as determined by the Soil and Water Conservation Commission as aforesaid, but in no event shall they include any area included within the boundaries of another soil and water conservation district organized under the provisions of this Chapter.

(g) After six months shall have expired from the date of entry of a determination by the Soil and Water Conservation Commission that operation of a proposed district is not administratively practicable and feasible, and denial of a petition pursuant to such determination, subsequent petitions may be filed as aforesaid, and action taken thereon in accordance with the provisions of this Chapter.

(h) Petitions for including additional territory within an existing district may be filed with the Soil and Water Conservation Commission, and the proceedings herein provided for in the case of petitions to organize a district shall be observed in the case of petitions for such inclusions. The Commission shall prescribe the form for such petitions, which shall be as nearly as may be in the form prescribed in this Chapter for petitions to organize a district. Where the total number of land occupiers in the area proposed for inclusion shall be less than 25, the petition may be filed when signed by two thirds of the occupiers of such area, and in such case no referendum need be held. In referenda petitions for such inclusion, all occupiers of land lying within the proposed additional area shall be eligible to vote.

(i) In any suit, action or proceeding involving the validity or enforcement of, or relating to any contract, proceeding or action of the district, the district shall be deemed to have been established in accordance with the provisions of this Chapter upon proof of the issuance of the aforesaid certificate by the Secretary of State. A copy of such certificate duly certified by the Secretary of State shall be admissible in evidence in any such suit, action, or proceeding and shall be proof of the filing and contents thereof. (1937, c. 393, s. 5; 1947, c. 131, s. 4; 1959, c. 781, s. 6; 1965, c. 582, s. 3; 1973, c. 1262, s. 38; 1977, c. 771, s. 4; 1989, c. 727, s. 218(91); 1997-443, s. 11A.119(a).)

## § 139-6. District board of supervisors — elective members; certain duties.

After the issuance of the certificate of organization of the soil and water conservation district by the Secretary of State, an election shall be held in each county of the district to elect the members of the soil and water conservation district board of supervisors as herein provided.

The district board of supervisors shall consist of three elective members to be elected in each county of the district, and that number of appointive members as provided in G.S. 139-7. Upon the creation of a district, the first election of the members shall be held at the next succeeding election for county officers.

All elections for members of the district board of supervisors shall be held at the same time as the regular election for county officers beginning in November 1974. The election shall be nonpartisan and no primary election shall be held. The election shall be held and conducted by the county board of elections.

Candidates shall file their notice of candidacy on forms prescribed by the county board of elections. The notice of candidacy must be filed no earlier than noon on the second Monday in June and no later than noon on the first Friday in July preceding the election. The candidate shall pay a filing fee of five dollars ($5.00) at the time of filing the notice of candidacy.

Beginning with the election to be held in November 1974, the two candidates receiving the highest number of votes shall be elected for a term of four years, and the candidate receiving the next highest number of votes shall be elected for a term of two years; thereafter, as their terms expire, their successors shall be elected for terms of four years. If the position of district supervisor is not filled by failure to elect, then the office shall be deemed vacant upon the expiration of the term of the incumbent, and the office shall be filled as provided in G.S. 139-7.

The persons elected in 1974 and thereafter shall take office on the first Monday in December following their election.

The terms of the present members of the soil and water conservation districts, both elective and appointive members, are hereby extended to or terminated on the first Monday in December 1974.

All qualified voters of the district shall be eligible to vote in the election. Except as provided in this Chapter, the election shall be held in accordance with the applicable provisions of Articles 23 and 24 of Chapter 163 of the General Statutes.

The district board of supervisors, after the appointment of the appointive members has been made, shall select from its members a chairman, a vice-chairman and a secretary. It shall be the duty of the district board of supervisors to perform those powers, duties, and authority conferred upon supervisors under this Chapter; to develop annual county and district goals and plans for soil conservation work therein; to request agencies, whose duties are such as to render assistance in soil and water conservation, to set forth in writing what assistance they may have available in the county and district. (1937, c. 393, s. 6; 1947, c. 131, s. 5; 1949, c. 268, s. 1; 1957, c. 1374, s. 2; 1963, c. 815; 1973, c. 502, s. 1; 1975, c. 798, s. 4; 1979, c. 519, s. 1; 1981, c. 560, s. 3; 2002-159, s. 55(h).)

### § 139-7. District board of supervisors — appointive members; organization of board; certain powers and duties.

The governing body of a soil and water conservation district shall consist of the three elective supervisors from the county or counties in the district, together with the appointive members appointed by the Soil and Water Conservation Commission pursuant to this section, and shall be known as the district board of supervisors. When a district is composed of less than four counties, the board of supervisors of each county shall on or before October 31, 1978, and on or before October 31 as the terms of the appointive supervisors expire, recommend in writing two persons from the district to the Commission to be appointed to serve with the elective supervisors. If the names are not submitted to the Commission as required, the office shall be deemed vacant on the date the term is set to expire and the Commission shall appoint two persons of the district to the district board of supervisors to serve with the elected supervisors. The Commission shall make its appointments prior to or at the November meeting of the Commission. Appointive supervisors shall take office on the first Monday in December following their appointment. Such appointive supervisors shall serve for a term of four years, and thereafter, as their terms expire, their successors shall serve for a term of four years. The terms of office of all appointive supervisors who have heretofore been lawfully appointed for terms the final year of which presently extends beyond the first Monday in December are hereby terminated on the first Monday in December of the final year of appointment. Vacancies for any reason in the appointive supervisors shall be filled for the unexpired term by the appointment of a person by the Commission from the district in which the vacancy occurs. Vacancies for any reason in the elected supervisors shall be filled for the unexpired term by appointment by the Commission of a person from the county in the district in which the vacancy occurs.

In those districts composed of four or more counties, the Commission may, but is not required to, appoint two persons from the district without recommendation from the board of supervisors, to serve as district supervisors along with the elected members of the board of supervisors. Such appointments shall be made at the same time other appointments are made under this section, and the persons appointed shall serve for a term of four years.

The supervisors shall designate a chairman and may, from time to time, change such designation. A simple majority of the board shall constitute a quorum for the purpose of transacting the business of the board, and approval by a majority of those present shall be adequate for a determination of any matter before the board, provided at least a quorum is present. Supervisors of soil and water conservation districts shall be compensated for their services at the per diem rate and allowed travel, subsistence and other expenses, as provided for State boards, commissions and committees generally, under the provisions of G.S. 138-5; provided, that when per diem compensation and travel, subsistence, or other expense is claimed by any supervisor for services performed outside the district for which such supervisor ordinarily may be appointed or elected to serve, the same may not be paid unless prior written approval is obtained from the Department of Environment and Natural Resources.

The supervisors may employ a secretary, technical experts, whose qualifications shall be approved by the Department, and such other employees as they may require, and shall determine their qualifications, duties and compensation. The supervisors may call upon the Attorney General of the State for such legal services as they may require. The supervisors may delegate to their chairman, to one or more supervisors, or to one or more agents, or employees such powers and duties as they may deem proper. The supervisors shall furnish to the Soil and Water Conservation Commission, upon request, copies of such ordinances, rules, regulations, orders, contracts, forms, and other documents as they shall adopt or employ, and such other information concerning their activities as it may require in the performance of its duties under this Chapter.

The supervisors shall provide for the execution of surety bonds for all employees and officers who shall be entrusted with funds or property; shall provide for the keeping of a full and accurate record of all proceedings and of all resolutions, regulations, and orders issued or adopted; and shall provide for an annual audit of the accounts of receipts and disbursements. In any given year, if the supervisors provide for an internal audit, and the supervisor serving as chairman certifies, under oath, that this internal audit is a true and accurate reflection of the accounts of receipts and disbursements, then the supervisors shall not be required, notwithstanding the provisions of G.S. 159-34, to provide for an audit of the accounts of receipts and disbursements by a certified public accountant or by an accountant certified by the Local Government Commission. Any supervisor may be removed by the Soil and Water Conservation Commission upon notice and hearing, for neglect of duty, incompetence or malfeasance in office, but for no other reason.

The supervisors may invite the legislative body of any municipality or county located near the territory comprised within the district to designate a representative to advise and consult with the supervisors of the district on all questions of program and policy which may affect the property, water supply, or other interests of such municipality or county.

All district supervisors whose terms of office expire prior to the first Monday in January, 1948, shall hold over and remain in office until supervisors are elected or appointed and qualify as provided in this Chapter, as amended. The terms of office of all district supervisors, who have heretofore been elected or appointed for terms extending beyond the first Monday in January, 1948, are hereby terminated on the first Monday in January, 1948. (1937, c. 393, s. 7; 1943, c. 481; 1947, c. 31, ss. 6, 7; 1957, c. 1374, s. 3; 1963, c. 563; 1973, c. 502, s. 2; c. 1262, s. 38; 1977, c. 387; c. 771, s. 4; 1979, c. 519, s. 2; 1981, c. 330; 1989, c. 66, s. 1; c. 727, s. 218(92); 1991, c. 689, s. 166; 1997-443, s. 11A.119(a).)

## § 139-8. Powers of districts and supervisors.

(a) A soil and water conservation district organized under the provisions of this Article shall constitute a governmental subdivision of this State, and a public body corporate and politic, exercising public powers, and such district, and the supervisors thereof, shall have the following powers in addition to others granted in other sections of this Chapter:

(1) To conduct surveys and investigations relating to the character of soil erosion and floodwater and sediment damages, and to the conservation, utilization, and disposal of water, the development of water resources, and the preventive and control measures and works of improvement needed, to publish the results of such surveys and investigations, and to disseminate information concerning such preventive and control measures and works of improvement.

(2) To carry out preventive and control measures and works of improvement for flood prevention or the conservation, utilization, and disposal of water and development of water resources within the district, including, but not limited to, engineering operations, methods of cultivation, the growing of vegetation, changes in use of land, and the measures listed in subsection (a), subdivision (3) of G.S. 139-2, on lands owned or controlled by this State or any of its agencies, with the cooperation of the agency administering and having jurisdiction thereof, and on any other lands within the district upon obtaining the consent of the occupiers of such lands or the necessary rights or interest in such lands.

(3) To cooperate, or enter into agreements with, and within the limits or appropriations duly made available to it by law, to furnish financial or other aid to, any agency, governmental or otherwise, or any occupiers of land within the district, in the carrying on of erosion control and prevention operations and works of improvement for flood prevention or the conservation, utilization, and disposal of water and development of water resources within the district, subject to such conditions as the supervisors may deem necessary to advance the purposes of this Chapter.

(4) To obtain options upon and to acquire by purchase, exchange, lease, gift, grant, bequest, devise, or otherwise, any property, real or per-

sonal, or rights or interests therein; to maintain, administer, and improve any properties acquired, to receive income from such properties and to expend such income in carrying out the purposes and provisions of this Chapter; and to sell, lease, or otherwise dispose of its property or interests therein in furtherance of the purposes and the provisions of this Chapter.

(5) To make available, on such terms as it shall prescribe, to land occupiers within the district, agricultural and engineering machinery and equipment, fertilizer, seeds and seedlings, and such other material or equipment as will assist such land occupiers to carry on operations upon their lands for the conservation of soil resources and for the prevention and control of soil erosion and for flood prevention or the conservation, development, utilization, and disposal of water and the development of water resources.

(6) To construct, improve, operate, and maintain such structures, works and projects as may be necessary or convenient for the performance of any of the operations authorized in this Chapter, including watershed improvement structures, works, and projects as well as any other structures, works, and projects which the district is authorized to undertake.

(7) To develop comprehensive plans for the conservation of soil resources and for the control and prevention of soil erosion and for flood prevention or the conservation, utilization and disposal of water and development of water resources, within the district, which plans shall specify in such detail as may be possible, the acts, procedures, performances, and avoidances which are necessary or desirable for the effectuation of such plans, including the specification of engineering operations, methods of cultivation, the growing of vegetation, cropping programs, tillage practices, and changes in use of land; and to bring such plans and information to the attention of occupiers of lands within the district.

(8) To act as agent for the United States, or any of its agencies, in connection with the acquisition, construction, operation, or administration of any project for soil conservation, erosion control, erosion prevention, flood prevention, or for the conservation, utilization, and disposal of water and development of water resources, or combinations thereof, within its boundaries; to accept donations, gifts, and contributions in money, services, materials, or otherwise, from the United States or any of its agencies, or from this State or any of its agencies, and to use or expend such moneys, services, materials, or other contributions in carrying on its operations, except that all forest tree seedlings shall be obtained insofar as available from the Department of Environment and Natural Resources in cooperation with the United States Department of Agriculture.

(9) To sue and be sued in the name of the district; to have a seal, which seal shall be judicially noticed; to have perpetual succession unless terminated as hereinafter provided; to make and execute contracts and other instruments necessary or convenient to the exercise of its powers; to make, and from time to time amend and repeal, rules and regulations not inconsistent with this Chapter, to carry into effect its purposes and powers.

(10) As a condition to the extending of any benefits under this Chapter to, or the performance of work upon, any lands not owned or controlled by this State or any of its agencies, the supervisors may require contributions in money, services, materials, or otherwise to any operations conferring such benefits, and may require land occupiers to enter into

and perform such agreement or covenants as to the permanent use of such lands as will tend to prevent or control erosion and prevent floodwater and sediment damages therein.

(11) No provision with respect to the acquisition, operation, or disposition of property by other public bodies shall be applicable to a district organized hereunder unless the legislature shall specifically so state.

(12) Nothing contained in this Chapter shall authorize or allow the withdrawal of water from a watershed or stream except to the extent and degree now permissible under the existing common and statute law of this State; nor to change or modify such existing common or statute law with respect to the relative rights of riparian owners or others concerning the use or disposal of water in the streams of this State; nor to authorize a district, its officers or governing body or any other person, firm, corporation (public or private), body politic or governmental agency to utilize or dispose of water except in the manner and to the extent permitted by the existing common and statute law of this State.

(13) To assist the Commission in the implementation and supervision of the Agriculture Cost Share Program for Nonpoint Source Pollution Control created pursuant to G.S. 143-215.74 and to assist in the implementation and supervision of any other program intended to protect water quality administered by the Department of Environment and Natural Resources by providing technical assistance, allocating available grant monies, and providing any other assistance that may by required or authorized by any provision of federal or State law.

(b) A district supervisor may apply for and receive a grant under the Agriculture Cost Share Program for Nonpoint Source Pollution Control created pursuant to Part 9 of Article 21 of Chapter 143 of the General Statutes or the Community Conservation Assistance Program created pursuant to Part 11 of Article 21 of Chapter 143 of the General Statutes if:

1. The district supervisor does not vote on the application or attempt to influence the outcome of any action on the application; and
2. The application is approved by the Commission. (1937, c. 398, s. 8; 1939, c. 341; 1959, c. 781, s. 7; 1969, c. 711, s. 1; 1973, c. 1262, s. 38; 1977, c. 771, s. 4; 1989, c. 727, s. 218(93); 1995, c. 519, ss. 2, 3; 1997-443, s. 11A.119(a); 2006-78, s. 4.)

**Local Modification.** — Duplin (As to subdivision (6)): 1969, c. 286; Johnston: 1969, c. 955; New Hanover: 1969, c. 958; Pender and Sampson (as to subdivision (6)): 1969, c. 286; Wayne: 1969, c. 821.

### OPINIONS OF ATTORNEY GENERAL

**As to disposition or exchange of land by watershed improvement district,** see opinion of Attorney General to Mr. Samuel H. Johnson, Watershed Improvement Commission, 41 N.C.A.G. 228 (1971).

## § 139-8.1. Purposes of Chapter.

(a) It is hereby declared that the provisions of General Statutes Chapter 139 were intended to authorize the maintenance of watershed improvement works and projects, as well as watershed improvement structures. All expenditures heretofore incurred by any local watershed sponsor for any such maintenance of works, projects, or structures are hereby validated and confirmed.

(b) The proceeds of any tax heretofore approved by the voters of a county for a county watershed improvement program, or authorized by special or local act for a county watershed improvement program, may be expended for such maintenance of works and projects, as well as structures, if the board of county commissioners or other watershed governing body after a public hearing determines that the proceeds should be so expended. Notice of such hearing shall be published as provided for notices under Article 2 of General Statutes Chapter 139.

(c) The proceeds of any tax hereafter approved by the voters of a county for a watershed improvement program may be expended for such maintenance of works and projects, as well as structures, with or without the holding of a public hearing as designated by subsection (b) of this section, even though any election procedures preliminary to the vote approving the tax may have been initiated prior to the ratification of this section.

(d) No action based on the alleged invalidity of the expenditures herein confirmed or of the use of tax proceeds herein authorized shall lie after January 1, 1970, to enjoin or contest any such expenditure or any such use of tax proceeds. (1969, c. 711, s. 1.)

## § 139-9. Adoption of land-use regulations.

The supervisors of any district shall have authority to formulate regulations governing the use of lands within the district in the interest of conserving the soil and soil resources and preventing and controlling soil erosion. The supervisors may conduct such public meetings and public hearings upon tentative regulations as may be necessary to assist them in this work. The supervisors shall not have authority to enact such land-use regulations into law until after they shall have caused due notice to be given of their intention to conduct a referendum for submission of such regulations to the occupiers of lands lying within the boundaries of the district for their indication of approval or disapproval of such proposed regulations, and until after the supervisors have considered the result of such referendum. The proposed regulations shall be embodied in a proposed ordinance. Copies of such proposed ordinance shall be available for the inspection of all eligible voters during the period between publication of such notice and the date of the referendum. The notices of the referendum shall recite the contents of such proposed ordinance, or shall state where copies of such proposed ordinance may be examined. The question shall be submitted by ballots, upon which the words "For approval of proposed ordinance number __________, prescribing land-use regulations for conservation of soil and prevention of erosion" and "Against approval of proposed ordinance number __________, prescribing land-use regulations for conservation of soil and prevention of erosion" shall appear, with a square before each proposition and a direction to insert an X mark in the square before one or the other of said propositions as the voter may favor or oppose approval of such proposed ordinance. The supervisors shall supervise such referendum, shall prescribe appropriate regulations, governing the conduct thereof, and shall publish the result thereof. All occupiers of lands within the district shall be eligible to vote in such referendum. Only such land occupiers shall be eligible to vote. No informalities in the conduct of such referendum or in any matters relating thereto shall invalidate said referendum or the result thereof if notice thereof shall have been given substantially as herein provided and said referendum shall have been fairly conducted.

The supervisors shall not have authority to enact such proposed ordinance into law unless at least two thirds of the votes cast in such referendum shall have been cast for approval of the said proposed ordinance. The approval of the proposed ordinance by a two thirds of the votes cast in such referendum shall not be deemed to require the supervisors to enact such proposed ordinance into law. Land-use regulations prescribed in ordinances adopted pursuant to the provisions of this section by the supervisors of any district shall have the force and effect of law in the said district and shall be binding and obligatory upon all occupiers of lands within such district.

Any occupier of land within such district may at any time file a petition with the supervisors asking that any or all of land-use regulations prescribed in any ordinance adopted by the supervisors under the provisions of this section shall be amended, supplemented, or repealed. Land-use regulations prescribed in any ordinance adopted pursuant to the provisions of this section shall not be amended, supplemented, or repealed except in accordance with the procedure prescribed in this section for adoption of land-use regulations. Referenda on adoption, amendment, supplementation, or repeal of land-use regulations shall not be held more often than once in six months.

The regulations to be adopted by the supervisors under the provisions of this section may include:

(1) Provisions requiring the carrying out of necessary engineering operations, including the construction of terraces, terrace outlets, check dams, dikes, ponds, ditches, and other necessary structures.

(2) Provisions requiring observance of particular methods of cultivation including contour cultivating, contour furrowing, lister furrowing, sowing, planting, strip cropping, seeding, and planting of lands to water-conserving and erosion-preventing plants, trees and grasses, forestation, and reforestation.

(3) Specifications of cropping programs and tillage practices to be observed.

(4) Provisions requiring the retirement from cultivation of highly erosive areas or of areas on which erosion may not be adequately controlled if cultivation is carried on.

(5) Provisions for such other means, measures, operations, and programs as may assist conservation of soil resources and prevent or control soil erosion in the district, having due regard to the legislative findings set forth in G.S. 139-2.

The regulations shall be uniform, throughout the territory comprised within the district except that the supervisors may classify the lands within the district with reference to such factors as soil type, degree of slope, degree of erosion threatened or existing, cropping and tillage practices in use, and other relevant factors, and may provide regulations varying with the type or class of land affected, but uniform as to all lands within each class or type. Copies of land-use regulations adopted under the provisions of this section shall be printed and made available to all occupiers of lands lying within the district. (1937, c. 393, s. 9.)

## § 139-10. Enforcement of land-use regulations.

The supervisors shall have authority to go upon any lands within the district to determine whether land-use regulations adopted under the provisions of G.S. 139-9 are being observed. The supervisors are further authorized to provide by ordinance that any land occupier who shall sustain damages from any violation of such regulations by any other land occupier may recover damages at law from such other land occupier for such violation. (1937, c. 393, s. 10.)

### § 139-11. Nonobservance of prescribed regulations; performance of work under the regulations by the supervisors.

Where the supervisors of any district shall find that any of the provisions of land-use regulations prescribed in an ordinance adopted in accordance with the provisions of G.S. 139-9 are not being observed on particular lands, and that such nonobservance tends to increase erosion on such lands and its interfering with the prevention of control of erosion on other lands within the district, the supervisors may present to the superior court for the county or counties within which the lands of the defendant lie a petition, duly verified, setting forth the adoption of the ordinance prescribing land-use regulations, the failure of the defendant land occupier to observe such regulations, and to perform particular work, operations, or avoidances as required thereby, and that such nonobservance tends to increase erosion on such lands and is interfering with the prevention or control of erosion on other lands within the district, and praying the court to require the defendant to perform the work, operations, or avoidances within a reasonable time and to order that if the defendant shall fail so to perform, the supervisors may go on the land, perform the work or other operations or otherwise bring the condition of such lands into conformity with the requirements of such regulations, and recover the cost and expenses thereof, with interest, from the occupier of such land. Upon the presentation of such petition, the court shall cause process to be issued against the defendant, and shall hear the case. If it appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence, or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may dismiss the petition, or it may require the defendant to perform the work, operations, or avoidances, and may provide that upon the failure of the defendant to initiate such performance within the time specified in the order of the court, and to prosecute the same to completion with reasonable diligence, the supervisors may enter upon the lands involved and perform the work or operations or otherwise bring the condition of such lands into conformity with the requirements of the regulations and recover the costs and expenses thereof, with interest at the rate of five per centum (5%) per annum, from the occupier of such lands.

The court shall retain jurisdiction of the case until after the work has been completed. Upon completion of such work pursuant to such order of the court the supervisors may file a petition with the court, a copy of which shall be served upon the defendant in the case, stating the costs and expenses sustained by them in the performance of the work and praying judgment therefor with interest. The court shall have jurisdiction to enter judgment for the amount of such costs and expenses, with interest at the rate of five per centum (5%) per annum until paid, together with the costs of suit, including a reasonable attorney's fee to be fixed by the court. This judgment, when filed in accordance with the provisions of G.S. 1-234, shall constitute a lien upon such lands. (1937, c. 393, s. 11.)

### § 139-12. Cooperation between districts.

The supervisors of any two or more districts organized under the provisions of this Chapter may cooperate with one another in the exercise of any or all powers conferred in this Chapter. (1937, c. 393, s. 12.)

## § 139-13. Discontinuance of districts.

At any time after five years after the organization of a district under the provisions of this Chapter, any 25 occupiers of land lying within the boundaries of such districts may file a petition with the Soil and Water Conservation Commission praying that the operations of the district be terminated and the existence of the district discontinued. The Commission may conduct such public meetings and public hearings upon such petition as may be necessary to assist it in the consideration thereof. Within 60 days after such a petition has been received by the Commission it shall give due notice of the holding of a referendum, and shall supervise such referendum, and issue appropriate regulations governing the conduct thereof, the question to be submitted by ballots upon which the words "For terminating the existence of the __________ (name of the soil and water conservation district to be here inserted)" and "Against terminating the existence of the __________ (name of the soil and water conservation district to be here inserted)" shall appear with a square before each proposition and a direction to insert an X mark in the square before one or the other of said propositions as the voter may favor or oppose discontinuance of such district. All occupiers of lands lying within the boundaries of the district shall be eligible to vote in such referendum. Only such land occupiers shall be eligible to vote. No informalities in the conduct of such referendum or in any matters relating thereto shall invalidate said referendum or the result thereof if notice thereof shall have been given substantially as herein provided and said referendum shall have been fairly conducted.

The Department of Environment and Natural Resources shall publish the result of such referendum and shall thereafter consider and determine whether the continued operation of the district within the defined boundaries is administratively practicable and feasible. If the Commission shall determine that the continued operation of such district is administratively practicable and feasible, it shall record such determination and deny the petition. If the Commission shall determine that the continued operation of such district is not administratively practicable and feasible, it shall record such determination and shall certify such determination to the supervisors of the district. In making such determination the Commission shall give due regard and weight to the attitudes of the occupiers of lands lying within the district, the number of land occupiers eligible to vote in such referendum who shall have voted, the proportion of the votes cast in such referendum in favor of the discontinuance of the district to the total number of votes cast, the approximate wealth and income of the land occupiers of the district, the probable expense of carrying on erosion control operations within such district, and such other economic and social factors as may be relevant to such determination, having due regard to the legislative findings set forth in G.S. 139-2: Provided, however, that the Commission shall not have authority to determine that the continued operation of the district is administratively practicable and feasible unless at least a majority of the votes cast in the referendum shall have been cast in favor of the continuance of such district.

Upon receipt from the Soil and Water Conservation Commission of a certification that the Commission has determined that the continued operation of the district is not administratively practicable and feasible, pursuant to the provisions of this section, the supervisors shall forthwith proceed to terminate the affairs of the district. The supervisors shall dispose of all property belonging to the district at public auction and shall pay over the proceeds of such sale to be covered into the State treasury. The supervisors shall thereupon file an application, duly verified, with the Secretary of State for the discontinuance of such district, and shall transmit with such application the certificates of the Soil and Water Conservation Commission setting forth the determination of the Commission that the continued operation of such district is not administratively practicable and feasible. The application shall recite that the property of the district has been disposed of and the proceeds paid over as in this section provided, and shall set forth a full accounting of such properties and proceeds of the sale. The Secretary of State shall issue to the supervisors a certificate of dissolution and shall record such certificate in an appropriate book of record in his office.

Upon issuance of a certificate of dissolution under the provisions of this section, all ordinances and regulations theretofore adopted and in force within such districts shall be of no further force and effect. All contracts theretofore entered into, to which the district or supervisors are parties, shall remain in force and effect for the period provided in such contracts. The Soil and Water Conservation Commission shall be substituted for the district or supervisors as party to such contracts. The Commission shall be entitled to all benefits and subject to all liabilities under such contracts and shall have the same right and liability to perform, to require performance, to sue and be sued thereon, and to modify or terminate such contracts by mutual consent or otherwise as the supervisors of the district would have had. Such dissolution shall not affect the lien of any judgment entered under the provisions of G.S. 139-11, nor the pendency of any action instituted under the provisions of such section, and the Commission shall succeed to all the rights and obligations of the district or supervisors as to such liens and actions.

The Soil and Water Conservation Commission shall not entertain petitions for the discontinuance of any district nor conduct referenda upon such petitions, nor make determinations pursuant to such petitions, in accordance with the provisions of this Chapter, more often than once in five years. (1937, c. 393, s. 13; 1973, c. 1262, s. 38; 1977, c. 771, s. 4; 1989, c. 727, s. 218(94); 1997-443, s. 11A.119(a).)

## § 139-14. Dividing large districts.

Whenever the Soil and Water Conservation Commission shall receive a petition from any board of district supervisors signed by all supervisors of such district, the Commission shall have the authority to divide such district into two or more districts. The governing bodies of the resulting districts shall be composed of supervisors in the same manner and in the same number as is provided in G.S. 139-6 and 139-7. Upon the creating of new districts through dividing an existing district under the provisions of this section, the Commission shall appoint all district supervisors necessary to give such district its full quota of supervisors who shall serve until regular supervisors are elected or appointed, as the case may be, at the time of the next regular election of supervisors. The Commission shall assign a name to each district resulting from the division of the district under the provisions of this section and do all other things necessary to complete the organization of such new districts and place them on an operating basis. (1947, c. 131, s. 8; 1973, c. 1262, s. 38.)

## § 139-15. "County committeeman" construed to mean "county supervisor"; powers and duties.

Wherever the words "county committeeman" or "county committeemen" appear in this Chapter, the same shall be construed to mean "county supervisor" or "county supervisors"; and each such county committeeman or county supervisor shall receive the same compensation and have and exercise the same rights, powers, duties, responsibilities and voting privileges granted to or imposed upon district supervisors in respect to soil conservation activities under the provisions of this Chapter. (1949, c. 268, s. 2.)

## ARTICLE 2.

## *Watershed Improvement Districts.*

**§§ 139-16 through 139-20:** Repealed by Session Laws 1993, c. 391, ss. 2-6.

### § 139-20.1. Validation of creation of certain districts.

All actions had and taken prior to March 1, 1963, by supervisors of soil and water conservation districts, boards of county commissioners, boards of election, registrars, or other officials in the course of attempting to form and create watershed improvement districts, are hereby ratified, approved, validated and confirmed, as if accomplished in full and complete compliance with the law, and any watershed improvement district with respect to which formation may have been attempted and completed prior to March 1, 1963, is hereby declared to be lawfully formed, created, and in all respects constituted a legal and valid watershed improvement district. (1963, c. 918, s. 1.)

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 762, s. 5 changed the term "registrar" to "chief judge" throughout Chapter 163. It appears the reference to "registrars" above should now be a reference to "chief judges."

**§§ 139-21 through 139-30:** Repealed by Session Laws 1993, c. 391, ss. 7-16.

**§ 139-31:** Repealed by Session Laws 1963, c. 1228, s. 9.

**§§ 139-32 through 139-36:** Repealed by Session Laws 1993, c. 391, ss. 17-21.

**§§ 139-37, 139-37.1:** Recodified as §§ 139-48, 139-49 by Session Laws 1993, c. 391, ss. 22, 23.

**§ 139-38:** Repealed by Session Laws 1993, c. 391, s. 24.

## ARTICLE 3.

## *Watershed Improvement Programs; Expenditure by Counties.*

### § 139-39. Alternative method of financing watershed improvement programs by special county tax.

The board of county commissioners in any county is authorized to call a special election to determine whether it be the will of the qualified voters of the county that they levy and cause to be collected annually, at the same time and in the same manner as the general county taxes are levied and collected, a special tax at a rate not to exceed twenty-five cents (25¢) on each one hundred dollars ($100.00) valuation of property in said county, to be known as a "Watershed Improvement Tax," the funds therefrom, if the levy be authorized by the voters of said county, to be used for the prevention of flood water and sediment damages, and for furthering the conservation, utilization and disposal of water and the development of water resources. (1959, c. 781, s. 10; 1967, c. 987, s. 8.)

**Local Modification.** — Alexander: 1967, c. 500; Cabarrus: 1965, c. 615; Camden: 1973, cc. 387, 957; Caswell: 1969, c. 553; Graham: 1967, c. 503; Iredell: 1967, c. 623; Johnston: 1969, c. 955; Lincoln: 1969, c. 934; Mecklenburg: 1969, c. 1191; Mitchell: 1963, c. 1033; New Hanover: 1969, c. 958; Onslow: 1967, c. 725, s. 1; Pasquotank: 1973, c. 957; Perquimans: 1973, c. 957; Person: 1967, c. 111, s. 1; Polk: 1963, c. 996; Rowan: 1967, c. 568; Stokes: 1963, c. 156; Surry: 1963, c. 442; Union: 1965, c. 19, s. 1; Wayne: 1969, c. 821; Yadkin: 1961, c. 433.

## § 139-40. Conduct of election.

(a) There shall be no new registration of voters for such an election. Registration shall be open for registration of new voters in said county and registration of any and all legal residents of said county, who are or could legally be enfranchised as qualified voters for regular general elections, shall be carried out in accordance with the general election laws of the State of North Carolina as provided for local elections. Notice of such registration of new voters shall be published in a newspaper circulated in said county, once, not less than 55 days before and not more than 65 days before the election, stating the hours and days for registration. The special election, if called, shall be under the control and supervision of the county board of elections.

(b) The form of the question shall be substantially the words "For Watershed Improvement Tax of Not More Than ________ Cents Per One Hundred Dollar ($100.00) Valuation," and "Against Watershed Improvement Tax of Not More Than ________ Cents Per One Hundred Dollar ($100.00) Valuation," which alternates shall appear separated from each other on one ballot containing opposite, and to the left of each alternate, squares of appropriate size in one of which squares the voter may make a mark "X" to designate the voter's choice for or against such tax, provided, the board of county commissioners may vary the aforesaid form of the question to be placed upon the ballot for the watershed improvement tax election in such manner as the board deems appropriate, and the board of elections shall cause to be placed upon the ballot such form of the question as may be requested by the board of county commissioners. The board of county commissioners shall designate the amount of the maximum annual rate of such tax to be levied, which amount may be less than but may not exceed twenty-five cents (25¢) on the one hundred dollar ($100.00) valuation of property in the county, and said amount shall be stated on the ballot in the question to be voted upon. Such ballot shall be printed on white paper and each polling place shall be supplied with a sufficient number of ballots not later than the day before the election. At such special election the election board shall cause to be placed at each voting precinct in said county a ballot box marked "Watershed Improvement Tax Election".

(c) The duly appointed judges and other election officials who are named and fixed by the county board of elections shall count the ballots so cast in such election and the results of the election shall be officially canvassed, certified and announced by the proper officials of the board of elections, according to the manner of canvassing, certifying and announcing the elections held under the general election laws of the State as provided for local elections.

(d) If a majority of those voting in such election favor the levying of such a tax, the board of commissioners of such county is authorized to levy a special tax at a rate not to exceed twenty-five cents (25¢) on each one hundred dollars ($100.00) of assessed value of real and personal property taxable in said county, not to exceed the maximum rate of tax approved by the voters in such election, and the General Assembly does hereby give its special approval for the levy of such special tax. (1959, c. 781, s. 10; 1961, c. 32; 1969, c. 711, s. 2; 1993 (Reg. Sess., 1994), c. 762, s. 10.)

**Local Modification.** — Alexander: 1967, c. 500; Cabarrus: 1965, c. 615; Camden: 1973, cc. 387, 957; Caswell: 1969, c. 553; Graham: 1967, c. 503; Iredell: 1967, c. 623; Johnston: 1969, c. 955; Lincoln: 1969, c. 934; Mecklenburg: 1969, c. 1191; Mitchell: 1963, c. 1033; New Hanover: 1969, c. 958; Onslow: 1967, c. 725, s. 1; Pasquotank: 1973, c. 957; Perquimans: 1973, c. 957; Person: 1967, c. 111, s. 1; Polk: 1963, c. 996; Rowan: 1967, c. 568; Stokes: 1963, c. 156; Surry: 1963, c. 442; Union: 1965, c. 19, s. 1; Wayne: 1969, c. 821; Yadkin: 1961, c. 433.

**Legal Periodicals.** — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

## § 139-41. Powers of county commissioners.

(a) If the majority of the qualified voters voting in such election favor the levying of such tax, then and in that event, the board of county commissioners shall have all powers of soil and water conservation districts as set forth in subdivisions (1), (2), (3), (4), (5), (6), (7), (8) and (10) of G.S. 139-8 (subject to the limitations set forth in subdivision (12) of such section) concerning flood prevention, development of water resources, floodwater and sediment damages, and conservation, utilization and disposal of water. It is the intention of the General Assembly that such powers shall normally be exercised within all or parts of one or more single watersheds, or of two or more watersheds tributary to one of the major drainage basins of the State, but exceptions to this policy may be permitted in appropriate cases; provided, however, it is not the intention of the General Assembly to authorize hereby the diversion of water from one stream or watershed to another.

(b) The board of county commissioners may itself exercise such powers or, for that purpose, may create a watershed improvement commission to be composed of three members appointed by the board. The terms of office of the members of the commission shall be six years, with the exception of the first two years of existence of the commission, in which one member shall be appointed to serve for a period of two years, one for a period of four years, and one for a period of six years; thereafter all members shall be appointed for six years, and shall serve until their successors have been appointed and qualified. Vacancies in the membership of the commission occurring otherwise than by expiration of term shall be filled by appointment to the unexpired term by the board of county commissioners. The commission shall hold its first meeting within 30 days after its appointment as provided for in this Article, and the beginning date of all terms of office of commissioners shall be the date on which the commission holds its first meeting. The commission at its first meeting shall select a chair, vice-chair, and secretary-treasurer to serve two-year terms. All acts done by the commission shall be entered in a book of minutes to be kept by the secretary-treasurer. A majority of the membership of the commission shall constitute a quorum. The commission shall meet in regular session at least quarterly and may meet specially upon the call of the chair or any members, and upon at least three-day notice of the time, place, and purpose of the meeting. The commission shall provide the board of county commissioners 30 days prior to July 1 a proposed budget for the fiscal year commencing on July 1 and shall provide the board of county commissioners an audit by a certified public accountant within 60 days after the expiration of the fiscal year ending on June 30.

(c) The board of county commissioners may create a single watershed improvement commission for the entire county or may create separate commissions for individual projects or watersheds.

(d) The board of county commissioners, as an alternative to itself exercising the powers set forth in subsection (a) of this section or to creating a watershed improvement commission for that purpose, may by resolution designate the soil and water conservation district having jurisdiction in the county to exercise authority for the board of county commissioners in carrying out the county watershed improvement program. The soil and water conservation district shall provide the board of county commissioners 30 days prior to July 1 a proposed budget for the fiscal year commencing on July 1 and shall provide the board of county commissioners an audit by a certified public accountant within 60 days after the expiration of the fiscal year ending on June 30.

(e) Repealed by Session Laws 1981, c. 326, s. 5.

(f) Any industry or private water user, the State of North Carolina, the United States or any of its agencies, any municipality, any other county, or any other political subdivision may participate in county watershed improvement programs hereunder in the same manner and to the same extent as provided by G.S. 139-37 with respect to participation in watershed improvement district programs.

(g) The board of county commissioners may provide for county watershed improvement programs and any or all other related activities (such as water supply systems, sewerage systems, water resources programs, beach erosion control programs, and conservation programs) to be coordinated, to be jointly undertaken by two or more local agencies, or to be assigned to a single county agency designated by such name and organized in such manner as the board deems appropriate.

(h) A Watershed Improvement Commission created pursuant to subsection (b) of this section or a soil and water conservation district designated pursuant to subsection (d) of this section may employ such officers, agents, consultants, and other employees as they may require; shall determine their qualifications, duties, and compensation; shall provide for the execution of surety bonds for the secretary-treasurer and such other officers, agents, and employees as shall be entrusted with funds or property, and shall provide for making and publication of an annual audit of the accounts of receipts and disbursements of the watershed improvement program.

(i) District supervisors and watershed improvement commissioners shall receive a per diem allowance of seven dollars ($7.00) and necessary expenses while engaged in the discharge of official duties pursuant to subsections (b) and (d) of this section. Claims for per diem and expenses for any duty except attendance upon a meeting shall be paid only after approval of the commission or the Board of Supervisors respectively. (1959, c. 781, s. 10; 1967, c. 987, s. 10; 1969, c. 711, s. 3; 1971, c. 1138, s. 2; 1973, c. 1262, s. 38; 1981, c. 326, s. 5; 1993, c. 391, s. 25.)

**Local Modification.** — Davie: 1961, c. 794, s. 11/2; Forsyth: 1963, c. 761, s. 4; Guilford: 1963, c. 734; Iredell: 1961, c. 794, s. 11/2; 1963, c. 955; McDowell: 1963, c. 637; Onslow: 1967, c. 725, s. 21/2; Person: 1961, c. 794, s. 11/2; 1967, c. 111, s. 2; Polk: 1961, c. 794, s. 11/2; Rowan: 1961, c. 794, ss. 1, 11/2; 1963, c. 109; Stokes: 1963, cc. 155, 401; Union: 1961, c. 794, s. 11/2; 1963, c. 955; 1965, c. 19, s. 2; Wake: 1961, c. 794, s. 11/2; Yadkin: 1961, c. 794, s. 11/2; 1963, c. 401.

**Editor's Note.** — Section 10 of Session Laws 1967, c. 987, which amended this section, provides: "It is hereby declared that the purpose of this section is to clarify the existing authority of boards of county commissioners to acquire property in connection with county watershed improvement programs. The authority expressed in this section concerning acquisition, use and disposition of property by counties under the provisions of G.S. 139-41 (a)(4) shall be considered to be in addition to the general property acquisition use and disposal powers of counties under G.S. Chapter 153 or otherwise. All expenditures heretofore incurred by counties for property acquisition in connection with county watershed improvement programs are hereby validated and confirmed, as being based upon said general property acquisition powers of counties. The proceeds of any tax heretofore or hereafter approved by the voters of a county for a county watershed improvement program, or authorized by local act for a county watershed improvement program, may be expended for property acquisition in connection with such program." Chapter 153 was repealed by Session Laws 1973, c. 822. For present provisions relating to counties, see Chapter 153A.

## § 139-41.1. Powers of counties that are not authorized to levy watershed improvement taxes.

A county may exercise any of the powers set out in this Article without having been authorized to levy a watershed improvement tax pursuant to the procedures of G.S. 139-39 and 139-40 or otherwise. (1981, c. 251, s. 1.)

## § 139-41.2. Review of watershed work plans.

(a) Watershed work plans developed under Public Law 566 (83rd Congress) as amended, and all other work plans developed pursuant to this Chapter, shall be submitted to the Soil and Water Conservation Commission for review and approval or disapproval. No work of improvement may be constructed or established without the approval of work plans by the Soil and Water Conservation Commission pursuant to this section.

(b) The Soil and Water Conservation Commission shall approve a watershed work plan if, in its judgment, it:

(1) Provides for proper and safe construction of proposed works of improvement;

(2) Shows that the construction and operation of the proposed works of improvement (in conjunction with other such works and related structures of the district and the watershed) will not appreciably diminish the flow of useful water that would otherwise be available to existing downstream water users during critical periods;

(3) Determines whether a program of floodplain management in connection with such proposed works is in the public interest, and the Soil and Water Conservation Commission may withhold approval until satisfactory floodplain management measures are incorporated; and

(4) Is otherwise in compliance with law.

(c) Amendments to the work plan involving major changes shall be approved by the Soil and Water Conservation Commission. Determinations by the Soil and Water Conservation Commission that an amendment involve major changes shall be conclusive for purposes of this section. No work of improvement may be constructed or established without the approval of work plans by the Soil and Water Conservation Commission pursuant to this subsection. The construction or establishment of any such work of improvement without such approval, or without conforming to a work plan approved by the Soil and Water Conservation Commission, may be enjoined. The Soil and Water Conservation Commission may institute an action for such injunctive relief in the superior court of any county wherein such construction or establishment takes place.

(d) In conjunction with any work plans submitted to the Soil and Water Conservation Commission under subsection (c) of this section, a county shall submit in such form as the Soil and Water Conservation Commission may prescribe a plan of its proposed method of operations for works of improvement covered by the work plans and for related structures. With the approval of the Soil and Water Conservation Commission, the county may amend its initial plan of operations from time to time. Soil and Water Conservation Commission approval of the initial plan of operations shall not be required.

(e) If the Soil and Water Conservation Commission has reason to believe that a county is not operating any work of improvement or properly related structure in accordance with its plan of operations as amended, the Soil and Water Conservation Commission on its own motion or upon complaint may order a hearing to be held thereon upon not less than 30 days' written notification to the county and complainant, if any, by personal service or registered mail. Notice of such hearing shall be published at least once a week for two successive weeks. In connection with any such hearing the Soil and Water Conservation Commission shall be empowered to administer oaths; to take testimony; and, in the same manner as the superior court, to order the taking of depositions, issue subpoenas, and to compel the attendance of witnesses and production of documents. If the Soil and Water Conservation Commission determines from evidence of record that the county is not operating any work of improvement or related structure in accordance with its plan of operations, as amended, the Soil and Water Conservation Commission may issue an order directing the county to comply therewith or to take other appropriate corrective action. Upon failure by a county to comply with any such order, the Soil and Water Conservation Commission may institute an action for injunctive relief in the superior court of any county wherein such noncompliance occurs. (1981, c. 326, s. 6; 2007-495, s. 16.)

## § 139-41.3. Liability of owners of land associated with watershed improvement projects.

(a) Purpose. — The purpose of this section is to encourage owners of land to make land and water areas available to the public at no cost for educational and recreational purposes by limiting the liability of the owner to persons entering the land for those purposes. The further purpose of this section is to establish a statutory rule of landowner liability law to govern the liability of a landowner whose land is associated with a watershed improvement project as defined by this Chapter to persons entering the land for educational and recreational purposes without charge. This statutory rule modifies the common law of North Carolina concerning landowner liability.

(b) Definitions. — The following definitions apply in this section, unless otherwise specified:

(1) Charge. — A price or fee asked for services, entertainment, recreation performed, or products offered for sale on land or in return for an invitation or permission to enter upon land, except as otherwise excluded in this section.

(2) Educational purpose. — Any activity undertaken as part of a formal or informal educational program, and viewing historical, natural, archaeological, or scientific sites.

(3) Land. — Real property, land, and water. The term does not include a dwelling or the property immediately adjacent to and surrounding the dwelling that is generally used for activities associated with occupancy of the dwelling as a living space.

(4) Land associated with watershed improvement projects. — The entire parcel or set of parcels on which any part of a watershed improvement project is located, including any fee easement, leasehold interest or legal possession.

(5) Legal entity. — The term includes (in addition to a private entity) a county, city, special district, public authority, or other unit or agency of government.

(6) Owner. — Any individual or legal entity that has any fee, easement, leasehold interest, or legal possession, and any employee or agent of the individual or legal entity.

(7) Recreational purpose. — Any activity undertaken for recreation, exercise, education, relaxation, refreshment, diversion, or pleasure.

(c) Exclusion. — For purposes of this Chapter, the term "charge" does not include any of the following:

(1) Any contribution in-kind, services, or cash contributed by a person, legal entity, nonprofit organization, or governmental entity other than the owner, whether or not sanctioned or solicited by the owner, the

purpose of which is to: (i) remedy damage to land caused by educational or recreational use; or (ii) provide warning of hazards on, or remove hazards from, land used for educational or recreational purposes.

(2) Unless otherwise agreed in writing or otherwise provided by the State or federal tax codes, any property tax abatement or relief received by the owner from the State or local taxing authority in exchange for the owner's agreement to open the land for educational or recreational purposes.

(3) Any volunteer service involving trash pickup, stream cleanup, or stream bank restoration.

(d) Limitation of Liability. — Except as specifically recognized by or provided for in this section, an owner of land associated with a watershed improvement project, as defined by this Chapter, who either directly or indirectly invites or permits without charge any person to use the land for educational or recreational purposes owes the person the same duty of care that he or she owes a trespasser, except that nothing in this Chapter shall be construed to limit or nullify the doctrine of attractive nuisance and the owner shall inform direct invitees of artificial or unusual hazards of which the owner has actual knowledge.

This section does not apply to an owner who invites or permits any person to use land for a purpose for which the land is regularly used and for which a price or fee is usually charged even if it is not charged in that instance, or to an owner whose purpose in extending an invitation or granting permission is to promote a commercial enterprise. (2001-272, s. 1.)

**Editor's Note.** — Session Laws 2001-272, which added this section, provides in s. 2: "This act becomes effective October 1, 2001, and applies to all causes of action arising on or after that date. All insurance policies providing liability coverage for land, as defined in G.S. 139-41.3(b)(3) covered by Section 1 of this act [G.S. 139-41.3] shall be rerated on the anniversary dates of the policies next following the effective date of Section 1 of this act, to reflect the added limitation of liability contained in G.S. 139-41.3."

## § 139-42. Article intended as supplementary.

This Article is intended to provide an alternative method of financing and operating watershed improvement programs, supplementary to any other method authorized by law. (1959, c. 781, s. 10; 1993, c. 391, s. 26.)

## § 139-43: Repealed by Session Laws 1993, c. 391, s. 27.

## § 139-44. Power of eminent domain conferred on counties.

(a) A county shall have the power to acquire by condemnation any interest in land needed in carrying out the purposes of this act, except interests in land within the boundaries of any project licensed by the Federal Power Commission or interests in land owned or held for use by a public utility as defined in G.S. 62-3. This power may be exercised only after:

(1) The county makes application to the Soil and Water Conservation Commission, identifying the land sought to be condemned and stating the purposes for which said land is needed; and

(2) The Soil and Water Conservation Commission finds that the land is sought to be acquired for a proper county purpose. The findings of the Soil and Water Conservation Commission shall be conclusive in the absence of fraud, notwithstanding any other provision of law.

(b) The Soil and Water Conservation Commission shall certify copies of its findings to the applicant county, the Environmental Management Commission and the clerk of the superior court of the county or counties wherein any part of the project lies for recordation in the special proceedings thereof.

(c) For purposes of this section:

(1) The term "interest in land" means any land, right-of-way, right of access, privilege, easement, or other interest in or relating to land. Said "interest in land" does not include an interest in land which is held or used in whole or in part for a public water supply, unless such "interest in land" is not necessary or essential for such uses or purposes.

(2) A "description" of land shall be sufficient if the boundaries of the land are described in such a way as to convey an intelligent understanding of the location of the land. In the discretion of the applicant county, boundaries may be described by any of the following methods or any combination thereof: by reference to a map; by metes and bounds; by general description referring to natural boundaries, or to boundaries of existing political subdivisions or municipalities, or to boundaries of particular tracts or parcels of land.

(3) "Commission" means the Soil and Water Conservation Commission.

(d) The procedure in all condemnation proceedings pursuant to this section shall conform as nearly as possible to the procedure provided in Chapter 40A and all acts amendatory thereof.

(e) Interests in land acquired pursuant to this section may be used in such manner and for such purposes as the board of county commissioners deem best. If, in the opinion of the board, such lands should be sold, leased or rented, the board may do so, subject to the approval of the Soil and Water Conservation Commission.

(f) All provisions of local acts inconsistent herewith limiting condemnation powers of counties for county watershed improvement programs are hereby repealed. (1967, c. 987, s. 5; 1973, c. 1262, s. 38; 1981, c. 326, s. 4; c. 919, s. 19; 1993, c. 391, ss. 28, 29.)

**Editor's Note.** — This section was formerly G.S. 139-38. It was amended and transferred to its present position by Session Laws 1981, c. 326, s. 4. Former G.S. 139-44 was renumbered as G.S. 139-38 by Session Laws 1981, c. 326, s. 7.

## § 139-45. Extraterritorial powers of counties.

A county which has been authorized to levy a watershed improvement tax, whether pursuant to Article 3 of General Statutes 139 or by special act or otherwise, may take any authorized watershed action and may expend funds for any authorized watershed purpose (including acquisition of real and personal property, easements, options, or other interests in real property) outside as well as inside the boundaries of the county, if the board of county commissioners finds that substantial flood prevention, drainage or water supply benefits will accrue to property located within the boundaries of the county as a result of such action or expenditure. The board of county commissioners may delegate to a watershed improvement commission the function of making such findings, either generally or in a particular case. (1967, c. 987, s. 7.)

## § 139-46. Recreational and related aspects of watershed improvement programs.

(a) Local watershed sponsors may install and maintain recreational facilities and services in connection with watershed improvement works or projects, and may provide areas (including structures) for the conservation and replacement of fish and wildlife habitat. For any of these purposes said sponsors may appropriate and expend funds, may levy taxes and assessments, and may issue bonds and notes, to the same extent as in the case of other authorized watershed activities. Such recreational facilities and services may include but are not limited to any or all of the water-related recreational facilities provided for in subsection (b) of this section, and parking areas, ingress and egress roads, hiking or nature trails, picnic areas and campsites. No application for watershed planning under Public Law 566 (83rd Congress, United States), as amended, may be approved by the Soil and Water Conservation Commission until after receipt and consideration of recommendations from the appropriate fish and wildlife agency concerning replacement of fish and wildlife habitat in mitigation of anticipated damages: Provided that this requirement for consideration of fish and wildlife recommendations shall not apply if such recommendations are not received by the Soil and Water Conservation Commission within 30 days after the Soil and Water Conservation Commission requests such recommendations. Within the meaning of this provision the "appropriate fish and wildlife agency" means the North Carolina Wildlife Resources Commission as to matters within its jurisdiction, and the North Carolina Department of Environment and Natural Resources as to matters within its jurisdiction, or both such agencies as to matters within their concurrent jurisdiction.

(b) It is hereby declared that the provisions of this Chapter authorizing works of improvement, structures, plans, surveys and investigations for the development of water resources were intended to include water-related recreational facilities, including but not limited to boat launching areas and facilities, bathhouses, campsites and picnic areas adjacent to the water, and other basic facilities for water recreational areas. All expenditures heretofore incurred by any local watershed sponsor for such water-related recreational facilities are hereby validated and confirmed. The proceeds of any tax heretofore approved by the voters of a county for a county watershed improvement program, or authorized by special or local act for a county watershed improvement program, may be expended for such water-related recreational facilities, if the board of county commissioners after a public hearing determines that the proceeds should be so expended. Notice of such hearing shall be published at least once a week for two consecutive weeks in at least one newspaper of general circulation published in the county, in lieu thereof, in a newspaper of general circulation in the county. No action based on the alleged invalidity of the expenditures herein confirmed or of the use of tax proceeds herein authorized shall lie after January 1, 1968, to enjoin or contest any such expenditure or any such use of tax proceeds.

(c) Within the meaning of this section "local watershed sponsors" include soil and water conservation districts, drainage districts, municipalities, and counties undertaking county watershed programs under Article 3 of this Chapter or any local act granting similar powers. (1967, c. 987, s. 9; 1973, c. 1262, ss. 38, 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218(95); 1993, c. 391, s. 30; 1997-443, s. 11A.119(a).)

**§ 139-47:** Repealed by Session Laws 1993, c. 391, s. 31.

### § 139-48. Participation by cities, counties, industries and others.

(a) Any industry, or private water user, the State of North Carolina, the United States or any of its agencies, any county, municipality or any other political subdivision may participate in watershed improvement works or projects upon mutually agreeable terms relating to such matters as the construction, financing, maintenance and operation thereof.

(b) Any county or municipality may contribute funds toward the construction, maintenance and operation of watershed improvement works or projects, to the extent that such works or projects:

(1) Provide a source (respectively) of county or municipal water supply; or protect an existing source of such supply, enhance its quality or increase its dependable capacity or quantity; or

(2) Protect against or alleviate the effects of flood-water or sediment damages affecting, or provide drainage benefits for, (respectively) county or municipally owned property or the property (respectively) of county or municipal inhabitants located outside the boundaries of such works or projects but within the respective boundaries of such county or municipality.

Each county and city may fund appropriations for the purposes of this section by levy of property taxes pursuant to G.S. 153A-149 and G.S. 160A-209 and by the allocation of other revenues whose use is not otherwise restricted by law. (1959, c. 781, s. 8; 1973, c. 803, s. 33; 1993, c. 391, ss. 22, 32.)

## § 139-49. Borrowing by local units for anticipated water supplies.

(a) Any local unit may issue bonds or other obligations in the manner provided by this section (and may appropriate and expend funds derived therefrom) for the purpose of financing all or any part of the cost of providing storage capacity for anticipated future or present water supply needs, in conjunction with any watershed improvement work or project.

(b) Any two or more local units, each situated in whole or in part in the basin of the same river in which a watershed improvement work or project is located, may issue bonds or other obligations for the purpose stated in subsection (a) of this section in such amounts as constitute their proportionate parts, respectively, of the estimated cost of such a work or project. The governing bodies of said local units shall jointly determine and agree upon the proportionate part of the estimated cost which each local unit is to bear, taking into consideration the taxable resources of each local unit and such other economic and beneficial factors as deemed pertinent and advisable, and such determination shall be recorded in the minutes of each such body.

(c) Such bonds or other obligations of counties shall be issued pursuant to the Local Government Finance Act, Chapter 159 of the General Statutes: Provided, the amount thereof shall constitute a deduction from the gross debt under G.S. 159-55(a)(2): Provided, further, the provisions of G.S. 159-65(2) shall not apply to such bonds.

(d) Such bonds or other obligations of municipalities shall be issued pursuant to the Local Government Finance Act, Chapter 159 of the General Statutes, and the amount thereof shall constitute a deduction from the gross debt under G.S. 159-55(a)(2): Provided, such bonds may not be consolidated with bonds authorized by another ordinance as provided in G.S. 159-65(2).

(e) Notwithstanding any other provisions of law, the Local Government Commission may sell any bonds or other obligations issued pursuant to this section to the United States of America, or any agency thereof, at private sale and without advertisement. The first installment of principal of bonds or other obligations issued under this section may be made payable not more than 10 years after the date of the bonds or obligations. Accrual of interest may be deferred not more than 10 years. Any such bonds or other obligations may contain appropriate provisions which will authorize the initiation of payments of interest and installments of principal on the bonds on a date not later than 10 years from the date of such bonds or obligations, or on the date when the local unit shall begin to use such local water supplies, whichever date shall occur first. The date on which such use of local water supplies begins shall be determined by the governing body of the local unit issuing such bonds or other obligations, which determination shall be binding and conclusive.

(f) If the bonds or other obligations of one or more local units which have agreed upon their proportionate part of the estimated cost, as provided for in subsection (b) of this section, are required by the laws or the Constitution to be submitted to the voters of such local unit at an election and a majority of said voters voting in said election vote against the issuance of such bonds, the bonds or other obligations of any other local unit which have been duly authorized may be issued in whole or in part only when a sufficient number of local units have agreed upon their proportionate part as provided in subsection (b) of this section and have duly authorized their bonds or obligations so that the full amount of such estimated cost may be paid.

(g) As used in this section the following terms have the following meanings:

"Local unit" means any county or municipality.

"Local water supplies" include any municipal or county water supplies, whether or not the purposes served by a particular storage facility financed under this section initially include service to domestic or any other water supply customers.

"Costs" include the cost of water storage capacity in a structure or facility (or other equivalent costs for water supply purposes) and the cost of facilities for release or withdrawal of water stored for water supply purposes, as well as other installation costs of a structure or facility including costs of real and personal property, easements, options, or other interests in real property, and water rights, engineering and inspection fees, contract administration costs, and costs of conveyance facilities for local water supplies. (1967, c. 987, s. 4; 1993, c. 391, ss. 23, 33(a), (b).)

**§§ 139-50 through 139-52:** Reserved for future codification purposes.

## ARTICLE 4.

## *Grants for Small Watershed Projects.*

### § 139-53. State Soil and Water Conservation Commission authorized to accept applications.

The State Soil and Water Conservation Commission is authorized to accept applications for grants for nonfederal costs relating to small watershed projects authorized under Public Law 566 (83rd Congress as amended) from local sponsors of such projects properly organized under the provisions of either Chapter 156 of the General Statutes of North Carolina or Chapter 139 of the General Statutes of North Carolina, or from county service districts authorized by G.S. 153A-301, or from municipal service districts authorized by G.S. 160A-536. Applications shall be made on forms prescribed by the Commission. (1977, 2nd Sess., c. 1206; 1981, c. 326, s. 9.)

### § 139-54. Purposes for which grants may be requested.

Applications for grants may be made for the nonfederal share of small watershed projects for the following purposes in amounts not to exceed the percentage of the nonfederal costs indicated:

(1) Land rights acquisition for impounding or retarding water — fifty percent (50%).

(2) Engineering fees — fifty percent (50%).
(3) Anticipated future and present water supply needs in conjunction with watershed improvement works or projects as described in G.S. 139-37.1 — fifty percent (50%).
(4) Installation of recreational facilities and services (to include land acquisition) as described in G.S. 139-46 — fifty percent (50%).
(5) Construction costs for water management (drainage or irrigation) purposes, including utility and road relocations not funded by the State Department of Transportation — sixty-six and two-thirds percent (66 ⅔%).
(6) Conservation and replacement of fish and wildlife habitat as described in G.S. 139-46 — seventy-five percent (75%).
(7) Rehabilitation or improvement of water resources structural measures in accordance with criteria established by the Natural Resources Conservation Service of the United States Department of Agriculture pursuant to the Watershed Protection and Flood Prevention Act of 1954, as amended by the Small Watershed Rehabilitation Amendments of 2000 (Pub. L. No. 106-472, 114 Stat. 2007), codified at 16 U.S.C. § 1001, et. seq.; the Dam Safety Law of 1967, G.S. 143-215.23, et. seq.; and rules adopted pursuant thereto — fifty percent (50%). (1977, 2nd Sess., c. 1206; 1979, c. 1046, s. 2; 2002-176, s. 3.)

## § 139-55. Review of applications.

(a) The State Soil and Water Conservation Commission shall receive and review applications for grants for small watershed projects authorized under Public Law 566 (83rd Congress, as amended) and approve, approve in part, or disapprove all such applications.

(b) In reviewing each application, the State Soil and Water Conservation Commission shall consider:
(1) The financial resources of the local sponsoring organization;
(2) Nonstructural measures such as sedimentation control ordinances and floodplain zoning ordinances enacted and enforced by local governments to alleviate flooding;
(3) Regional benefits of projects to an area greater than the area under jurisdiction of the local sponsoring organization;
(4) Any direct benefit to State-owned lands and properties. (1977, 2nd Sess., c. 1206; 2002-165, s. 2.17; 2007-495, s. 17.)

## § 139-56. Recommendation of priorities and disbursal of grant funds.

Whenever two or more applications for grants are approved in whole or in part, the State Soil and Water Conservation Commission shall establish priorities among the several applications for disbursal of grant funds. To the extent that funds are available, the State Soil and Water Conservation Commission may authorize the disbursal of grant funds to the applicants consistent with the established priorities. The State Soil and Water Conservation Commission shall promulgate regulations to provide for an audit of grant funds to assure that they are spent for the purposes delineated in the application. Established priorities may be reviewed from time to time and revised if circumstances warrant such revision. (1977, 2nd Sess., c. 1206.)

## § 139-57. Availability of funds.

All grants shall be contingent upon the availability of funds for disbursement to applicants. At the end of each fiscal year the State Soil and Water

Conservation Commission shall notify all applicants whose applications have been approved and to whom grant funds have not been disbursed of the status of their application. At the time of notification the State Soil and Water Conservation Commission shall notify the applicants of the availability of funds for grants in the upcoming fiscal year and at the same time shall notify the applicants of their position on any priority list that may have been established for the disbursal of grant funds for small watershed projects. (1977, 2nd Sess., c. 1206.)

Conservation Commission shall notify all applicants whose applications have been approved and to whom grant funds have not been disbursed of the status of their application. At the time of notification the State Soil and Water Conservation Commission shall notify the applicants of the availability of funds for grants in the upcoming fiscal year and at the same time shall notify the applicants of their position on any priority list that may have been established for the disbursal of grant funds for small watershed projects. (1977, 2nd Sess., c. 1260.)

# Chapter 140.

# State Art Museum; Symphony and Art Societies.

### Article 1.

### North Carolina Museum of Art.

Sec.
140-1 through 140-5.1. [Recodified.]

### Article 1A.

### Art Museum Building Commission.

140-5.2 through 140-5.6. [Repealed.]
140-5.7 through 140-5.11. [Reserved.]

### Article 1B.

### North Carolina Museum of Art.

140-5.12. Agency of State; functions.
140-5.13. Board of Trustees — establishment; members; selection; quorum; compensation; officers; meetings.
140-5.14. Board of Trustees — powers and duties.
140-5.15. Director of Museum of Art; appointment; dismissal; powers and duties; staff.
140-5.16. Gifts; special fund; exemption from taxation.
140-5.17. [Repealed.]

### Article 2.

### North Carolina Symphony Society.

Sec.
140-6. [Repealed.]
140-7. Adoption of bylaws; amendments.
140-8. Audit.
140-9. Allocations from Contingency and Emergency Fund; expenditures.
140-10. Counties and municipalities authorized to make contributions.
140-10.1. Exempt from certain taxes.

### Article 3.

### North Carolina State Art Society.

140-11. [Repealed.]
140-12. Department of Administration authorized to provide space for Art Society.
140-13. Audit.
140-14. North Carolina State Art Society within the North Carolina Museum of Art; promotion of public appreciation of art; etc.
140-15. [Repealed.]

## ARTICLE 1.

## *North Carolina Museum of Art.*

### §§ 140-1 through 140-5.1: Recodified as G.S. 140-5.12 to 140-5.17.

**Editor's Note.** — This Article was rewritten by Session Laws 1979, 2nd Sess., c. 1306, s. 1, effective July 1, 1980, and has been recodified as Article 1B, G.S. 140-5.12 to 140-5.17.

G.S. 140-5.17 was subsequently repealed by Session Laws 2007-484, s. 19, effective August 30, 2007.

## ARTICLE 1A.

## *Art Museum Building Commission.*

### § 140-5.2: Repealed by Session Laws 1973, c. 476, s. 43.

**Cross References.** — For present provisions as to creation and organization of the Art Museum Building Commission, see G.S. 143B-58 through 143B-61.

### §§ 140-5.3 through 140-5.6: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 16.

**§§ 140-5.7 through 140-5.11:** Reserved for future codification purposes.

## ARTICLE 1B.

## *North Carolina Museum of Art.*

### § 140-5.12. Agency of State; functions.

The North Carolina Museum of Art is an agency of the State of North Carolina within the Department of Cultural Resources. The functions of the North Carolina Museum of Art shall be to acquire, preserve, and exhibit works of art for the education and enjoyment of the people of the State, and to conduct programs of education, research, and publication designed to encourage an interest in and an appreciation of art on the part of the people of the State. (1961, c. 731; 1979, 2nd Sess., c. 1306, s. 1.)

**Editor's Note.** — This Article is Article 1 of this Chapter as rewritten by Session Laws 1979, 2nd Sess., c. 1306, s. 1, effective July 1, 1980, and recodified. Where appropriate, the historical citations to the former Article have been added to corresponding sections in this Article as rewritten.

#### CASE NOTES

**As to appraisal of works of art,** see North Carolina State Art Soc'y v. Bridges, 235 N.C. 125, 69 S.E.2d 1 (1952), decided prior to enactment of this Article.

### § 140-5.13. Board of Trustees — establishment; members; selection; quorum; compensation; officers; meetings.

(a) It is the duty of the Department of Cultural Resources to develop policy and to establish and enforce standards for resources, services, and programs involving the arts and the cultural aspects of the lives of the citizens of North Carolina. To attain these objectives, there is hereby established within the Department of Cultural Resources the Board of Trustees of the North Carolina Museum of Art.

(b) The Board of Trustees of the North Carolina Museum of Art shall consist of 29 members, chosen as follows:

(1) The Governor shall appoint 13 members, one from each congressional district in the State in accordance with G.S. 147-12(3b);

(2) The North Carolina State Art Society, Incorporated, shall elect four members;

(3) The North Carolina Museum of Art Foundation, Incorporated, shall elect four members;

(4) The Board of Trustees of the North Carolina Museum of Art shall elect four members;

(5) The General Assembly shall appoint four members, two upon the recommendation of the Speaker of the House of Representatives, and two upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121;

(6) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1191, s. 49.

All regular appointments or elections except those by the General Assembly shall be for terms of six years, except that each member shall serve until his successor is chosen and qualifies. No person may be appointed or elected to more than two consecutive terms of six years. All regular appointments by the General Assembly shall be for the then current legislative term, and no appointee of the General Assembly may be appointed to more than two consecutive terms of two years.

(c) Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. All other vacancies occurring in the regular membership of the Board of Trustees prior to the expiration of a term shall be filled by the same authority and in the same manner as the vacating member was chosen, and the successor member so chosen shall serve for the remainder of the unexpired term of the vacating member.

(d) All initial appointments and elections to the Board of Trustees shall be made on July 1, 1980, or as soon as feasible thereafter except as provided in this subsection, and the terms of all except the legislative appointees shall expire on June 30, 1983, or June 30, 1986, as the case may be. In order to establish regularly overlapping terms, initial appointments and elections to the Board of Trustees shall be made as follows:

(1) Four members at large shall be appointed by the Governor for initial terms of three years and four members at large shall be appointed by the Governor for initial terms of six years.

(2) One member shall be elected by the North Carolina State Art Society, Incorporated, for an initial term of three years and two members shall be elected by that Society for initial terms of six years.

(3) One member shall be elected by the North Carolina Museum of Art Foundation, Incorporated, for an initial term of three years and two members shall be elected by that Foundation for initial terms of six years.

(4) One member shall be elected by the Art Commission prior to July 1, 1980, for an initial term of three years and two members shall be elected by that Commission for initial terms of six years. Upon the expiration of the terms of those three members, their successors shall be elected by the Board of Trustees of the North Carolina Museum of Art.

(5) Three members shall be elected by the State Art Museum Building Commission to serve until the termination of that Commission or until June 30, 1983, whichever shall first occur. Upon the termination of the terms of those three members, should such termination occur prior to June 30, 1983, their successors shall be elected as follows: one by the North Carolina State Art Society, Incorporated, one by the North Carolina Museum of Art Foundation, Incorporated, and one by the Board of Trustees of the North Carolina Museum of Art; the terms of the successor members so elected shall expire on June 30, 1983. On July 1, 1983, or as soon as feasible thereafter, the successors of these three members shall be elected for terms of six years, as follows: one by the North Carolina State Art Society, Incorporated, one by the North Carolina Museum of Art Foundation, Incorporated, and one by the Board of Trustees of the North Carolina Museum of Art.

(6) The initial appointments by the General Assembly shall serve until June 30, 1983. Subsequent appointments shall be for two-year terms commencing July 1, 1983, and biennially thereafter.

(7) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1191, s. 51.

Every vacancy occurring in the initial membership of the Board of Trustees prior to the expiration of a term of office shall be filled by the same authority and in the same manner as the vacating member was chosen and the successor member so appointed shall serve for the remainder of the unexpired term of the vacating member.

(e) Any member of the Board of Trustees may be removed from office by the authority that appointed or elected that member for misfeasance, malfeasance, or nonfeasance in office. In the case of an appointment made by the Governor, removal shall be made in accordance with the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

(f) A public officer who is appointed or elected to serve on the Board of Trustees shall be deemed to serve thereon as a trustee ex officio and his duties as a trustee shall be deemed additional duties of his primary public office.

(g) The Board of Trustees shall have a chairman, a vice-chairman, and such other officers as the Board deems necessary. The chairman shall be designated by the Governor from among the members of the Board. The vice-chairman shall be elected by and from among the members of the Board. The chairman and vice-chairman shall be chosen for terms of two years or for so long as they are members of the Board, whichever is the shorter period. The Director of the North Carolina Museum of Art shall serve as Secretary to the Board of Trustees and shall attend all meetings, except when the Board is considering issues related to the Director's performance of duties.

(h) The Board of Trustees shall meet at least once in each quarter. The Board may hold special meetings at any time and place within the State at the call of the chairman. The chairman may call a special meeting at his discretion, and he shall call a special meeting upon the written request of a majority of the authorized membership of the Board of Trustees.

(i) A majority of the authorized membership of the Board of Trustees shall constitute a quorum for the transaction of business.

(j) Members of the Board of Trustees who are officers or employees of State agencies or institutions shall receive from funds available to the Department of Cultural Resources subsistence and travel allowances at the rates authorized by G.S. 138-6. All other members of the Board of Trustees shall receive from funds available to the Department of Cultural Resources per diem and travel and subsistence allowances at the rates authorized by G.S. 138-5.

(k) All clerical and administrative services required by the Board of Trustees shall be supplied by the office of the Director of the North Carolina Museum of Art. (1979, 2nd Sess., c. 1306, s. 1; 1981 (Reg. Sess., 1982), c. 1191, ss. 49-52; 1987, c. 842, ss. 1, 2; 1991, c. 756, s. 35; 1995, c. 490, s. 8; 2001-486, s. 2.10; 2006-66, s. 22.22(b); 2006-221, s. 23; 2008-194, s. 6(d).)

**Effect of Amendments.** — Session Laws 2008-194, s. 6(d), effective August 8, 2008, inserted "State" preceding "Art Society, Incorporated" once in subdivision (d)(2) and twice in subdivision (d)(5).

## § 140-5.14. Board of Trustees — powers and duties.

The Board of Trustees shall be the governing body of the North Carolina Museum of Art and shall have the following powers and duties:

(1) To adopt bylaws for its own government;

(2) To adopt policies, rules, and regulations for the conduct of the North Carolina Museum of Art;

(3) To prescribe the powers and duties of the Director of the North Carolina Museum of Art, consistent with the provisions of this Article;

(4) To establish such advisory boards and committees as it may deem advisable;

(5) To advise the Secretary of Cultural Resources with respect to inspecting, appraising, obtaining attributions and evaluations of, transporting, exhibiting, lending, storing, and receiving upon consignment or upon loan of statuary, paintings, and other works of art of any and every kind and description that are worthy of acquisition, preservation, and exhibition by the North Carolina Museum of Art;

(6) To advise the Secretary of Cultural Resources on the care, custody, storage, and preservation of all works of art acquired or received upon consignment or loan by the North Carolina Museum of Art;

(7) After consultation with the Secretary of Cultural Resources, on behalf of and in the name of the North Carolina Museum of Art, to acquire by purchase, gift, or will, absolutely or in trust, from individuals, corporations, the federal government, or from any other source, money, works of art, or other property which may be retained, sold, or otherwise used to promote the purposes of the North Carolina Museum of Art as provided in G.S. 140-5.12. The net proceeds of the sale of all property acquired under the provisions of this paragraph shall be deposited in the State Treasury to the credit of the "The North Carolina Museum of Art Special Fund";

(8) After consultation with the Secretary of Cultural Resources, to exchange works of art owned by the North Carolina Museum of Art for other works of art which, in the opinion of the Board, would improve the quality, value, or representative character of the art collection of the Museum;

(9) After consultation with the Secretary of Cultural Resources, to sell any work of art owned by the North Carolina Museum of Art if the Board finds that it is in the best interest of the Museum to do so, unless such sale would be contrary to the terms of acquisition. The net proceeds of each such sale, after deduction of the expenses attributable to that sale, shall be deposited in the State treasury to the credit of "The North Carolina Museum of Art Special Fund," and shall be used only for the purchase of other works of art. No work of art owned by the North Carolina Museum of Art may be pledged or mortgaged;

(10) To make a biennial report to the Governor and the General Assembly on the activities of the Board of Trustees and of the North Carolina Museum of Art;

(11) To adopt, amend, and rescind rules and regulations consistent with the provisions of this Article. All rules and regulations heretofore adopted by the Art Commission shall remain in full force and effect unless and until repealed or superseded by action of the Board. All rules and regulations adopted by the Board shall be enforced by the Department of Cultural Resources;

(12) To determine the sites for expansion of the North Carolina Museum of Art with the approval of the Governor and Council of State and the North Carolina State Capital Planning Commission;

(13) To provide auxiliary services at the North Carolina Museum of Art. Such services may include the sale of books, periodicals, art works, art supplies and providing facilities for the operation of food and beverage services. The operation of food and beverage services shall be by contract with private enterprises, and subject to the provisions of Article 3 of Chapter 111. (1979, 2nd Sess., c. 1306, s. 1; 1981, c. 301.)

### § 140-5.15. Director of Museum of Art; appointment; dismissal; powers and duties; staff.

(a) The Secretary of Cultural Resources shall appoint the Director of the North Carolina Museum of Art from a list of not fewer than two nominees recommended by the Board of Trustees of the North Carolina Museum of Art.

(b) The Secretary of Cultural Resources may dismiss the Director unless two thirds of the authorized membership of the Board of Trustees shall vote to reverse that action in accordance with the following procedure: Upon dismissal of the Director, the Secretary shall give to the chairman of the Board of Trustees written notice of that action. This notice shall be sent to the chairman of the Board within 10 days after the Secretary makes a final decision on dismissal. The chairman shall promptly communicate the notice of dismissal to all other Board members. Board action to consider reversal of the Secretary's decision shall be taken at a regular or special meeting called pursuant to G.S. 140-5.13(h). Reversal of the Secretary's order of dismissal may be effected only by resolution adopted by an affirmative vote of two thirds of the authorized membership of the Board of Trustees at a meeting held within 30 days after the chairman of the Board receives from the Secretary written notice of dismissal of the Director. All ex officio members of the Board shall be entitled to vote on this question. The failure of two thirds of the authorized membership of the Board of Trustees to vote to reverse the Secretary's order of dismissal within 30 days after the chairman of the Board receives from the Secretary written notice of dismissal of the Director shall be deemed an affirmance of that order by the Board.

(c) The State-funded portion of the salary of the Director shall be fixed by the General Assembly in the Current Operations Appropriations Act.

(d) The Director shall have the following powers and duties:

(1) Under the supervision of the Board of Trustees, to direct and administer the North Carolina Museum of Art in accordance with the policies, rules, and regulations adopted by the Board of Trustees;

(2) To employ such persons as are necessary to perform the functions of the North Carolina Museum of Art and are provided for in the budget of the Museum and to promote, demote, and dismiss such persons in accordance with State personnel policies, rules, and regulations. This paragraph shall not apply to associate directors and curators;

(3) To serve as director of collections of the North Carolina Museum of Art;

(4) To serve as Secretary to the Board of Trustees.

(e) The Director, associate directors, and curators shall be exempt from the provisions of the State Personnel Act. The Board of Trustees shall adopt, subject to the approval of the Secretary of Cultural Resources, rules and regulations governing the employment, promotion, demotion, and dismissal of associate directors and curators. (1961, c. 731; 1973, c. 476, s. 38; 1979, 2nd Sess., c. 1306, s. 1; 1985, c. 122, s. 6; c. 479, s. 218; 1987, c. 827, s. 81; 2006-66, s. 22.22(g); 2006-221, s. 23.)

### § 140-5.16. Gifts; special fund; exemption from taxation.

(a) All gifts of money to the North Carolina Museum of Art and all interest earned thereon shall be paid into the State treasury and maintained as a fund to be designated "The North Carolina Museum of Art Special Fund."

(b) All gifts made to the North Carolina Museum of Art shall be exempt from every form of taxation including, but not by way of limitation, ad valorem, intangible, gift, inheritance, and income taxation. (1961, c. 731; 1979, 2nd Sess., c. 1306, s. 1.)

**§ 140-5.17:** Repealed by Session Laws 2007-484, s. 19, effective August 30, 2007.

## ARTICLE 2.

## *North Carolina Symphony Society.*

**§ 140-6:** Repealed by Session Laws 1973, c. 476, s. 89.

**Cross References.** — For present provisions as to the organization of the North Carolina Symphony Society, Inc., see G.S. 143B-94.

## § 140-7. Adoption of bylaws; amendments.

The said board of trustees, when organized under the terms of this Article, shall have authority to adopt bylaws for the Society and said bylaws shall thereafter be subject to change only by a three-fifths vote of a quorum of said board of trustees. (1943, c. 755, s. 3; 1947, c. 1049, s. 2.)

## § 140-8. Audit.

The operations of the North Carolina Symphony Society, Inc., shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. (1943, c. 755, s. 4; 1983, c. 913, s. 28.)

## § 140-9. Allocations from Contingency and Emergency Fund; expenditures.

The Governor and Council of State are hereby authorized to allot such sums as they may deem appropriate, from the Contingency and Emergency Fund, to the North Carolina Symphony Society, to aid in carrying on the activities of the said Society. All expenditures made by said Society shall be subject to the provisions of the State Budget Act, Chapter 143C of the General Statutes. (1943, c. 755, s. 5; 1955, c. 1309; 2006-203, s. 80.)

**Editor's Note.** — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 80, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "the State Budget Act, Chapter 143C of the General Statutes" for "G.S. 143-1 to 143-34, inclusive" at the end of the section.

## § 140-10. Counties and municipalities authorized to make contributions.

The governing body of any county or incorporated municipality is hereby authorized and empowered to appropriate and make voluntary contributions out of nontax funds to the North Carolina Symphony Society. (1953, c. 1212.)

## § 140-10.1. Exempt from certain taxes.

The North Carolina Symphony Society, Incorporated, shall be exempt from all privilege license and gross receipts taxes, whether imposed by Article 2, Schedule B, Chapter 105 of the North Carolina General Statutes, or otherwise. (1969, c. 100.)

## ARTICLE 3.

## *North Carolina State Art Society.*

---

**Editor's Note.** — Session Laws 2008-194, s. 6(c), effective August 8, 2008, inserted "State" in the Article heading.

## § 140-11: Repealed by Session Laws 1973, c. 476, s. 81.

**Cross References.** — As to the organization of the North Carolina Art Society, see G.S. 143B-89.

## § 140-12. Department of Administration authorized to provide space for Art Society.

Subject to the approval of the Governor, the Department of Administration is authorized and empowered to set apart, for the administration of the affairs of the North Carolina State Art Society, Incorporated, space in any of the public buildings in Wake County which may be so used without interference with the conduct of the business of the State. (1961, c. 1152; 1983, c. 717, ss. 52, 53; 1985 (Reg. Sess., 1986), c. 955, ss. 54, 55; 2006-66, s. 22.22(c); 2006-203, s. 81; 2006-221, s. 23.)

**Editor's Note.** — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 81, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, deleted the last sentence of the section, which read: "Prior to taking any action under this section, the Governor may consult with the Advisory Budget Commission."

## § 140-13. Audit.

The operations of the North Carolina State Art Society, Inc., shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. (1961, c. 1152; 1977, c. 702, s. 1; 1983, c. 913, s. 29; 2006-66, s. 22.22(d); 2006-221, s. 23.)

## § 140-14. North Carolina State Art Society within the North Carolina Museum of Art; promotion of public appreciation of art; etc.

The North Carolina State Art Society, Incorporated, is administratively located within the North Carolina Museum of Art. It shall be the duty of the North Carolina State Art Society to promote the public appreciation of art and its role in the development of civilization; to organize State and regional arts advocacy initiatives; and to do all other things deemed necessary to advance the objectives of the Society. (1961, c. 1152; 1977, c. 702, s. 2; 2006-66, s. 22.22(a); 2006-221, s. 23.)

## § 140-15: Repealed by Session Laws 1999-337, s. 35(b).

# Chapter 140A.

# State Awards System.

Sec.
140A-1. Annual awards established; form and design.
140A-2. Fields of recognition; periods covered.
140A-3. Annual awards to natives living outside State.

Sec.
140A-4. [Repealed.]
140A-5. Selection of recipients for awards.
140A-6. Administration expense.

## § 140A-1. Annual awards established; form and design.

The State of North Carolina hereby establishes annual awards, not to exceed six in number, each bearing the name of the recipient, with an appropriate inscription reciting the reason for the award, which form and design shall be approved by the Governor and Council of State. (1961, c. 1143, s. 1.)

**Cross References.** — As to the North Carolina Awards Committee, see G.S. 143B-84.

## § 140A-2. Fields of recognition; periods covered.

These recognitions shall be known as the North Carolina Awards for Literature, Science, the Fine Arts and Public Service, and shall be conferred upon citizens of North Carolina for the most notable attainments in these respective fields during the current year, terminating four months before the date of award, though such distinctions can be exceptionally conferred, with the approval of the Governor and the Council of State, for eminence achieved during years prior to the award. (1961, c. 1143, s. 2.)

## § 140A-3. Annual awards to natives living outside State.

Awards may be made annually to native-born North Carolinians, living outside of North Carolina, for preeminent accomplishment in not more than two of the above fields of creative endeavor. (1961, c. 1143, s. 3; 1991, c. 131, s. 1.)

## § 140A-4: Repealed by Session Laws 1973, c. 476, s. 73.

## § 140A-5. Selection of recipients for awards.

The recipients of the awards shall be chosen by a committee named by the North Carolina Awards Committee, for each category of achievement, but no award shall be made in any field unless the committee of awards deems the recognized accomplishment to be outstanding in merit, value, and distinction. (1961, c. 1143, s. 5; 1973, c. 476, s. 73.)

## § 140A-6. Administration expense.

The expense of administering this Chapter shall be paid out of the Contingency and Emergency Fund subject to the approval of the Governor and Council of State. (1961, c. 1143, s. 6.)

# Chapter 141.

# State Boundaries.

Sec.
141-1. Governor to cause boundaries to be established and protected.
141-2. Payment of expenses of establishing boundaries.
141-3. Appointment of arbitrators.
141-4. Disagreement of arbitrators reported to General Assembly.

Sec.
141-5. Approval of survey.
141-6. Eastern boundary of State; jurisdiction over territory within littoral waters and lands under same.
141-7. [Repealed.]
141-7.1. Southern lateral seaward boundary.
141-8. Northern lateral seaward boundary.

## § 141-1. Governor to cause boundaries to be established and protected.

The Governor of North Carolina is hereby authorized to appoint two competent commissioners and a surveyor and a sufficient number of chainbearers, on the part of the State of North Carolina, to act with the commissioners or surveyors appointed or to be appointed by any of the contiguous states of Virginia, Tennessee, South Carolina, and Georgia, to return and remark, by some permanent monuments at convenient intervals, not greater than five miles, the boundary lines between this State and any of the said states.

The Governor is also authorized, whenever in his judgment it shall be deemed necessary to protect or establish the boundary lines between this State and any other state, to institute and prosecute in the name of the State of North Carolina any and all such actions, suits, or proceedings at law or in equity, and to direct the Attorney General or such other person as he may designate to conduct and prosecute such actions, suits, or proceedings. (1881, c. 347, s. 1; Code, s. 2289; 1889, c. 475, s. 1; Rev., s. 5315; 1909, c. 51, s. 1; C.S., s. 7396.)

### CASE NOTES

**Line Between North Carolina and Tennessee.** — Under the Acts of 1821 of the States of North Carolina and Tennessee confirming the boundary line between the two states "as run and marked" by the joint commission, when it is clearly shown where the line between two known points but a few miles apart was run and marked by the commission, such line must be accepted by the courts, in a suit between private persons, as the true and ancient boundary, even though it now appears that a different line between such points might more accurately conform to a general call in the act of cession for "the extreme height" of a certain mountain for a distance of 100 miles. Stevenson v. Fain, 116 F. 147 (6th Cir. 1902), appeal dismissed, 195 U.S. 165, 25 S. Ct. 6, 49 L. Ed. 142 (1904).

## § 141-2. Payment of expenses of establishing boundaries.

When the line has been rerun and remarked as above provided between this State and any of the contiguous states, or such portion of said lines as shall be mutually agreed by the commissioners, the Governor is authorized to issue his warrant upon the State Treasurer for such portion of the expenses as shall fall to the share of this State. (1881, c. 347, s. 2; Code, s. 2290; 1889, c. 475, s. 2; Rev., s. 5316; C.S., s. 7397.)

## § 141-3. Appointment of arbitrators.

If any disagreement shall arise between the commissioners, the Governor of this State is hereby authorized to appoint arbitrators to act with similar officers to be appointed by the other states in the settlement of the exact boundary. (1881, c. 347, s. 3; Code, s. 2291; 1889, c. 475, s. 3; Rev., s. 5317; C.S., s. 7398.)

## § 141-4. Disagreement of arbitrators reported to General Assembly.

In case of any serious disagreement and inability on the part of the said arbitrators to agree upon said boundary, such fact shall be reported by the Governor to the next General Assembly for their action. (1881, c. 347, s. 4; Code, s. 2292; 1889, c. 475, s. 4; Rev., s. 5318; C.S., s. 7399.)

## § 141-5. Approval of survey.

When the commissioners shall have completed the survey, or so much as shall be necessary, they shall report the same to the Governor, who shall lay the same before the Council of State; and when the Governor and the Council of State shall have approved the same the Governor shall issue his proclamation, declaring said lines to be the true boundary line or lines, and the same shall be the true boundary line or lines between this and the states above referred to. (1881, c. 347, s. 5; Code, s. 2293; 1889, c. 475, s. 5; Rev., s. 5319; C.S., s. 7400.)

## § 141-6. Eastern boundary of State; jurisdiction over territory within littoral waters and lands under same.

(a) The Constitution of the State of North Carolina, adopted in 1868, having provided in Article I, Sec. 34, that the "limits and boundaries of the State shall be and remain as they now are," and the eastern limit and boundary of the State of North Carolina on the Atlantic seaboard having always been, since the Treaty of Peace with Great Britain in 1783 and the Declaration of Independence of July 4, 1776, one marine league eastward from the Atlantic seashore, measured from the extreme low-water mark, the eastern boundary of the State of North Carolina is hereby declared to be fixed as it has always been at one marine league eastward from the seashore of the Atlantic Ocean bordering the State of North Carolina, measured from the extreme low-water mark of the Atlantic Ocean seashore aforesaid.

(b) The State of North Carolina shall continue as it always has to exercise jurisdiction over the territory within the littoral waters and ownership of the lands under the same within the boundaries of the State, subject only to the jurisdiction of the federal government over navigation within such territorial waters.

(c) The Governor and the Attorney General are hereby directed to take all such action as may be found appropriate to defend the jurisdiction of the State over its littoral waters and the ownership of the lands beneath the same. (1947, c. 1031, ss. 1-3; 1969, c. 541, s. 1.)

**Editor's Note.** — The reference to the State Constitution in this section is to the Constitution adopted in 1868, as amended. See now N.C. Const., Art. XIV, § 2.

### CASE NOTES

**Cited** in State ex rel. Bruton v. Flying "W" Enters., Inc., 273 N.C. 399, 160 S.E.2d 482 (1968).

OPINIONS OF ATTORNEY GENERAL

**Ambulatory Seaward Boundary Consistent with Constitution.** — While a proposal to permanently fix the seaward boundary for the State at specific coordinates would violate both subsection (a) of this section, and Article XIV, G.S. 2 of the N.C. Constitution, which this section implements, the acceptance of an ambulatory boundary, which merely represents the seaward boundary's location at a certain time, and moves with changes to the shoreline, whether by erosion, accretion or fill deposition, would be consistent with the constitution and not require amendment of this section; a reading of the State constitutional provision together with this section and the case law reveal them to require that the eastern boundary always remain at a distance of three geographical miles from the extreme low water mark (ELWM). See opinion of Attorney General to Gary W. Thompson, Chief, North Carolina Geodetic Survey, 1998 N.C.A.G. 7 (2/11/98).

**§ 141-7:** Repealed by Session Laws 1977, c. 342.

## § 141-7.1. Southern lateral seaward boundary.

The lateral seaward boundary between North Carolina and South Carolina from the low-water mark of the Atlantic Ocean shall be and is hereby designated as a continuation of the North Carolina-South Carolina boundary line as described by monuments located at Latitude 33° 51′ 50.7214″ North, Longitude 78° 33′ 22.9448″ West, at Latitude 33° 51′ 36.4626″ North, Longitude 78° 33′ 06.1937″ West, and at Latitude 33° 51′ 07.8792″ North, Longitude 78° 32′ 32.6210″ West, in a straight line projection of said line to the seaward limits of the States' territorial jurisdiction, such line to be extended on the same bearing insofar as a need for further delimitation may arise. (1979, c. 894; 1981, c. 744.)

**Editor's Note.** — Session Laws 1979, c. 894, s. 2, provided: "This act shall become effective upon ratification and with approval thereof, and concurrence therein, by the State of South Carolina and upon the approval and consent to this act by the Congress of the United States; provided, that this act shall stand repealed if the State of South Carolina and the Congress of the United States do not ratify, confirm, adopt, or otherwise consent to the effect of the act establishing the lateral seaward boundary between North Carolina and South Carolina by January 1, 1985." The approval of the State of South Carolina and consent of the United States Congress has been given to the effect of the act.

## § 141-8. Northern lateral seaward boundary.

The lateral seaward boundary between North Carolina and Virginia eastward from the low-water mark of the Atlantic Ocean shall be and is hereby designated as a line beginning at the intersection of the low-water mark of the Atlantic Ocean and the existing North Carolina-Virginia boundary line; thence due east on a true 90 degree bearing to the seaward jurisdictional limit of North Carolina; such boundary line to be extended on the true 90 degree bearing as far as a need for further delineation may arise. (1969, c. 841; 1971, c. 452, s. 1.)

**Editor's Note.** — Former G.S. 141-8, enacted by Session Laws 1969, c. 841, provided that that section should stand repealed should the Congress of the United States not ratify, confirm, adopt or otherwise consent to the effect of the same by November 1, 1970. Congress did not consent, and the section enacted in 1969 therefore stood repealed.

Session Laws 1971, c. 452, s. 2, provided: "This act shall become effective upon ratification, and with approval thereof, and concurrence therein, by the General Assembly of Virginia and upon the approval and consent to this act by the Congress of the United States." The act has been approved by the State of Virginia and consented to by the United States Congress.

### OPINIONS OF ATTORNEY GENERAL

**Ambulatory Seaward Boundary Consistent with Constitution.** — While a proposal to permanently fix the seaward boundary for the State at specific coordinates would violate both subsection (a) of this section and Article XIV, G.S. 2, of the N.C. Constitution, which this section implemented, the acceptance of an ambulatory boundary, which merely expresses the seaward boundary's location at a certain time, and moves with changes to the shoreline, whether by erosion, accretion or fill deposition, would be consistent with the constitution and not require amendment of this section; a reading of the State constitutional provision together with this section and the case law reveal them to require that the eastern boundary always remain at a distance of three geographical miles from the extreme low water mark (LWM). See opinion of Attorney General to Gary W. Thompson, Chief, North Carolina Geodetic Survey, 1998 N.C.A.G. [illegible] (1998).

## § 141-7: Repealed by Session Laws 1977, c. 342.

## § 141-7.1. Southern lateral seaward boundary.

The lateral seaward boundary between North Carolina and South Carolina from the low-water mark of the Atlantic Ocean shall be and is hereby designated as a continuation of the North Carolina-South Carolina boundary line as described by monuments located at Latitude 33° 51' 50.2914" North, Longitude 78° 33' 22.9448" West, at Latitude 33° 51' 36.4626" North, Longitude 78° 33' 06.1937" West, and at Latitude 33° 51' 07.8792" North, Longitude 78° 32' 32.6210" West, in a straight line projection of said line to the seaward limits of the States' territorial jurisdiction. Such line to be extended on the same bearing insofar as a need for further delineation may arise. (1979, c. 584; 1981, c. 744.)

**Editor's Note.** — Session Laws 1979, c. 584, s. 2, provided: "This act shall become effective upon ratification and with approval thereof and concurrence therein by the State of South Carolina and upon the approval and consent to this Act by the Congress of the United States; provided, that this act shall stand repealed if (i) the State of South Carolina and the Congress of the United States do not ratify, confirm, adopt or otherwise consent, to the effect of the act establishing the lateral seaward boundary between North Carolina and South Carolina by January 1, [illegible]." The approval of the State of South Carolina and consent of the United States Congress has been given to the act.

## § 141-8. Northern lateral seaward boundary.

The lateral seaward boundary between North Carolina and Virginia seaward from the low-water mark of the Atlantic Ocean shall be and is hereby designated as a line beginning at the intersection of the low-water mark of the Atlantic Ocean and the existing North Carolina-Virginia boundary line; thence due east on a true 90 degree bearing to the seaward jurisdictional limit of North Carolina; such boundary line to be extended on the true 90 degree bearing as far as a need for further delineation may arise. (1969, c. 815, s. 1; 1971, c. 452, s. 1.)

**Editor's Note.** — Former G.S. 141-8, enacted by Session Laws 1969, c. 815, provided that that section should stand repealed should the Congress of the United States not ratify, confirm, adopt or otherwise consent to the effect of the same by November 1, 1970. Congress did not consent, and the section enacted in 1969 therefore stood repealed.

Session Laws 1971, c. 452, s. 2, provided: "This act shall become effective upon its ratification and with approval thereof and concurrence therein by the General Assembly of Virginia and upon the approval and consent to this act by the Congress of the United States." The act has been approved by the State of Virginia and consented to by the United States Congress.

# Chapter 142.

# State Debt.

## Article 1.

## General Provisions.

Sec.
142-1. How bonds executed; interest coupons attached; where payable; not to be sold at less than par.
142-2. Title of act and year of enactment recited in bonds.
142-3. Record of bonds kept by State Treasurer.
142-4. Books for registration and transfer.
142-5. Registration as to principal.
142-6. Registration as to principal and interest.
142-7. No charge for registration.
142-8. Application of §§ 142-1 to 142-9.
142-9. Duties performed by other officers.
142-10. Chief clerk may issue when Treasurer unable to act.
142-11. When bonds deemed duly executed.
142-12. State bonds exempt from taxation.
142-12.1. Effect of federal taxation of interest income on state or local bonds on issuance thereof; continuation of state tax exemptions.
142-13. Destruction of canceled bonds, notes and coupons.
142-14. Issuance of temporary bonds.
142-15. Reimbursement of Treasurer for interest.
142-15.1. Lost, stolen, defaced, or destroyed State bonds.
142-15.3. Capital appreciation bonds.

## Article 2.

## Borrowing Money in Emergencies and in Anticipation of Collection of Taxes.

142-16. Governor and Council of State may borrow on note.
142-17. Recital of facts entered on minutes; directions to Treasurer; limit of amount.
142-18. Report to General Assembly.
142-19. Power given to Director of Budget to authorize State Treasurer to borrow money.

## Article 3.

## Refunding Bonds.

142-20 through 142-29. [Repealed.]

## Article 3A.

## Refunding Bonds.

142-29.1. Title of Article.
142-29.2. Definitions.
Sec.
142-29.3. Purpose.
142-29.4. Powers.
142-29.5. Authorization of refunding obligations.
142-29.6. Sale of refunding obligations and provisions thereof.
142-29.7. Additional refunding obligation provisions.

## Article 4.

## Sinking Fund Commission.

142-30 through 142-43. [Repealed.]

## Article 5.

## Sinking Funds for Highway Bonds.

142-44 through 142-46. [Repealed.]

## Article 5A.

## Exchange and Cancellation of Bonds Held in Sinking Funds; Investment of Moneys.

142-47 through 142-49. [Repealed.]

## Article 6.

## Citations to Bond and Note Acts

## [Repealed.]

## Article 7.

## General Fund Bond Sinking Fund.

142-50 through 142-54. [Repealed.]
142-55 through 142-59. [Reserved.]

## Article 8.

## State Energy Conservation Finance Act.

142-60. Short title.
142-61. Definitions.
142-62. [Reserved.]
142-63. Authorization of financing contract.
142-64. Procedure for incurrence or issuance of financing contract.
142-65. Security; other requirements.
142-66. Payment provisions.
142-67. Certificates of participation.
142-68. Tax exemption.
142-69. Other agreements.
142-70. Investment eligibility.

## Article 9.

## State Capital Facilities Finance Act.

142-80. Short title.
142-81. Findings and purpose.

Sec.
142-82. Definitions.
142-83. Authorization of special indebtedness; General Assembly approval.
142-84. Procedure for incurrence or issuance of special indebtedness.
142-85. Security; other requirements.
142-86. Financing contract indebtedness.
142-87. Additional requirements for certificates of participation indebtedness.
142-88. Bonded indebtedness.
142-89. Issuance of limited obligation bonds and notes.
142-90. Variable rate demand bonds and notes and financing contract indebtedness.
142-91. Other agreements.
142-92. Tax exemption.
142-93. Investment eligibility.
142-94. Procurement of capital facilities.
142-95. [Repealed.]
142-96 through 142-99. [Reserved.]

**Article 10.**
**Managing Debt Capacity.**

142-100. Purpose.
142-101. Debt Affordability Advisory Committee.
142-102 through 142-106. [Reserved.]

## ARTICLE 1.

## *General Provisions.*

### § 142-1. How bonds executed; interest coupons attached; where payable; not to be sold at less than par.

All bonds or certificates of debt of the State shall be signed by the Governor, and countersigned by the State Treasurer, and sealed with the great seal of the State, and shall be made payable to bearer unless registered as hereinafter provided. The principal shall be made payable by the State at a day named in the bonds or certificates. Interest coupons shall be attached to the bonds or certificates unless they be bonds or certificates registered as to both principal and interest, and the bonds, certificates and coupons shall be made payable at such banks or trust companies within or without the State as shall be designated by the State Treasurer, or at the office of the State Treasurer in Raleigh. Any bank or trust company serving as a paying agent may be paid such reasonable fees and charges for such services as shall be agreed upon by and between such bank or trust company and the State Treasurer. No original bond or certificate of debt of the State shall be sold for a sum less than the par value thereof, nor shall any such bond or certificate, issued in lieu of a transferred bond or certificate, be payable elsewhere than may be the original, except by the consent of the holder it may be made payable at the State treasury. (1848, c. 89, s. 22; 1852, c. 9; c. 10, s. 10; R.C., c. 90, s. 3; Code, s. 3563; Rev., s. 5020; C.S., s. 7401; Ex. Sess. 1921, c. 66, ss. 1, 2; 1977, c. 405.)

**Two-Thirds Bonds Act of 2008.** — Session Laws 2008-107, s. 27.9, as amended by Session Laws 2008-118, s. 2.7 (c) and (d), as amended by Session Laws 2009-209, s. 1(a) through (f), provides: "(a) Short Title. — This section may be cited as the 'Two-Thirds Bonds Act of 2008.'

"(b) Findings and Determinations. — It is the intent and purpose of the General Assembly by this section to provide for the issuance of general obligation bonds or notes of the State in order to provide funds for the cost of State capital facilities.

"(c) Definitions. — The following definitions apply in this section unless the context otherwise requires:

"(1) Bonds. — Bonds issued under this section.

"(2) Cost. — The term includes all of the following:

"a. The cost of constructing, reconstructing, renovating, repairing, enlarging, acquiring, and improving State capital facilities, including the acquisition of land, rights-of-way, easements, franchises, equipment, machinery, furnishings, and other interests in real or personal property acquired or used in connection with a State capital facility.

"b. The cost of engineering, architectural, and other consulting services as may be required.

"c. Administrative expenses and charges.

"d. The cost of providing personnel to ensure effective project management.

"e. The cost of bond insurance, investment contracts, credit enhancement and liquidity facilities, interest-rate swap agreements or other derivative products, financial and legal consultants and related costs of bond and note issuance, to the extent and as determined by the State Treasurer.

"f. Finance charges, reserves for debt service, and other types of reserves required pursuant to the terms of any bond or note or related documents, interest before and during construction or acquisition of a State capital facility and, if considered advisable by the State Treasurer, for a period not exceeding two years after the estimated date of completion of construction or acquisition.

"g. The cost of bond insurance, investment contracts, credit enhancement facilities and liquidity facilities, interest-rate swap agreements or other derivative products, financial and legal consultants, and related costs of the incurrence or issuance of any bond or note.

"h. The cost of reimbursing the State for any payments made for any cost described in this subdivision.

"i. Any other costs and expenses necessary or incidental to the purposes of this section.

"(3) Credit facility. — An agreement entered into by the State Treasurer on behalf of the State with a bank, savings and loan association or other banking institution, an insurance company, reinsurance company, surety company or other insurance institution, a corporation, investment banking firm or other investment institution, or any financial institution or other similar provider of a credit facility, which provider may be located within or without the United States, such agreement providing for prompt payment of all or any part of the principal or purchase price (whether at maturity, presentment or tender for purchase, redemption or acceleration), redemption premium, if any, and interest on any bonds or notes payable on demand or tender by the owner, in consideration of the State agreeing to repay the provider of the credit facility in accordance with the terms and provisions of such agreement.

"(4) Notes. — Notes issued under this section.

"(5) Par formula. — A provision or formula adopted by the State to provide for the adjustment, from time to time, of the interest rate or rates borne by any bonds or notes, including:

"a. A provision providing for such adjustment so that the purchase price of such bonds or notes in the open market would be as close to par as possible.

"b. A provision providing for such adjustment based upon a percentage or percentages of a prime rate or base rate, which percentage or percentages may vary or be applied for different periods of time.

"c. Such other provision as the State Treasurer may determine to be consistent with this act and will not materially and adversely affect the financial position of the State and the marketing of bonds or notes at a reasonable interest cost to the State.

"(6) State. — The State of North Carolina, including any State agency.

"(7) State agency. — Any agency, institution, board, commission, bureau, council, department, division, officer, or employee of the State. The term does not include counties, municipal corporations, political subdivisions, local boards of education, or other local public bodies.

"(d) Authorization of Bonds and Notes. — The State Treasurer is authorized, by and with the consent of the Council of State, to issue and sell at one time or from time to time in the biennium ending June 30, 2011, general obligation bonds of the State to be designated "State of North Carolina General Obligation Bonds," with any additional designations as may be determined, or notes of the State, in the aggregate principal amount of four hundred eighty-seven million seven hundred thousand dollars ($487,700,000), this amount being not in excess of two-thirds of the amount by which the State's outstanding indebtedness will be reduced during the biennium ending June 30, 2009, for the purpose of providing funds, with any other available funds, for the purposes authorized by this section.

"(e) Uses of Bond and Note Proceeds. — The proceeds of bonds and notes shall be used for financing the cost of State capital facilities as provided in this section. Any additional moneys which may be received by grant from the United States of America or any agency or department thereof or from any other source to aid in financing the cost of any State capital facilities authorized by this section may be placed by the State Treasurer in a separate fund or funds and shall be disbursed, to the extent permitted by the terms of the grant, without regard to any limitations imposed by this section.

"The proceeds of bonds and notes may be used with any other moneys made available by the General Assembly for the cost of State capital facilities, including the proceeds of any other State bond issues, whether heretofore made available or which may be made available at the session of the General Assembly at which this section is ratified or any subsequent sessions. The proceeds of bonds and notes shall be expended and disbursed under the direction and supervision of the Director of the Budget. The funds provided by this section shall be disbursed for the purposes provided in this section upon warrants drawn on the State Treasurer by the State Controller, which warrants shall not be drawn until requisition has been approved by the Director of the Budget and which requisition shall be approved only after full compliance with the State Budget Act, Chapter 143C of the General Statutes.

"The Office of State Budget and Management shall provide semiannual reports to the Joint Legislative Oversight Committee on Capital Improvements, the Chairs of the Senate and House of Representatives Appropriation Committees, and the Fiscal Research Division on the expenditure of moneys authorized by this section. The reports shall continue until the completion of the projects provided for in this section.

"(f) Allocation of Proceeds. — The proceeds of bonds and notes shall be allocated and expended as provided in this subsection:

"(1) A maximum aggregate principal amount of ninety-nine million fifty-four thousand five hundred eighty-four dollars ($99,054,584) to finance the capital facility costs of the Green Square Project, Department of Environment and Natural Resources. The projected allocation may be increased to reflect the availability of other funds, including contingency funds, income earned on the investment of bond and note proceeds, and the proceeds of any grants.

"(2) A maximum aggregate principal amount of two hundred twenty-three million dollars ($223,000,000) to finance the capital facility costs of the Biomedical Research Imaging Center at the University of North Carolina at Chapel Hill. The project allocation may be increased to reflect the availability of other funds, including contingency funds, income earned on the investment of bond and note proceeds, and the proceeds of any grants.

"(3) A maximum aggregate principal amount of fifty million dollars ($50,000,000) to finance the capital facility costs of repairing and renovating State facilities and related infrastructure, to be allocated by the General Assembly.

"(4) An amount the Director of the Budget determines is not required for projects listed in subdivisions (1), (2), and (3) of this subsection to finance a portion of those capital projects that have been approved by the General Assembly for financing with the proceeds of special indebtedness as hereinafter described.

"(f1) The projects financed with the proceeds of bonds allocated as provided in Section 27.9(f)(4) of this act may include, but are not limited to, the following projects:

"(1) Davis Arena renovation and expansion at The Western North Carolina Agricultural Center.

"(2) School of Education building at Elizabeth City State University.

"(3) General Classroom building at North Carolina Agricultural and Technical State University.

"(4) Nursing Building at North Carolina Central University.

"(5) Energy Production Infrastructure Center at the University of North Carolina at Charlotte.

"(6) Educational Building at Appalachian State University.

"(7) Renovation of Rhoades Hall at the University of North Carolina at Asheville.

"(f2) The State, upon the direction of the Director of the Budget, may finance with the proceeds of bonds authorized pursuant to this act the costs of any capital project approved for financing with special indebtedness, provided that the bonds must be issued in the fiscal biennium ending June 30, 2011. The State, upon the direction of the Director of the Budget, may finance with the proceeds of special indebtedness the costs of any capital project approved for financing with proceeds of bonds authorized pursuant to this act. If the financing is to be provided by special indebtedness, then such indebtedness may be issued or incurred during or beyond the fiscal biennium ending June 30, 2011. The amount of financing for a project from special indebtedness and the proceeds of two-thirds bonds issued pursuant to this act shall not exceed the amount set forth in the legislation that authorizes the project.

"(f3) As used in this act, projects approved for financing with special indebtedness, as authorized by Article 9 of Chapter 142 of the General Statutes, means projects authorized pursuant to this act or to Session Laws 2003-314, 2004-126, 2004-179, 2005-276, 2006-66, 2006-231, 2007-323, and 2008-107.

"(f4) The Office of State Budget and Management shall report to the Joint Legislative Commission on Governmental Operations no more than 30 days after issuing bonds or notes pursuant to Section 27.9 of this act or special indebtedness. Each report shall include the project name, the form of indebtedness, terms of the sale, the authorizing legislation, and justification for the form of debt selected. This subsection expires on June 30, 2011.

"(g) Issuance of bonds and notes. —

"(1) Terms and conditions. — Bonds or notes may bear a date or dates, may be serial or term bonds or notes, or any combination thereof, may mature in such amounts and at such time or times, not exceeding 40 years from their date or dates, may be payable at such place or places, either within or without the United States of America, in such coin or currency of the United States of America as at the time of payment is legal tender for payment of public and private debts, may bear interest at such rate or rates, which may vary from time to time, and may be made redeemable before maturity, at the option of the State or otherwise as may be provided by the State, at such price or prices, including a price less than or greater than the face amount of the bonds or notes, and under such terms and conditions, all as may be determined by the State Treasurer, by and with the consent of the Council of State.

"(2) Signatures; form and denomination; registration. — Bonds or notes may be issued in certificated or uncertificated form. If issued in certificated form, bonds or notes shall be signed on behalf of the State by the Governor or shall bear the Governor's facsimile signature, shall be signed by the State Treasurer or shall bear the State Treasurer's facsimile signature, and shall bear the Great Seal of the State, or a facsimile of the Seal shall be impressed or imprinted thereon. If bonds or notes bear the facsimile signatures of the Governor and the State Treasurer, the bonds or notes shall also bear a manual signature which may be that of a bond registrar, trustee, paying agent or designated assistant of the State Treasurer. Should any officer whose signature or facsimile signature appears on bonds or notes cease to be such officer before the delivery of the bonds or notes, the signature or facsimile signature shall nevertheless have the same validity for all purposes as if the officer had remained in office until delivery. Bonds or notes may bear the facsimile signatures of persons who at the actual time of the execution of the bonds or notes shall be the proper officers to sign any bond or note, although at the date of the bond or note such persons may not have been such officers. The form and denomination of bonds or notes, including the provisions with respect to registration of the bonds or notes and any system for their registration, shall be as the State Treasurer may determine in conformity with this section.

"(3) Manner of sale; expenses. — Subject to the approval by the Council of State as to the manner in which bonds or notes shall be offered for sale, whether at public or private sale, whether within or without the United States, and whether by publishing notices in certain newspapers and financial journals, mailing notices, inviting bids by correspondence, negotiating contracts of purchase or otherwise, the State Treasurer is authorized to sell bonds or notes at one time or from time to time at any rates of interest, which may vary from time to time, and at any prices, including a price less than or greater than the face amount of the bonds or notes, as the State Treasurer may determine. All expenses incurred in the preparation, sale, and issuance of bonds or notes shall be paid by the State Treasurer from the proceeds of bonds or notes or other available moneys.

"(4) Notes; repayment. —

"a. By and with the consent of the Council of State, the State Treasurer is hereby authorized to borrow money and to execute and issue notes of the State for the same, but only in the following circumstances and under the following conditions:

"1. For anticipating the sale of bonds, the issuance of which the Council of State has approved, if the State Treasurer considers it advisable to postpone the issuance of the bonds;

"2. For the payment of interest on or any installment of principal of any bonds then outstanding, if there are not sufficient funds in the State treasury with which to pay the interest or installment of principal as they respectively become due;

"3. For the renewal of any loan evidenced by notes authorized in this section;

"4. For the purposes authorized in this section; and

"5. For refunding bonds or notes as authorized in this section.

"b. Funds derived from the sale of bonds or notes may be used in the payment of any bond anticipation notes issued under this section. Funds provided by the General Assembly for the payment of interest on or principal of bonds shall be used in paying the interest on or principal of any notes and any renewals thereof, the proceeds of which shall have been used in paying interest on or principal of the bonds.

"(5) Refunding bonds and notes. — By and with the consent of the Council of State, the State Treasurer is authorized to issue and sell refunding bonds and notes pursuant to the provisions of the State Refunding Bond Act for the purpose of refunding bonds or notes issued pursuant to this section. The refunding bonds and notes may be combined with any other issues of State bonds and notes similarly secured. Refunding bonds or notes may be issued at any time prior to the final maturity of the debt obligation to be refunded. The proceeds from the sale of any refunding bonds or notes shall be applied to the immediate payment and retirement of the bonds or notes being refunded or, if not required for the immediate payment of the bonds or notes being refunded, the proceeds shall be deposited in trust to provide for the payment and retirement of the bonds or notes being refunded and to pay any expenses incurred in connection with the refunding. Money in a trust fund may be invested in (i) direct obligations of the United States government, (ii) obligations the principal of and interest on which are guaranteed by the United States government, (iii) obligations of any agency or instrumentality of the United States government if the timely payment of principal and interest on the obligations is unconditionally guaranteed by the United States government or (iv) certificates of deposit issued by a bank or trust company located in the State if the certificates are secured by a pledge of any of the obligations described in (i), (ii), or (iii) above having an aggregate market value, exclusive of accrued interest, equal at least to the principal amount of the certificates so secured. This section does not limit the duration of any deposit in trust for the retirement of bonds or notes being refunded but that have not matured and are not presently redeemable, or if presently redeemable, have not been called for redemption.

"(6) Tax exemption. — Bonds and notes shall at all times be free from taxation by the State or any political subdivision or any of their agencies, excepting estate, inheritance or gift taxes, income taxes on the gain from the transfer of bonds or notes, and franchise taxes. The interest on bonds or notes is not subject to taxation as income.

"(7) Investment eligibility. — Bonds and notes are securities in which all of the following may invest, including capital in their control or belonging to them: public officers, agencies, and public bodies of the State and its political subdivisions, all insurance companies, trust companies, investment companies, banks, savings banks, savings and loan associations, credit unions, pension or retirement funds, other financial institutions engaged in business in the State, executors, administrators, trustees, and other fiduciaries. Bonds and notes are hereby made securities which may properly and legally be deposited with and received by any officer or agency of the State or political subdivision of the State for any purpose for which the deposit of bonds, notes, or obligations of the State or any political subdivision is now or may hereafter be authorized by law.

"(8) Faith and credit. — The faith and credit and taxing power of the State are hereby pledged for the payment of the principal of and the interest on bonds and notes. The State expressly reserves the right to amend any provision of this section to the extent it does not impair any contractual right of a bond owner.

"(9) Other agreements. — The State Treasurer may authorize, execute, obtain, or otherwise provide for bond insurance, investment contracts, credit and liquidity facilities, interest-rate swap agreements and other derivative products, and any other related instruments and matters the State Treasurer determines are desirable in connection with issuance, incurrence, carrying, or securing of bonds or notes. The State Treasurer is authorized to employ and designate any financial consultants, underwriters, and bond attorneys to be associated with any bond or note issue under this section as the State Treasurer considers necessary.

"(h) Variable Rate Demand Bonds and Notes. — In fixing the details of bonds and notes, the State Treasurer may provide that any of the bonds or notes may:

"(1) Be made payable from time to time on demand or tender for purchase by the owner, if a credit facility supports the bonds or notes, unless the State Treasurer specifically determines that a credit facility is not required upon a finding and determination by the State Treasurer that the absence of a credit facility will not materially and adversely affect the financial position of the State and the marketing of the bonds or notes at a reasonable interest cost to the State;

"(2) Be additionally supported by a credit facility;

"(3) Be made subject to redemption or a mandatory tender for purchase prior to maturity;

"(4) Bear interest at a rate or rates that may vary for any period of time, as may be provided in the proceedings providing for the issuance of the bonds or notes, including, without limitation, such variations as may be permitted pursuant to a par formula; and

"(5) Be made the subject of a remarketing agreement whereby an attempt is made to remarket bonds or notes to new purchasers prior to their presentment for payment to the provider of the credit facility or to the State.

"If the aggregate principal amount payable by the State under a credit facility is in excess of the aggregate principal amount of bonds or notes secured by the credit facility, whether as a result of the inclusion in the credit facility of a provision for the payment of interest for a limited period of time or the payment of a redemption premium or for any other reason, then the amount of authorized but unissued bonds or notes during the term of such credit facility shall not be less than the amount of such excess, unless the payment of such excess is otherwise provided for by agreement of the State executed by the State Treasurer.

"(i) Interpretation of Section. —

"(1) Additional method. — The foregoing sections of this section shall be deemed to provide an additional and alternative method for the doing of the things authorized under it and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing.

"(2) Statutory references. — References in this section to specific sections or Chapters of the General Statutes or to specific acts are intended to be references to such sections, Chapters, or acts as they may be amended from time to time by the General Assembly.

"(3) Broad construction. — This section, being necessary for the health and welfare of the people of the State, shall be broadly construed to effect the purposes thereof.

"(4) Inconsistent provisions. — Insofar as the provisions of this section are inconsistent with the provisions of any general, special, or local laws, or parts thereof, the provisions of this section shall be controlling.

"(5) Severability. — If any provision of this section or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are declared to be severable.

"(j) Effective Date. — This section is effective when it becomes law."

**Editor's Note.** — Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

### CASE NOTES

**Cited** in Galloway v. Jenkins, 63 N.C. 147 (1869).

## § 142-2. Title of act and year of enactment recited in bonds.

In every bond or certificate of debt issued by the State, and in the body thereof, shall be set forth the title of the act, with the year of its enactment, under the authority of which the same may be issued; or reference shall be made thereto by the number of the Chapter, and the year of the legislative session. (1850, c. 90, s. 6; R.C., c. 90, s. 6; Code, s. 3566; Rev., s. 5023; C.S., s. 7402.)

## § 142-3. Record of bonds kept by State Treasurer.

The State Treasurer shall enter in a book to be kept for that purpose a memorandum of every bond or certificate of debt of the State, issued or to be issued under any act whatever, together with the numbers, dates of issue, when and where payable, at what premium, and to whom the same may have been sold or issued. (1852, c. 10, s. 2; R.C., c. 90, s. 4; Code, s. 3564; Rev., s. 5021; C.S., s. 7403.)

## § 142-4. Books for registration and transfer.

The State Treasurer shall keep in his office a register or registers for the registration and transfer of all bonds and certificates of the State heretofore or hereafter issued, in which he may register any bond or certificate at the time of its issue or at the request of the holder. When any bond or certificate shall have been registered as hereinafter provided, the State Treasurer shall enter in a manner to be of easy and ready reference, a description of said bond, or certificates giving the number, series, date of issue, denomination, by whom signed, and such other data as may be necessary for the ready identification thereof, together with the name of the person in whose name the same is then to be registered and whether in his individual capacity or in a fiduciary relation, and if the latter, for whose benefit the same is to be registered. (1848, c. 37, s. 5; 1850, c. 58, s. 4; 1852, c. 11; R.C., c. 90, s. 2; Code, s. 3562; Rev., s. 5019; C.S., s. 7404; Ex. Sess. 1921, c. 66, s. 3.)

## § 142-5. Registration as to principal.

Upon the presentation at the office of the State Treasurer of any bond or certificate that has heretofore been or may hereafter be issued by the State, or upon the first issuance of any bond or certificate, the same may be registered as to principal in the name of the holder upon such register, such registration to be noted on the reverse of the bond or certificate by the State Treasurer. The principal of any bond or certificate so registered shall be payable only to the registered payee or his legal representative, and such bond or certificate shall be transferable to another holder or back to bearer only upon presentation of the State Treasurer with a written assignment acknowledged or approved in a form satisfactory to the Treasurer. The name of the registered assignee shall be written in said register and upon any bond or certificate so transferred. A bond or certificate so transferred to bearer shall be subject to future registration and transfer as before. (1883, c. 25; Code, s. 3568; 1887, c. 287; Rev., s. 5025; C.S., s. 7405; Ex. Sess. 1921, c. 66, s. 4.)

## § 142-6. Registration as to principal and interest.

(a) If, upon the registration of any such bond or certificate dated prior to January 1, 1965, or at any time after such registration, the coupons thereto attached, evidencing all interest to be paid thereon to the date of maturity, shall be surrendered, such coupons shall be canceled by the Treasurer, and he shall sign a statement endorsed upon such bond or certificate of the cancellation of all unmatured coupons and of the fact that such bond or certificate has been converted into a fully registered bond or certificate, and shall make like entry in the said register. Thereafter the interest evidenced by such canceled coupons shall be paid at the time provided therein, to the registered owner or his legal representatives, in New York exchange, mailed to his address, unless he shall have requested the State Treasurer to pay such interest in funds current at the State capital, which request shall be entered in the said register.

(b) If, upon the registration of any such bond or certificate dated on or after January 1, 1965, or at any time after such registration, the coupons thereto attached, evidencing all interest to be paid thereon to the date of maturity, shall be surrendered, such coupons shall be detached and retained in the custody of the State Treasurer, and the State Treasurer shall endorse upon such bond or certificate the fact that such bond or certificate has been converted into a fully registered bond or certificate, and shall make like entry in said register. Thereafter the interest evidenced by such detached coupons shall be paid at the times provided therein to the registered owner or his legal representatives, in New York exchange, mailed to his address, unless he shall have requested the State Treasurer to pay such interest in funds current at the State capital, which request shall be entered in said register. Any such bond or certificate, if converted into a bond or certificate registered as to both principal and interest, may be reconverted at the expense of the registered owner into a coupon bond or certificate upon presentation thereof to the State Treasurer, accompanied by an instrument duly executed by the registered owner or his legal representatives in such form as shall be satisfactory to the State Treasurer; upon any such reconversion the State Treasurer shall reattach thereto the coupons representing the interest to become due thereafter on such bond or certificate to the date of maturity and shall make notation upon such bond or certificate whether such bond or certificate is registered as to principal alone or is payable to bearer, and shall make like entry in said register and he shall cancel any detached coupons retained by him representing interest that has been paid. (1856, c. 16; 1883, c. 25, s. 2; Code, s. 3569; 1887, c. 287, s. 2; Rev., s. 5026; C.S., s. 7406; Ex. Sess. 1921, c. 66, s. 5; 1965, c. 181, s. 1.)

## § 142-7. No charge for registration.

There shall be no charge for the registration of any bond or certificate whether registered at the time of issuance thereof or subsequently registered, and no charge for the transfer of registered bonds and certificates shall be made. (1887, c. 287, ss. 4, 5; Rev., s. 5027; C.S., s. 7407; Ex. Sess. 1921, c. 66, s. 6; 1925, c. 49.)

### § 142-8. Application of §§ 142-1 to 142-9.

General Statutes 142-1 to 142-9, both inclusive, as amended, shall be applicable to all bonds or certificates of the State heretofore issued and now outstanding, and to all bonds or certificates of the State that may hereafter be issued in accordance with any law now in force or hereafter to be enacted. However, any provisions of G.S. 142-1 to G.S. 142-9 in conflict with the "Registered Public Obligations Act", Chapter 159E of the General Statutes, shall not apply. (Code, s. 3570; 1887, c. 287, s. 3; Rev., s. 5028; C.S., s. 7408; Ex. Sess. 1921, c. 66, s. 7; 1965, c. 181, s. 2; 1983, c. 322, s. 2.)

### § 142-9. Duties performed by other officers.

If the Council of State shall at any time find that either the Governor or the State Treasurer is unable by reason of absence, disability, or otherwise, to sign any bonds or certificates, the Lieutenant-Governor may sign the same in lieu of the Governor, and they may be signed in lieu of the Treasurer by any member of the Council of State designated by it. (1864-5, c. 24; Code, s. 3567; Rev., s. 5024; C.S., s. 7409; Ex. Sess. 1921, c. 66, s. 8.)

### § 142-10. Chief clerk may issue when Treasurer unable to act.

Whenever it shall appear by formal finding of the Governor and Council of State, within seven days before any bonds or notes of the State or any interest thereon shall fall due, that it is advisable to issue notice of the State to provide for the renewal or payment of such bonds, notes or interest and that the State Treasurer is unable for any reason to negotiate or to issue such notes, it shall be the duty of the chief clerk of the State treasury, if the issuance of such notice shall have been authorized by law, upon certification to him of such finding, and in the name of the State Treasurer, to make all necessary negotiations and to sign and deliver such notes for value and to attach thereto the seal of the State Treasurer. (1927, c. 12.)

### § 142-11. When bonds deemed duly executed.

State bonds duly authorized by law and approved by the Governor and Council of State shall be regarded as duly executed by proper officers if signed and sealed while in office by the officer or officers then authorized to sign and seal the same, notwithstanding one or more of such officers shall not be in office at the time of actual delivery of such bonds. (1925, c. 2.)

### § 142-12. State bonds exempt from taxation.

Bonds and other evidences of indebtedness issued by the State are exempt from State taxation to the extent provided in the act authorizing their issuance. If the act authorizing the issuance of the instruments does not address exemption from taxation, then they are exempt from taxation by the State or any of its subdivisions, except for inheritance or gift taxes, income taxes on the gain from the transfer of the instruments, and franchise taxes. Unless the act authorizing the issuance of the instruments provides otherwise, the interest on the instruments is not subject to taxation as income. (1852, c.

10, s. 4; R.C., c. 90, s. 5; Code, s. 3565; Rev., s. 5022; C.S., s. 7410; 1995, c. 46, s. 14.)

## § 142-12.1. Effect of federal taxation of interest income on state or local bonds on issuance thereof; continuation of state tax exemptions.

(a) It is hereby found, determined and declared that:

(1) From time to time bills have been introduced in the United States Congress providing that the interest on all or certain state and municipal bonds or debt obligations, whether issued by or on behalf of states or local governmental units, be subject to federal income taxation; and

(2) The Tax Reform Act of 1986 requires, in certain circumstances, the inclusion in the gross income of the recipient thereof of interest on bonds or obligations issued by or on behalf of certain state or local governmental units for purposes of federal income tax which heretofore would have been exempt from federal income taxation.

(b) Nothing in any act, general, special or private, shall be deemed to limit or restrict the right of the State or any agency or instrumentality thereof, or The University of North Carolina or any agency or instrumentality thereof, or any county, city, town, special district, authority or other political subdivision or local governmental unit or any agency or instrumentality thereof, to issue, or have issued on its behalf, bonds or obligations the interest income on which is or may be subject to federal income taxation.

(c) The interest on any of these bonds or obligations shall maintain its existing exemption from State income taxation, or other taxation, if any, notwithstanding that the interest may be or become subject to federal income taxation as a result of legislative action by the federal government.

(d) If the provisions of this section are inconsistent with the provisions of any other laws, the provisions of this section shall be controlling. (1987, c. 587, ss. 1-4; 1995, c. 41, s. 10.)

## § 142-13. Destruction of canceled bonds, notes and coupons.

All canceled bonds, notes and interest coupons of the State may be destroyed in one of the following ways, in the discretion of the Treasurer:

(1) Method 1. The Treasurer shall make an entry in a substantially bound book kept by him for the purpose of recording the destruction of bonds, notes and coupons, showing

a. With respect to bonds and notes, the designation, the date of issue, serial numbers (if any), denomination, maturity date, and total principal amount.

b. With respect to coupons, the designation and date of the bonds to which the coupons appertain, the maturity date of the coupons and, as to each maturity date, the denomination, quantity and total amount of coupons.

After this entry has been made, the paid bonds, notes or coupons shall be destroyed, by either burning or shredding, in the presence of the Council of State. Each member of the Council of State in attendance shall certify under his hand in the book kept by the Treasurer that he saw the bonds, notes or coupons destroyed. Canceled bonds, notes or coupons shall not be destroyed until after one year from the date of payment.

(2) Method 2. The Treasurer may contract with the bank or trust company acting as paying agent for a bond issue for the destruction of bonds and interest coupons which have been canceled by the paying agent. The contract shall require that the paying agent give the Treasurer a written certificate of each destruction containing the same information required by Method 1 to be entered in the record of destroyed bonds and coupons. The certificates shall be filed among the permanent records of the Treasurer. Canceled bonds or coupons shall not be destroyed until one year from the date of payment.

The provisions of G.S. 121-5 and 132-3 shall not apply to any such paid bonds, notes or coupons.

Notwithstanding the foregoing, in lieu of destroying all canceled bonds, notes and interest coupons, the Treasurer is authorized, with the approval of the Council of State, to distribute the bonds, notes, and coupons to the public schools of North Carolina and to the Department of Cultural Resources to be used for educational and historical purposes. The Department of Public Instruction and the Department of Cultural Resources may cooperate and assist in implementing such purposes. (1879, c. 98, s. 8; Code, s. 3578; Rev., s. 5035; C.S., s. 7415; 1941, c. 28; 1975, c. 527; 1987, c. 522, s. 1.)

## § 142-14. Issuance of temporary bonds.

Whenever the State Treasurer shall be authorized by law to issue bonds or notes of the State, and all acts, conditions and things required by law to happen, exist and be performed, before the delivery thereof for value, shall have happened, shall exist and shall have been performed, except the printing, lithographing or engraving of the definitive bonds or notes authorized and the execution thereof, the State Treasurer is authorized, by and with the consent of the Governor and Council of State, to issue and deliver for value temporary bonds or notes, with or without coupons, which may be printed or lithographed in any denomination or denominations which may be a multiple of one thousand dollars ($1,000), and shall be signed and sealed as shall be provided for the signing and sealing of such definitive bonds or notes, and shall be substantially of the tenor of such definitive bonds or notes except as herein otherwise provided and except that such temporary bonds or notes shall contain such provisions as the Treasurer may elect as to the conditions of payment of the semiannual interest thereon. Every such temporary bond or note shall bear upon its face the words "Temporary Bond (or Note) Exchangeable for Definitive Bond." Upon the completion and execution of the definitive bonds or notes, such temporary bonds or notes shall be exchangeable without charge therefor to the holder of such temporary bonds or notes for definitive bonds or notes of an equal amount of principal. Such exchange shall be made by the Treasurer or by a bank or trust company in North Carolina or elsewhere appointed by him as agent which shall have a capital and surplus of not less than the amount of the definitive bonds or notes to be so exchanged, and in making such exchange the Treasurer shall detach from the definitive bonds or notes all coupons which represent interest theretofore paid upon the temporary bonds or notes to be exchanged therefor, and shall cancel all such coupons; and upon such exchange such temporary bonds or notes and the coupons attached thereto, if any, shall be forthwith canceled by the Treasurer of such agent. Until so exchanged, temporary bonds and notes issued under the authority hereof shall in all respects be entitled to all the rights and privileges of the definitive securities. (1925, c. 43.)

## § 142-15. Reimbursement of Treasurer for interest.

Whenever it shall become necessary for the State Treasurer to borrow money to provide the maintenance fund for any State institution, the said Treasurer is authorized to deduct from the sum appropriated for maintenance of said institution the amount of interest the Treasurer shall have to pay for the use of said fund. This section shall apply to all future laws creating a maintenance fund for any State institution, unless said laws shall specifically state otherwise. (1923, c. 210; C.S., s. 7466(a).)

### § 142-15.1. Lost, stolen, defaced, or destroyed State bonds.

(a) If lost, stolen, or completely destroyed, any State bond, note, or coupon may be reissued in the same form and tenor upon the owner's furnishing to the satisfaction of the State Treasurer:

(1) Proof of ownership,
(2) Proof of loss or destruction,
(3) A surety bond in twice the face amount of bond or note and coupon, and
(4) Payment of the cost of preparing and issuing the new bond, note, or coupon.

(b) If defaced or partially destroyed, any State bond, note, or coupon may be reissued in the same form and tenor to the bearer or registered holder, at his expense, upon surrender of the defaced or partially destroyed bond, note, or coupon and on such other conditions as the State Treasurer may prescribe. The State Treasurer may also provide for authentication of defaced or partially destroyed bonds, notes, or coupons instead of reissuing them.

(c) Each new State bond, note, or coupon issued under this section shall be signed by the State Treasurer and shall contain a recital to the effect that it is issued in exchange for or replacement of a certain bond, note, or coupon (describing it sufficiently to identify it) and is to be deemed a part of the same issue as the original bond, note, or coupon.

(d) Before taking action under this section to replace, exchange, or authenticate a State bond, note, or coupon, the State Treasurer shall obtain the advice and consent of the Council of State. (1971, c. 780, s. 36.)

### § 142-15.3. Capital appreciation bonds.

(a) Cross-Reference. — The provisions of G.S. 159-99 govern capital appreciation bonds.

(b) Authorization. — The State is authorized to issue capital appreciation bonds pursuant to the provisions of The State and Local Government Revenue Bond Act. The State is authorized to issue capital appreciation bonds pursuant to the provisions of applicable law and pursuant to the provisions of any law enacted in the future. (1987-650, ss. 2, 4 and 5; 2004-170, s. 41(a), (b).)

**Editor's Note.** — Session Laws 2004-170, s. 41(a), codified Session Laws 1987-650, ss. 2, 4, and 5 as G.S. 142-15.3, effective August 2, 2004.

## ARTICLE 2.

## *Borrowing Money in Emergencies and in Anticipation of Collection of Taxes.*

### § 142-16. Governor and Council of State may borrow on note.

The Governor and Council of State may authorize and empower the State Treasurer in the intervals between sessions of the General Assembly, to borrow money on short term notes to meet any emergency arising from the destruction of the State's property, whether used by department or institution, or from some unforeseen calamity not amounting to its destruction. (1927, c. 49, s. 1.)

### § 142-17. Recital of facts entered on minutes; directions to Treasurer; limit of amount.

The Council of State, when such emergency arises during such interval, shall recite upon its minutes the facts out of which it does arise, and thereupon direct the State Treasurer to borrow from time to time money needed to meet such emergency or calamity, not exceeding, however in the whole, five hundred thousand dollars ($500,000) in the aggregate in the period between the adjournment of the present session of the General Assembly and the convening of the General Assembly in regular session in 1929 and not exceeding five hundred thousand dollars ($500,000) in the aggregate in any succeeding interval between regular sessions of the General Assembly, and to execute in behalf of the State of North Carolina notes for said money so borrowed to run not exceeding two years, and to bear interest not exceeding five percent (5%) per annum, payable semiannually. Said notes shall be in such forms as the State Treasurer may determine, and the obligations for the interest thereupon after maturity shall be receivable in payment of taxes, debts, dues, licenses, fines and demands due the State of any kind whatsoever. The said notes shall be exempt from all State, county and municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest thereon shall not be subject to taxation as for income, nor shall said notes be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. (1927, c. 49, s. 2.)

### § 142-18. Report to General Assembly.

At each, the next regular or extra session of the General Assembly, the Governor and Council of State shall report to it the proceedings of the Governor and Council of State in borrowing money under this Article, setting out fully the facts upon which they held that the emergency existed which authorized such borrowing. (1927, c. 49, s. 3.)

### § 142-19. Power given to Director of Budget to authorize State Treasurer to borrow money.

The Director of the Budget by and with the consent of the Governor and Council of State shall have authority to authorize and direct the State Treasurer to borrow, in the name of the State and pledge the credit of the State for the payment thereof, in anticipation of the collection of taxes, such sums as may be necessary to make the payment on appropriations to the various institutions, departments and agencies of the State as even as possible so as to preserve the best interest of the State in the conduct of the various institutions, departments and agencies of the State during each fiscal year. (1927, c. 195.)

## ARTICLE 3.

## *Refunding Bonds.*

**§§ 142-20 through 142-29:** Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 823, s. 1.

**Cross References.** — As to the State Refunding Bond Act, see now G.S. 142-29.1 et seq.

## Article 3A.
## *Refunding Bonds.*

### § 142-29.1. Title of Article.

This Article may be known and cited as the "State Refunding Bond Act." (1935, c. 445, s. 1; 1985 (Reg. Sess., 1986), c. 823, s. 1.)

**Editor's Note.** — Session Laws 1985 (Reg. Sess., 1986), c. 823, s. 4 made this Article effective upon ratification. The act was ratified June 27, 1986.

Sections 2 and 3 of Session Laws 1985 (Reg. Sess., 1986), c. 823 provide:

"Section 1 of this act shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby by the State and shall be regarded as supplemental and additional to powers conferred by other laws and shall not be regarded as in derogation of any powers now existing; provided, however, that the issuance of bonds, bond anticipation notes and notes under the provisions of this act need not comply with the requirements of any other law applicable to the issuance of bonds, bond anticipation notes and notes of the State.

"Nothing in this act shall be construed to impair the obligation of any bond, bond anticipation note, note or coupon issued by the State under the provisions of Article 3 of Chapter 142 of the General Statutes and outstanding on the effective date of this act."

### § 142-29.2. Definitions.

The words and phrases defined in this section shall have the meanings indicated when used in this Article, unless the context clearly requires another meaning:

(1) "Authorized investments" means
  a. Direct obligations of the United States government,
  b. Obligations the principal of and the interest on which are guaranteed by the United States government,
  c. Evidences of ownership of proportionate interests in future interest and principal payments on specified obligations described in a. and b. above, which obligations are held by a bank or trust company organized and existing under the laws of the United States of America or any state thereof in the capacity of custodian,
  d. Obligations of state or local government municipal bond issuers, provision for the payment of the principal of and interest on which shall have been made by deposit with a trustee or escrow agent of obligations described in a., b. or c. above, the maturing principal of and interest on which, when due and payable, shall provide sufficient money with any other money held in trust for such purpose to pay the principal of, premium, if any, and interest on such obligations of state or local government municipal bond issuers, and which are rated in the highest rating by Standard & Poor's Corporation and Moody's Investors Service, Inc.,
  e. Obligations of state or local government municipal bond issuers, the principal of and interest on which, when due and payable, have been insured by a bond insurance company which is rated in the highest rating category by Standard & Poor's Corporation and Moody's Investors Service, Inc.,
  f. Full faith and credit obligations of state or local government bond issuers which are rated in the highest rating category by Stan-

dard & Poor's Corporation and Moody's Investors Service, Inc., and

g. Any obligations or investments in which the State Treasurer is authorized, at the time of such investment, to invest funds of the State.

(2) "Bond documentation" means any resolution, order, trust agreement, trust indenture or other document authorizing the issuance of and securing any outstanding obligations.

(3) "Bonds" means any bonds issued under the provisions of this Article.

(4) "Credit facility" means an agreement entered into by the State Treasurer on behalf of the State with a bank, savings and loan association or other banking institution, an insurance company, reinsurance company, surety company or other insurance institution, a corporation, investment banking firm or other investment institution, or any financial institution providing for prompt payment of all or any part of the principal (whether at maturity, presentment for purchase, redemption or acceleration), redemption premium, if any, and interest on any refunding obligations payable on demand or tender by the owner issued in accordance with this Article, in consideration of the State agreeing to repay the provider of such credit facility in accordance with terms and provisions of such agreement, provided, that any such agreement shall provide that the obligation of the State thereunder shall have only such sources of payment as are permitted for the payment of refunding obligations issued under this Article.

(5) "Notes" means any bond anticipation notes or notes issued under the provisions of this Article.

(6) "Outstanding obligations" means any outstanding bonds, bond anticipation notes or notes of the State, whether now outstanding or hereafter issued, the payment of the principal of and the interest on which are secured by a pledge of the full faith, credit and taxing power of the State and which may also be secured, as and to the extent provided in applicable bond documentation, by additional security.

(7) "Par formula" shall mean any provision or formula adopted by the State to provide for the adjustment, from time to time, of the interest rate or rates borne by any refunding obligations so that the purchase price of such refunding obligations in the open market would be as close to par as possible.

(8) "Refunding obligations" means any notes or bonds issued under the provisions of this Article. (1935, c. 445, s. 2; 1985 (Reg. Sess., 1986), c. 823, s. 1.)

## § 142-29.3. Purpose.

The purpose of this Article is to provide statutory procedures or to supplement existing procedures for the issuance of refunding obligations. (1935, c. 445, s. 3; 1985 (Reg. Sess., 1986), c. 823, s. 1.)

## § 142-29.4. Powers.

In addition to the powers it may now or hereafter have, the State shall have the following powers, subject to the provisions of this Article and applicable bond documentation:

(1) To borrow money and issue one or more series of refunding obligations for the purpose of refunding all or any part of any series or combination of series of outstanding obligations including, without limitation,

the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption or maturity or maturities of such outstanding obligations;

(2) To apply the proceeds of refunding obligations
  a. To the payment and retirement of outstanding obligations by direct application to such payment and retirement,
  b. To the payment and retirement of outstanding obligations, whether by redemption or in accordance with their terms, by the deposit in trust of such proceeds,
  c. To the payment of any expenses incurred in connection with such refunding, including the expense of any credit facility employed in connection with such refunding obligations, including, without limitation, bond insurance policies, letters of credit and lines of credit, and
  d. For such other uses not inconsistent with any such refunding,

(3) To issue refunding obligations in combination with any other bonds, bond anticipation notes, notes or financial obligations issued by the State;

(4) To issue refunding obligations bearing interest at rates lower, the same as or higher than and having maturities shorter, the same as or longer than the outstanding obligations being refunded;

(5) To issue one series of refunding obligations to refund one or more series of outstanding obligations;

(6) To issue refunding obligations in exchange for outstanding obligations;

(7) To apply to any purpose consistent with any refunding, including the funding of an escrow fund or account to be used for the payment or redemption of any outstanding obligations, moneys made available as a consequence of such refunding, including, without limitation, any moneys then on deposit in debt service reserve funds, principal accounts, interest accounts and sinking fund accounts in respect of the outstanding obligations being refunded and, subject to the approval of the Council of State, any moneys appropriated by the General Assembly for the payment of principal of or interest on the outstanding obligations being refunded; and

(8) To invest any moneys, including any moneys held in trust, in authorized investments. (1935, c. 445, s. 4; 1985 (Reg. Sess., 1986), c. 823, s. 1.)

## § 142-29.5. Authorization of refunding obligations.

By and with the consent of the Council of State, the State Treasurer is authorized to issue and sell, from time to time, refunding obligations for the purpose of refunding outstanding obligations as and to the extent authorized by this Article. The principal amount of any such refunding obligations shall not exceed the principal amount of outstanding obligations to be refunded unless (i) the refunding results in an aggregate debt service savings and (ii) the increase in the principal amount issued does not create cash-in-hand available for new capital improvements.

Refunding obligations issued pursuant to the provisions of this Article shall not be subject to limitations imposed by any other law including, without limitation, the other Articles of this Chapter. (1935, c. 445, s. 5; 1985 (Reg. Sess., 1986), c. 823, s. 1; 1993, c. 542, s. 13.)

## § 142-29.6. Sale of refunding obligations and provisions thereof.

(a) The bonds shall bear such date or dates, shall be serial or term bonds, shall mature in such amounts and at such times, not exceeding 40 years from their date or dates, and shall bear interest at such rate or rates, which may vary from time to time as hereinafter authorized, and which may be represented, in part, by evidences of additional interest, and the bonds may be made redeemable before maturity, at the option of the State or otherwise as may be provided by the State, at such price or prices and under such terms and conditions, all as may be fixed by the State Treasurer with the consent of the Council of State.

(b) The bonds shall be signed on behalf of the State by the Governor or shall bear his facsimile signature; shall be signed by the State Treasurer or shall bear his facsimile signature; and shall bear the Great Seal of the State or a facsimile thereof impressed or imprinted thereon; and interest coupons, if any, shall bear a facsimile of the signature of the State Treasurer. If the bonds shall bear the facsimile signatures of the Governor and the State Treasurer, the bonds shall also bear a manual signature which may be that of a bond registrar, trustee, paying agent or designated assistant of the State Treasurer. Should any officer whose signature or facsimile signature appears on any bonds or coupons (if any) cease to be such officer before the delivery of the bonds, such signature or facsimile signature shall nevertheless have the same validity for all purposes as if the officer had remained in office until delivery and any bond or coupon may bear the facsimile signatures of such persons who at the actual time of the execution of such bond or coupon shall be the proper officers to sign any bond or coupon although at the date of such bond or coupon such persons may not have been such officers. The form and denomination of the bonds and any coupons, including the provisions with respect to registration of the bonds, shall be as the State Treasurer may determine in conformity with this Article; provided, however, that nothing in this Article shall prohibit the State Treasurer from proceeding, with respect to the issuance and form of the bonds, under the provisions of the Registered Public Obligations Act as well as this Article.

(c) Subject to determination by the Council of State as to the manner in which the bonds shall be offered for sale, whether at public or private sale and whether by publishing notices in certain newspapers and financial journals, mailing notices, inviting bids by correspondence, negotiating contracts of purchase or otherwise, the State Treasurer is authorized to sell the bonds, at one time or from time to time, at a price equal to, greater than or less than the face amount of the bonds as the State Treasurer may determine to be in the best interests of the State.

All expenses incurred in the preparation, sale and issuance of the refunding obligations shall be paid by the State Treasurer from the proceeds of any such refunding obligations or any other available moneys.

(d)(1) By and with the consent of the Council of State, the State Treasurer is hereby authorized to borrow money at such rate or rates of interest as the State Treasurer may determine to be in the best interests of the State, which may vary from time to time as hereinafter authorized, and to execute and issue bond anticipation notes or notes of the State for the same, but only in the following circumstances and under the following conditions:

a. For anticipating the sale of any bonds to the issuance of which the Council of State shall have given consent, if the State Treasurer shall deem it advisable to postpone the issuance of such bonds;

b. For the payment of interest upon or any installment of principal of any of the bonds then outstanding, if there shall not be sufficient funds in the State Treasury with which to pay the interest or installment of principal as they respectively become due; or

c. For the renewal of any loan evidenced by bond anticipation notes or notes herein authorized.

(2) Funds derived from the sale of bonds may be used in the payment of any bond anticipation notes issued under this Article. Funds provided by the General Assembly for the payment of interest on or principal of bonds shall be used in paying the interest on or principal of any notes and any renewals thereof, the proceeds of which shall have been used in paying interest on or principal of such bonds.

Nothing in this Article shall be construed as a limitation on the duration of any deposit in trust for the retirement of outstanding obligations which shall not have matured and which shall not be then redeemable or, if then redeemable, shall not have been called for redemption.

(e) Coupons (if any) and any evidences of additional interest appertaining to bonds and notes shall, after the maturity of such coupons or evidences of additional indebtedness, be receivable in payment of all taxes, debts, dues, licenses, fines and demands of any kind whatever due the State.

(f) All refunding obligations shall be exempt from all State, county and municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, except for inheritance and gift taxes, income taxes on the gain from the transfer of the obligations, and franchise taxes. The interest on the refunding obligations is not subject to taxation as income.

(g) Refunding obligations, coupons (if any) and any evidences of additional indebtedness are hereby made securities in which all public officers, agencies and public bodies of the State and its political subdivisions, all insurance companies, trust companies, investment companies, banks, savings banks, building and loan associations, credit unions, pension or retirement funds, other financial institutions engaged in business in the State, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. Such refunding obligations, coupons (if any) and any evidences of additional indebtedness are hereby made securities which may properly and legally be deposited with and received by any officer or agency of the State or political subdivision of the State for any purpose for which the deposit of bonds, notes or obligations of the State or any political subdivision is now or may hereafter be authorized by law.

(h) The full faith, credit and taxing power of the State are hereby pledged for the payment of the principal of and the interest on refunding obligations, coupons (if any) and any evidences of additional indebtedness to the same extent as pledged to the outstanding obligations being refunded. To the extent additional security has been pledged to outstanding obligations, such additional security may, at the discretion of the State, be continued and similarly pledged to the appropriate refunding obligations, coupons (if any) and any evidences of additional indebtedness. (1935, c. 445, s. 6; 1985 (Reg. Sess., 1986), c. 823, s. 1; 1995, c. 46, s. 15.)

## § 142-29.7. Additional refunding obligation provisions.

In fixing the details of refunding obligations, the State Treasurer may provide that any of the refunding obligations:

(1) May be made payable from time to time on demand or tender for purchase by the owner thereof provided a credit facility supports such refunding obligations, unless the State Treasurer specifically determines that a credit facility is not required upon a finding and determination by the State Treasurer that the absence of a credit facility will not materially and adversely affect the financial position of the State and the marketing of the refunding obligations at a reasonable interest cost to the State;

(2) May be additionally supported by a credit facility;

(3) May be made subject to redemption prior to maturity with such variations as may be permitted in connection with a par formula;

(4) May bear interest at a rate or rates that may vary as permitted pursuant to a par formula and for such period or periods of time, all as may be provided in the proceedings providing for the issuance of such refunding obligations; and

(5) May be made the subject of a remarketing agreement whereby an attempt is made to remarket the refunding obligations to new purchasers prior to their presentment for payment to the provider of the credit facility or to the State.

If the aggregate principal amount repayable by the State under an agreement is in excess of the aggregate principal amount of refunding obligations secured by the related credit facility, whether as a result of the inclusion in the credit facility of a provision for the payment of interest for a limited period of time or the payment of a redemption premium or for any other reason, then the amount of authorized but unissued refunding obligations during the term of such agreement shall not be less than the amount of such excess, unless the payment of such excess is otherwise provided for by agreement of the State executed by the State Treasurer. (1935, c. 445, s. 7; 1985 (Reg. Sess., 1986), c. 823, s. 1.)

## ARTICLE 4.

## *Sinking Fund Commission.*

**§§ 142-30 through 142-43:** Repealed by Session Laws 1983, c. 913, s. 30.

## ARTICLE 5.

## *Sinking Funds for Highway Bonds.*

**§§ 142-44 through 142-46:** Repealed by Session Laws 1983, c. 913, s. 30.

## ARTICLE 5A.

## *Exchange and Cancellation of Bonds Held in Sinking Funds; Investment of Moneys.*

**§§ 142-47 through 142-49:** Repealed by Session Laws 1983, c. 913, s. 30.

## ARTICLE 6.

## *Citations to Bond and Note Acts.*

(Repealed by Session Laws 1983, c. 913, s. 30.)

## ARTICLE 7.

## *General Fund Bond Sinking Fund.*

**§§ 142-50 through 142-54:** Repealed by Session Laws 1983, c. 913, s. 30.

**§§ 142-55 through 142-59:** Reserved for future codification purposes.

## ARTICLE 8.

## *State Energy Conservation Finance Act.*

### § 142-60. Short title.

This Article is the State Energy Conservation Finance Act. (2002-161, s. 9.)

**Editor's Note.** — Session Laws 2002-161, s. 12, provides that nothing in the act limits the use of any method of contracting authorized by local law or other applicable laws.

### § 142-61. Definitions.

The following definitions apply in this Article:

(1) Certificates of participation. — Certificates or other instruments delivered by a special corporation as provided in this Article evidencing the assignment of proportionate and undivided interests in the rights to receive payments to be made by the State pursuant to one or more financing contracts.

(2) Cost. — The term includes:

a. The cost of construction, modification, rehabilitation, renovation, improvement, acquisition, or installation in connection with an energy conservation measure.

b. The cost of engineering, architectural, and other consulting services as may be required, including the cost of performing the technical analysis in accordance with G.S. 143-64.17A and inspection and certification in accordance with G.S. 143-64.17K.

c. Finance charges, reserves for debt service and other types of reserves required pursuant to a financing contract or any other related documentation, and interest prior to and during construction, and, if deemed advisable by the State Treasurer, for a period not exceeding two years after the estimated date of completion of construction.

d. Administrative expenses and charges.

e. The cost of bond insurance, investment contracts, credit and liquidity facilities, interest rate swap agreements and other derivative products, financial and legal consultants, and related costs of the incurrence or issuance of the financing contract to the extent and as determined by the State Treasurer.

f. The cost of reimbursing the State for payments made for any costs described in this subdivision.

g. Any other costs and expenses necessary or incidental to implementing the purposes of this Article.

(3) Credit facility. — An agreement that:

a. Is entered into by the State with a bank, savings and loan association, or other banking institution, an insurance company, reinsurance company, surety company or other insurance institution, a corporation, investment banking firm or other investment institution, or any financial institution or other similar provider of a credit facility, which provider may be located within or without the United States of America; and

b. Provides for prompt payment of all or any part of the principal or purchase price (whether at maturity, presentment or tender for purchase, redemption, or acceleration), redemption premium, if any, and interest with respect to any financing contract payable on demand or tender by the owner in consideration of the State agreeing to repay the provider of the credit facility in accordance with the terms and provisions of the agreement.

(4) Energy conservation measure. — Defined in G.S. 143-64.17.

(5) Energy conservation property. — Buildings, equipment, or other property with respect to which an energy conservation measure is undertaken.

(6) Financing contract. — An installment financing contract entered into pursuant to the provisions of this Article to finance the cost of an energy conservation measure.

(7) Person. — An individual, a firm, a partnership, an association, a corporation, a limited liability company, or any other organization or group acting as a unit.

(8) Special corporation. — A nonprofit corporation created under Chapter 55A of the General Statutes for the purpose of facilitating the incurrence of certificates of participation indebtedness by the State under this Article.

(9) State governmental unit. — Defined in G.S. 143-64.17.

(10) State Treasurer. — The incumbent Treasurer, from time to time, of the State. (2002-161, s. 9.)

## § 142-62: Reserved for future codification purposes.

## § 142-63. Authorization of financing contract.

Subject to the terms and conditions set forth in this Article, a State governmental unit that has solicited a guaranteed energy conservation measure pursuant to G.S. 143-64.17A or G.S. 143-64.17B or the State Treasurer, as designated by the Council of State, is authorized to execute and deliver, for and on behalf of the State of North Carolina, a financing contract to finance the costs of the energy conservation measure. The aggregate outstanding amount payable by the State under financing contracts entered pursuant to this Article shall not exceed five hundred million dollars ($500,000,000) at any one time. (2002-161, s. 9; 2006-190, s. 6; 2009-375, s. 1.)

**Effect of Amendments.** — Session Laws 2009-375, s. 1, effective July 31, 2009, in the last sentence, substituted "aggregate outstanding amount" for "aggregate principal amount" near the beginning, and "five hundred million dollars ($500,000,000)" for "one hundred million dollars ($100,000,000)" near the end.

## § 142-64. Procedure for incurrence or issuance of financing contract.

(a) When a State governmental unit has solicited a guaranteed energy conservation measure, the State governmental unit shall request that the State Treasurer approve the State governmental unit's entering into a financing contract to finance the cost of the energy conservation measure. In connection with the request, the State governmental unit shall provide to the State Treasurer any information the State Treasurer requests in order to evaluate the request. In the event that the State Treasurer determines that financing efficiencies will be realized through the combining of financing contracts, then the State Treasurer is authorized to execute and deliver, for and on behalf of the State of North Carolina, subject to the terms and conditions set forth in this Article, a financing contract for the purpose of financing the cost of the multiple energy conservation measures.

(b) A financing contract may be entered into pursuant to this Article only after all of the following conditions are met:

(1) The Office of State Budget and Management has certified that resources are expected to be available to the State to pay the payments to fall due under the financing contract as they become due and payable.

(2) The Council of State has approved the execution and delivery of the financing contract by resolution that sets forth all of the following:

a. The not-to-exceed term or final maturity of the financing contract, which shall be no later than 20 years from the date of acceptance of the project.

b. The not-to-exceed interest rate or rates (or the equivalent thereof), which may be fixed or vary over a period of time, with respect to the financing contract.

c. The appropriate officers of the State to execute and deliver the financing contract and all other documentation relating to it.

(3) The State Treasurer has approved the financing contract and all other documentation related to it, including any deed of trust, security agreement, trust agreement or any credit facility.

The resolution of the Council of State shall include any other matters the Council of State considers appropriate.

(c) In determining whether to approve a financing contract under subdivision (b)(3) of this section, the State Treasurer may consider the factors the State Treasurer considers relevant in order to find and determine all of the following:

(1) The principal amount to be advanced to the State under the financing contract is adequate and not excessive for the purpose of paying the cost of the energy conservation measure.

(2) The increase, if any, in State revenues necessary to pay the sums to become due under the financing contract are not excessive.

(3) The financing contract can be entered into on terms desirable to the State.

(4) In the case of delivery of certificates of participation, the sale of certificates of participation will not have an adverse effect upon any scheduled or proposed sale of obligations of the State or any State agency.

(d) The Office of State Budget and Management is authorized to certify that funds are expected to be available to the State to make the payments due under a financing contract entered into under the provisions of this section as the payments become due and payable. In so certifying, the Office of State Budget and Management may take into account expected decreases in appropriations to the State governmental unit that will offset payments expected to be made under the financing contract. (2002-161, s. 9; 2006-190, s. 7.)

## § 142-65. Security; other requirements.

(a) In order to secure the performance by the State of its obligations under a financing contract or any other related documentation, the State may grant a lien on, or security interest in, all or any part of the energy conservation property or the land upon which the energy conservation property is or will be located.

(b) No deficiency judgment may be rendered against the State or any State governmental unit in any action for breach of any obligation contained in a financing contract or any other related documentation, and the taxing power of the State is not and may not be pledged directly or indirectly to secure any moneys due under a financing contract or any other related documentation. In the event that the General Assembly does not appropriate funds sufficient to make payments required under a financing contract or any other related documentation, the net proceeds received from the sale, lease, or other disposition of the property subject to the lien or security interest created pursuant to subsection (a) of this section shall be applied to satisfy these payment obligations in accordance with the deed of trust, security agreement, or other documentation creating the lien or security interest. These net proceeds are hereby appropriated for the purpose of making these payments. Any net proceeds in excess of the amount required to satisfy the obligations of the State under the financing contract or any other related documentation shall be paid to the State Treasurer for deposit to the General Fund of the State.

(c) Neither a financing contract nor any other related documentation shall contain a nonsubstitution clause that restricts the right of the State to (i) continue to provide a service or conduct an activity or (ii) replace or provide a substitute for any State property that is the subject of an energy conservation measure.

(d) A financing contract may include provisions requesting the Governor to submit in the Governor's budget proposal, or any amendments or supplements to it, appropriations necessary to make the payments required under the financing contract.

(e) A financing contract may contain any provisions for protecting and enforcing the rights and remedies of the person advancing moneys or providing funds under the financing contract that are reasonable and not in violation of law, including covenants setting forth the duties of the State in respect of the purposes to which the funds advanced under a financing contract may be applied, and the duties of the State with respect to the property subject to the lien or security interest created pursuant to subsection (a) of this section, including, without limitation, provisions relating to insuring and maintaining any property and the custody, safeguarding, investment, and application of moneys.

(f) The interest component of the installment payments to be made under a financing contract may be calculated based upon a fixed or variable interest rate or rates as determined by the State Treasurer.

(g) If the State Treasurer determines that it is in the best interest of the State, the State may enter into, or arrange for the delivery of, a credit facility to secure payment of the payments due under a financing contract or to secure payment of the purchase price of any certificates of participation delivered as provided in this Article. (2002-161, s. 9.)

## § 142-66. Payment provisions.

The payment of amounts payable by the State under a financing contract and any other related documentation during any fiscal biennium or fiscal year shall be limited to funds appropriated for that purpose by the General Assembly in its discretion. No provision of this Article and no financing contract or any other related documentation shall be construed or interpreted as creating a pledge of the faith and credit of the State or any agency, department, or commission of the State within the meaning of any constitutional debt limitation. (2002-161, s. 9.)

## § 142-67. Certificates of participation.

(a) If the State Treasurer determines that the State would realize debt service savings under one or more financing contracts if certificates of participation are issued with respect to the rights to receive payments under the financing contract, then the State Treasurer is authorized to take actions, with the consent of the Council of State, that will effectuate the delivery of certificates of participation for that purpose.

(b) Terms; Interest. — Certificates of participation may be sold by the State Treasurer in the manner, either at public or private sale, and for any price or prices that the State Treasurer determines to be in the best interest of the State and to effect the purposes of this Article, except that the terms of the sale must also be approved by the special corporation. Interest payable with respect to certificates of participation shall accrue at the rate or rates determined by the State Treasurer with the approval of the special corporation.

(c) Trust Agreement. — Certificates of participation may be delivered pursuant to a trust agreement or similar instrument with a corporate trustee approved by the State Treasurer. (2002-161, s. 9.)

## § 142-68. Tax exemption.

Any financing contract entered pursuant to this Article, and any certificates of participation relating to it, shall at all times be free from taxation by the State or any political subdivision or any of their agencies, excepting estate, inheritance, and gift taxes; income taxes on the gain from the transfer of the financing contract or certificates of participation; and franchise taxes. The interest component of the installment payments made by the State under the financing contract, including the interest component of any certificates of participation, is not subject to taxation as income. (2002-161, s. 9.)

## § 142-69. Other agreements.

The State Treasurer may authorize, execute, obtain, or otherwise provide for bond insurance, investment contracts, credit and liquidity facilities, credit enhancement facilities, interest rate swap agreements and other derivative products, and any other related instruments and matters the State Treasurer determines are desirable in connection with entering into financing contracts and issuing certificates of participation pursuant to this Article. The State Treasurer is authorized to employ and designate any financial consultants, underwriters, fiduciaries, and bond attorneys to be associated with any financing contracts or certificates of participation under this Article as the State Treasurer considers appropriate. (2002-161, s. 9.)

## § 142-70. Investment eligibility.

Financing contracts entered into pursuant to this Article, and any certificates of participation relating to them, are securities or obligations in which all of the following may invest, including capital in their control or belonging to them: public officers, agencies, and public bodies of the State and its political subdivisions; insurance companies, trust companies, investment companies, banks, savings banks, savings and loan associations, credit unions, pension or retirement funds, and other financial institutions engaged in business in the State; and executors, administrators, trustees, and other fiduciaries. Financing contracts entered pursuant to this Article, and any certificates of participation relating to them, are securities or obligations that may properly and legally be deposited with and received by any officer or agency of the State or any political subdivision of the State for any purpose for which the deposit of bonds, notes, or obligations of the State or any political subdivision is now or may later be authorized by law. (2002-161, s. 9.)

# ARTICLE 9.

# *State Capital Facilities Finance Act.*

## § 142-80. Short title.

This Article may be cited as the State Capital Facilities Finance Act. (2003-284, s. 46.2; 2003-314, s. 1; 2004-203, s. 79.)

**Repair and Renovation.** — Session Laws 2003-284, s. 46.1, provides: "This section authorizes the issuance or incurrence of special indebtedness in a maximum aggregate principal amount of three hundred million dollars ($300,000,000) to be used only in accordance with this section for the repair and renovation of State facilities and related infrastructure that are supported from the General Fund.

"Proceeds of the Repair and Renovation special indebtedness shall be used only for the purposes and in accordance with the procedures provided in G.S. 143-15.3A, the Repairs and Renovations Reserve Account.

"Except in the case of an emergency as provided in G.S. 143-15.3A, the Director of the Budget shall use the Repair and Renovations funds only for repairs and renovations that have been approved by an act of the General Assembly or, if the General Assembly is not in session, for repairs and renovations about which the Director of the Budget has first consulted with the Joint Legislative Commission on Governmental Operations under G.S. 143-15.3A(c). The Director of the Budget shall direct the State Treasurer to carry out the financing for repair and renovation projects selected pursuant to this section. Special indebtedness authorized by this section shall be issued or incurred only in accordance with Article 9 of Chapter 142 of the General Statutes, as enacted by this part."

**Psychiatric Hospital Construction.** — Session Laws 2003-314, ss. 2.1 through 2.3, provide: "Construction of Psychiatric Hospital. — In accordance with G.S. 142-83, as enacted by this act, this section authorizes the issuance or incurrence of financing contract indebtedness in a maximum aggregate principal amount of one hundred ten million dollars ($110,000,000) to finance the cost of the project described in this Part, subject to the limitations described in this Part. The financing contract indebtedness shall not be incurred prior to July 1, 2004.

"The Project. — The project shall consist of the acquisition, construction, and equipping of an approximately 450,000 square foot, 432-bed new psychiatric hospital to be located in Butner.

"Authorization of Financing Contracts. — The State, with the prior approval of the State Treasurer and the Council of State, as provided in Article 10 of Chapter 142 of the General Statutes as enacted by this act, is authorized to execute and deliver one or more financing contracts in order to provide funds to the State to be used, together with other available funds, to pay the cost of the project, in an aggregate principal amount not to exceed one hundred ten million dollars ($110,000,000). The State Treasurer may, in the Treasurer's sole discretion, require one or more reports satisfactory to the Treasurer evidencing the savings expected to be realized from the closure of existing psychiatric hospitals that are to be replaced by the project and the feasibility of the financing of the project."

**General Provisions for Psychiatric Hospital.** — Session Laws, 2003-314, s. 3.1, provides: "The Secretary of Health and Human Services shall maintain all existing educational and research programs in psychiatry and psychology conducted at Dorothea Dix Hospital and John Umstead Hospital by the University of North Carolina School of Medicine and by the Psychology Department within the College of Arts and Sciences at the University of North Carolina at Chapel Hill, unless the programs are otherwise modified by the University of North Carolina School of Medicine or the College of Arts and Sciences. The University of North Carolina School of Medicine shall retain authority over all educational and research programs in psychiatry and the University of North Carolina College of Arts and Sciences shall retain authority over all educational and research programs in psychology conducted at these hospitals and at any new State psychiatric hospital. The Secretary shall consult with the University of North Carolina School of Medicine in programmatic, operational, and facility planning of the new psychiatric hospital to ensure appropriate patient treatment and continuation of educational and research programs conducted by the University of North Carolina School of Medicine. In addition, the Secretary shall consult with the University of North Carolina College of Arts and Sciences to ensure appropriate continuation of educational and research programs conducted by the University of North Carolina College of Arts and Sciences."

**Additional Method.** — Session Laws 2003-

284, s. 46.4(a), provides: "This part [Part XLVI of Session Laws 2003-284] provides an additional and alternative method for the doing of the things authorized by this part [Part XLVI of Session Laws 2003-284] and shall be regarded as supplemental and additional to powers conferred by other laws. Except where expressly provided, this part [Part XLVI of Session Laws 2003-284] shall not be regarded as in derogation of any powers now existing. The authority granted in this part [Part XLVI of Session Laws 2003-284] is in addition to other laws now or hereinafter enacted authorizing the State to issue or incur indebtedness." Session Laws 2003-314, s. 4.1 contains similar provisions.

**Statutory References.** — Session Laws 2003-284, s. 46.4(b), provides: "References in this part [Part XLVI of Session Laws 2003-284] to specific sections or Chapters of the General Statutes are intended to be references to those sections or Chapters as they may be amended from time to time by the General Assembly." Session Laws 2003-314, s. 4.1 contains similar provisions.

**Liberal Construction.** — Session Laws 2003-284, s. 46.4(c), provides: "This part [Part XLVI of Session Laws 2003-284], being necessary for the health and welfare of the people of the State, shall be liberally construed to effect its purposes." Session Laws 2003-314, s. 4.1 contains similar provisions.

**Severability.** — Session Laws 2003-284, s. 46.4(d), provides: "If any provision of this part [Part XLVI of Session Laws 2003-284] or its application to any person or circumstance is held invalid, that invalidity does not affect other provisions or applications of the part [Part XLVI of Session Laws 2003-284] that can be given effect without the invalid provision or application, and to this end the provisions of this part [Part XLVI of Session Laws 2003-284] are severable." Session Laws 2003-314, s. 4.1 contains similar provisions.

**Editor's Note.** — Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment [June 30, 2003] or repeal."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2004-203, s. 79, amended the lead-in language to Session Laws 2003-314, which enacted this Article, as amended by Session Laws 2003-284, s. 46.2.

Session Laws 2006-231, s. 4, effective August 10, 2006, provides: "In accordance with G.S. 142-83, this section authorizes the issuance or incurrence of special indebtedness in the maximum aggregate principal amount of twenty million dollars ($20,000,000) to finance the capital facility costs of a new parking deck to be constructed in downtown Raleigh. The State, with the prior approval of the State Treasurer and the Council of State, as provided in Article 9 of Chapter 142 of the General Statutes, is authorized to issue or incur special indebtedness in order to provide funds to the State to be used, together with other available funds, to pay the capital facility costs of the project described in this section."

## § 142-81. Findings and purpose.

The General Assembly finds as follows:

(1) There is a continuing need for capital facilities for the State, many of which will continue to be provided on a "pay-as-you-go" basis by direct appropriations.

(2) The State will also continue to provide capital facilities through the issuance of general obligation bonds.

(3) There is a need, however, for the use of alternative financing methods, such as authorized in this Article, to facilitate the providing of capital facilities when circumstances and conditions warrant the providing of capital facilities through financing methods in addition to direct appropriations and the issuance of general obligation bonds.

(4) The use of these alternative financing methods as authorized in this Article will provide financing flexibility to the State and permit the

State to take advantage of changing financial and economic environments. (2003-284, s. 46.2; 2004-203, s. 79.)

## § 142-82. Definitions.

The following definitions apply in this Article:

(1) Bonded indebtedness. — Limited obligation bonds and bond anticipation notes, including refunding bonds and notes, authorized to be issued under this Article.

(2) Bonds or notes. — Limited obligation bonds and notes authorized to be issued under this Article.

(3) Capital facility. — Any one or more of the following:

a. Any one or more buildings, utilities, structures, or other facilities or property developments, including streets and landscaping, and the acquisition of equipment, machinery, and furnishings in connection with these items.

b. Additions, extensions, enlargements, renovations, and improvements to existing buildings, utilities, structures, or other facilities or property developments, including streets and landscaping.

c. Land or an interest in land.

d. Other infrastructure.

e. Furniture, fixtures, equipment, vehicles, machinery, and similar items.

(4) Certificates of participation. — Certificates or other instruments delivered by a special corporation evidencing the assignment of proportionate undivided interests in rights to receive payments pursuant to a financing contract.

(5) Certificates of participation indebtedness. — Financing contract indebtedness incurred by the State under a plan of finance in which a special corporation obtains funds to pay the cost of a capital facility to be financed through the delivery by the special corporation of certificates of participation.

(6) Cost. — Any of the following in financing the cost of capital facilities as authorized by this Article:

a. The cost of constructing, reconstructing, renovating, repairing, enlarging, acquiring, and improving capital facilities, including the acquisition of land, rights-of-way, easements, franchises, equipment, machinery, furnishings, and other interests in real or personal property acquired or used in connection with a capital facility.

b. The cost of engineering, architectural, and other consulting services.

c. The cost of providing personnel to ensure effective management of capital facilities.

d. Finance charges, reserves for debt service, and other types of reserves required pursuant to the terms of any special indebtedness or related documents, interest before and during construction or acquisition of a capital facility and, if considered advisable by the State Treasurer, for a period not exceeding two years after the estimated date of completion of construction or acquisition.

e. Administrative expenses and charges.

f. The cost of bond insurance, investment contracts, credit enhancement facilities and liquidity facilities, interest rate swap agreements or other derivative products, financial and legal consultants, and related costs of the incurrence or issuance of special indebtedness.

- g. The cost of reimbursing the State, a State agency, or a special corporation for any payments made for any cost described in this subdivision.
- h. Any other costs and expenses necessary or incidental to the purposes of this Article.

(7) Credit facility. — An agreement that:
- a. Is entered into by the State with a bank, savings and loan association, or other banking institution, an insurance company, reinsurance company, surety company, or other insurance institution, a corporation, investment banking firm, or other investment institution, or any financial institution or other similar provider of a credit facility, which provider may be located within or without the United States of America; and
- b. Provides for prompt payment of all or any part of the principal or purchase price (whether at maturity, presentment or tender for purchase, redemption, or acceleration), redemption premium, if any, and interest with respect to any special indebtedness payable on demand or tender by the owner in consideration of the State's agreeing to repay the provider of the credit facility in accordance with the terms and provisions of the agreement.

(8) Department of Administration. — The North Carolina Department of Administration, created by Article 36 of Chapter 143 of the General Statutes or, if the Department is abolished or otherwise divested of its functions under this Article, the public body succeeding it in its principal functions or upon which are conferred by law the rights, powers, and duties given by this Article to the Department.

(9) Financing contract. — A contract entered into pursuant to this Article to finance capital facilities and constituting a lease-purchase contract, installment-purchase contract, or other similar type installment financing contract. The term does not include, however, a contract that meets any one of the following conditions:
- a. It constitutes an operating lease under generally accepted accounting principles.
- b. It provides for the payment under the contract over its full term, including periods that may be added to the original term through the exercise of options to renew or extend, of an aggregate principal amount of not in excess of five thousand dollars ($5,000) or any greater amount that may be established by the Council of State if the Council of State determines (i) the aggregate amount to be paid under these contracts will not have a significant impact on the State budgetary process or the economy of the State and (ii) the change will lessen the administrative burden on the State.
- c. It is executed and provides for the making of all payments under the contract, including payment to be made during any period that may be added to the original term through the exercise of options to renew or extend, in the same fiscal year.

(10) Financing contract indebtedness. — Indebtedness incurred pursuant to a financing contract, including certificates of participation indebtedness.

(11) Fiscal period. — A fiscal biennium or a fiscal year of the fiscal biennium.

(12) Fiscal year. — The fiscal year of the State beginning on July 1 of one calendar year and ending on June 30 of the next calendar year.

(13) Limited obligation bond. — A limited obligation bond issued pursuant to G.S. 142-88 and payable and secured as provided in G.S. 142-89.

(14) Par formula. — A provision or formula adopted by the State to provide for the adjustment, from time to time, of the interest rate or rates borne or provided for by any special indebtedness, including any of the following:
  a. A provision providing for an adjustment so that the purchase price of special indebtedness in the open market would be as close to par as possible.
  b. A provision providing for an adjustment based upon a percentage or percentages of a prime rate or base rate, which percentages may vary or be applied for different periods of time.
  c. Any provision that the State Treasurer determines is consistent with this Article and will not materially and adversely affect the financial position of the State and the marketing of special indebtedness at a reasonable interest cost to the State.

(15) Person. — An individual, a firm, a partnership, an association, a corporation, a limited liability company, or any other organization or group acting as a unit.

(16) Special corporation. — Either of the following:
  a. A nonprofit corporation created under Chapter 55A of the General Statutes for the purpose of facilitating the incurrence of certificates of participation indebtedness by the State under this Article.
  b. A private corporation or other entity issuing certificates of participation pursuant to this Article.

(17) Special indebtedness. — Financing contract indebtedness and bonded indebtedness issued or incurred pursuant to this Article.

(18) State. — The State of North Carolina, including any State agency.

(19) State agency. — Any agency, institution, board, commission, bureau, council, department, division, officer, or employee of the State. The term does not include counties, municipal corporations, political subdivisions, local boards of education, or other local public bodies.

(20) State Treasurer. — The incumbent Treasurer, from time to time, of the State. (2003-284, s. 46.2; 2003-314, s. 1; 2004-203, s. 79.)

## § 142-83. Authorization of special indebtedness; General Assembly approval.

The State may incur or issue special indebtedness subject to the terms and conditions provided in this Article for the purpose of financing the cost of capital facilities that meet one of the following conditions:

(1) The General Assembly has enacted legislation describing the capital facility and authorizing its financing by the incurrence or issuance of special indebtedness up to a specific maximum amount.

(2) The General Assembly has enacted legislation authorizing the incurrence or issuance of special indebtedness up to a specific maximum amount for a specific category of capital facilities and the capital facility meets all of the conditions set in that legislation. (2003-284, s. 46.2; 2003-314, s. 1; 2004-203, s. 79.)

**Editor's Note.** — Session Laws, 2003-284, ss. 46A.1(a) through (e), provide: "(a) Acquisition of Correctional Facilities.—In accordance with G.S. 142-83, as enacted by this act, this section authorizes the issuance or incurrence of financing contract indebtedness to be used to acquire two correctional facilities that the State currently leases located in Pamlico County and Avery County. The State Treasurer is authorized to give notice for, arrange, and consummate the purchase of these facilities in accordance with this section.

"(b) Pamlico County Correctional Facility.—The State is authorized to acquire the correctional facility located in Pamlico County that the State currently leases from U.S. Corrections Corporation pursuant to the purchase option provision in the lease. Title to these facilities shall be held in the name of the State. The cost of acquiring the Pamlico County correctional facility shall be financed as provided in Article 9 of Chapter 142 of the General Statutes.

"(c) Mountain View Correctional Facility.—The State is authorized to acquire the Mountain View Correctional Facility located in Avery County that the State currently leases from Correctional Properties Trust pursuant to the purchase option provision in the lease. Title to these facilities shall be held in the name of the State. The cost of acquiring the Mountain View Correctional Facility shall be financed as provided in Article 9 of Chapter 142 of the General Statutes.

"(d) Authorization of Financing Contracts.—The State, with the prior approval of the State Treasurer and the Council of State as provided in Article 9 of Chapter 142 of the General Statutes, is authorized to execute and deliver one or more financing contracts in order to provide funds to the State to be used, together with any other available funds, to pay the cost of acquiring either or both of the Pamlico County correctional facility and the Mountain View Correctional Facility described in this section. Notwithstanding the provisions of G.S. 142-83, no maximum principal amount is required to be stated in this section authorizing the issuance or incurrence of financing contract indebtedness for these purposes.

"(e) Transition.—Funds are appropriated in this act to the Department of Correction in each year of the 2003-2005 fiscal biennium to directly or indirectly pay the property taxes levied on the two facilities to be acquired pursuant to this section. The Department of Correction shall make these payments in the amounts appropriated for the biennium only and, depending upon the ownership status of each facility for each respective tax year, may recharacterize one or more of the payments as fees in lieu of the original obligation."

Session Laws 2003-284, s. 46A.2, provides for the issuance or incurrence of funds for youth development centers.

Session Laws 2003-284, s. 46A.3, provides for the issuance or incurrence of funds for a structural pest control training facility.

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2004-179, ss. 1, 1.1 and 1.2, as amended by Session Laws 2005-276, s. 30.3A, as amended by Session Laws 2006-146, s. 2.1, as amended by Session Laws 2006-231, s. 1, as amended by Session Laws 2008-107, s. 27.8(b), as amended by Session Laws 2009-209, s. 2(d) and (e), and as amended by Session Laws 2009-451, s. 27.7(a), provides: "This part may be cited as the State Capital Facilities Act of 2004.

"In accordance with G.S. 142-83, this section authorizes the issuance or incurrence of special indebtedness in the following maximum aggregate principal amounts to finance the costs of the following projects. The table below provides the maximum principal amounts. The first column is the aggregate maximum principal amount. The second column is the maximum portion of this amount that can be issued or incurred before July 1, 2005. The State, with the prior approval of the State Treasurer and the Council of State, as provided in Article 9 of Chapter 142 of the General Statutes, is authorized to issue or incur special indebtedness in order to provide funds to the State to be used, together with other available funds, to pay the cost of these projects.

| **Aggregate Maximum** | **Maximum before 7/1/05** | **Project** |
|---|---|---|
| $180,000,000 | $110,000,000 | Acquiring, constructing, and equipping a new cancer rehabilitation and treatment center, a nearby physicians' office building, and a walkway between the two, all to be located at the University of North Carolina Hospitals at Chapel Hill. |
| 60,000,000 | 30,000,000 | Acquiring, constructing, and equipping the North Carolina Cardiovascular Diseases Institute at East Carolina University. |
| 35,000,000 | 25,000,000 | Acquiring, constructing, and equipping a Bioinformatics Center at the University of North Carolina at Charlotte. |

| | | |
|---|---|---|
| 28,000,000 | 25,000,000 | Acquiring, constructing, and equipping a stand-alone facility to house the new Pharmacy School program to be located at Elizabeth City State University, and interim temporary facilities to house the program during construction of the facility. |
| 35,000,000 | 25,000,000 | Acquiring, constructing, and equipping a Center for Health Promotion and Partnerships at the University of North Carolina at Asheville. |
| 10,000,000 | 10,000,000 | Land acquisition, site preparation, engineering, architectural, and other consulting services, and construction for the Southeastern North Carolina Nursing Education and Research Center at Fayetteville State University. |
| 10,000,000 | 10,000,000 | Site preparation, engineering, architectural, and other consulting services, and the construction of a research building on the joint Millennial Campus of North Carolina Agricultural and Technical State University and the University of North Carolina at Greensboro. |
| 10,000,000 | 10,000,000 | Land acquisition, site preparation, engineering, architectural, and other consulting services, and construction of a Nursing and Allied Health Building at the University of North Carolina at Pembroke. |
| 9,279,037 | 9,279,037 | To Western Carolina University for land acquisition, site preparation, engineering, architectural, and other consulting services, and construction of a building for Western Carolina University and the Mountain Area Health Education Consortium for the North Carolina Center for Health and Aging to be operated as a consortium among Western Carolina University, the University of North Carolina at Asheville, and the Mountain Area Health Education Consortium. |
| 11,500,000 | 10,000,000 | Land acquisition, site preparation, engineering, architectural, and other consulting services, acquisition of an existing building, construction, or renovation of a Center for Design Innovation to be operated jointly by Winston-Salem State University and the North Carolina School of the Arts. |
| **TOTAL:**<br>$388,797,037 | $264,297,037 | |

"In accordance with G.S. 142-83, this section authorizes the issuance or incurrence of special indebtedness in the maximum aggregate principal amount of thirty-five million two hundred thousand dollars ($35,200,000) to finance the costs of constructing up to five youth development centers totaling up to 224 beds to be operated by the Department of Juvenile Justice and Delinquency Prevention and to be located as determined by that Department. The State, with the prior approval of the State Treasurer and the Council of State, as provided in Article 9 of Chapter 142 of the General Statutes, is authorized to issue or incur special indebtedness in order to provide funds to the State to be used, together with other available funds, to pay the cost of constructing the projects described by this section. Of the special indebtedness authorized by this section, no more than thirteen million dollars ($13,000,000) may be issued or incurred before July 1, 2005."

Session Laws 2004-179, s. 8.3, contains a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-66, s. 23.12(a)-(h), as amended by Session Laws 2008-107, s. 27.8(c), and Session Laws 2009-209, s. 2(c), authorizes the issuance or incurrence of special indebtedness to finance the capital facility costs of various construction projects.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-231, s. 2, provides: "In accordance with G.S. 142-83, this section authorizes the issuance or incurrence of special indebtedness in the maximum aggregate principal amount of twenty million dollars ($20,000,000) to finance the costs of purchasing land to be administered by the Wildlife Resources Commission as State game lands. The State, with the prior approval of the State Treasurer and the Council of State, as provided in Article 9 of Chapter 142 of the General Statutes, is authorized to issue or incur special indebtedness in order to provide funds to the State to be used, together with other available funds, to pay the costs of purchasing the land described in this section."

Session Laws 2006-231, s. 4, provides: "In accordance with G.S. 142-83, this section authorizes the issuance or incurrence of special indebtedness in the maximum aggregate principal amount of twenty million dollars ($20,000,000) to finance the capital facility costs of a new parking deck to be constructed in downtown Raleigh. The State, with the prior approval of the State Treasurer and the Council of State, as provided in Article 9 of Chapter 142 of the General Statutes, is authorized to issue or incur special indebtedness in order to provide funds to the State to be used, together with other available funds, to pay the capital facility costs of the project described in this section."

Session Laws 2008-107, s. 27.8(a), as amended by Session Laws 2009-209, s. 2(a), and as amended by Session Laws 2009-451, ss. 27.7(b) and 27.12, provides: "(a) The State, with the prior approval of the State Treasurer and the Council of State, as provided in Article 9 of Chapter 142 of the General Statutes, is authorized to issue or incur special indebtedness in order to provide funds to the State to be used, together with other available funds, to pay the capital facility costs of the projects described in this subsection. In accordance with G.S. 142-83, this subsection authorizes the issuance or incurrence of special indebtedness:

"(1) In the maximum aggregate principal amount of sixty-one million five hundred ninety-nine thousand three hundred sixty-nine dollars ($61,599,369) to finance the capital facility costs of completing a School of Dentistry building at East Carolina University and no more than 10 satellite dental clinics across the State. No more than a maximum aggregate amount of twenty-one million dollars ($21,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2009. No more than a maximum aggregate amount of sixty million dollars ($60,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2010.

"(2) In the maximum aggregate principal amount of thirty-five million one hundred ninety-eight thousand five hundred thirty-seven dollars ($35,198,537) to finance the capital facility costs of completing a family medicine building at East Carolina University. No more than a maximum aggregate amount of sixteen million six hundred thousand dollars ($16,600,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2009.

"(3) In the maximum aggregate principal amount of sixteen million six hundred eighty-nine thousand five hundred seven dollars ($16,689,507) to finance the capital facility costs of completing a School of Education building at Elizabeth City State University. No more than a maximum aggregate amount of seven million dollars ($7,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2009. No more than a maximum aggregate amount of fifteen million dollars ($15,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2010.

"(4) In the maximum aggregate principal amount of two million four hundred thirty-eight thousand dollars ($2,438,000) to finance the capital improvement costs of acquiring land and constructing capital facilities for a horse park in Rockingham County for North Carolina Agricultural and Technical State University.

"(5) In the maximum aggregate principal amount of nineteen million forty-nine thousand six hundred twenty-eight dollars ($19,049,628) to finance the capital facility costs of completing a general classroom building at North Carolina Agricultural and Technical State University. No more than a maximum aggregate amount of seven million dollars ($7,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2009.

"(6) In the maximum aggregate principal amount of twenty-two million five hundred thirty-six thousand thirty-nine dollars ($22,536,039) to finance the capital facility costs of completing a nursing building at North Carolina Central University. No more than a maximum aggregate amount of six million dollars ($6,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2009. No more than a maximum aggregate amount of seventeen million dollars

($17,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2010.

"(7) In the maximum aggregate principal amount of ten million two hundred thirty-seven thousand one hundred sixteen dollars ($10,237,116) to finance the capital facility costs of completing, separately or together, a central storage facility and a police operations center at the University of North Carolina School of the Arts.

"(8) In the maximum aggregate principal amount of eleven million five hundred forty-three thousand eight hundred twenty-eight dollars ($11,543,828) to finance the capital facility costs of constructing, purchasing, or renovating an existing building for a film school production facility of the University of North Carolina School of the Arts. No special indebtedness may be issued or incurred under this subdivision prior to July 1, 2009. No more than a maximum aggregate amount of two million dollars ($2,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2010. No more than a maximum aggregate amount of seven million nine hundred thousand dollars ($7,900,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2011.

"(9) In the maximum aggregate principal amount of ninety-eight million three hundred forty-one thousand one hundred eighty-six dollars ($98,341,186) to finance the capital facility costs of completing the Centennial Campus library at North Carolina State University. No more than a maximum aggregate amount of forty-nine million dollars ($49,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2009. No more than a maximum aggregate amount of sixty-five million three hundred forty-one thousand one hundred eighty-six dollars ($65,341,186) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2011.

"(10) In the maximum aggregate principal amount of four million dollars ($4,000,000) for the capital facility costs of completing the 4-H Campuses at North Carolina State University.

"(11) In the maximum aggregate principal amount of sixty-one million five hundred ninety-nine thousand three hundred sixty-nine dollars ($61,599,369) to finance the capital facility costs of completing a School of Dentistry expansion at the University of North Carolina at Chapel Hill. No special indebtedness may be issued or incurred under this subdivision prior to July 1, 2009. No more than a maximum aggregate amount of twenty-five million dollars ($25,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2010. No more than a maximum aggregate amount of fifty-five million eight hundred nineteen thousand five hundred fifty-eight dollars ($55,819,558) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2011.

"(12) In the maximum aggregate principal amount of fifty-two million four hundred ninety-four thousand one hundred forty-nine dollars ($52,494,149) to finance the capital facility costs of completing the Energy Production Infrastructure Center at the University of North Carolina at Charlotte. No more than a maximum aggregate amount of ten million dollars ($10,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2009. No more than a maximum aggregate amount of thirty-two million two hundred eighteen thousand dollars ($32,218,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2010.

"(13) In the maximum aggregate principal amount of forty-two million six hundred seventy thousand dollars ($42,670,000) to finance the capital facility costs of completing an academic classroom and office building at the University of North Carolina at Greensboro. No more than a maximum aggregate amount of twenty-one million dollars ($21,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2009.

"(14) In the maximum aggregate principal amount of ten million dollars ($10,000,000) to finance the capital facility costs of installing fire sprinklers in The University of North Carolina System residence halls.

"(15) In the maximum aggregate principal amount of twenty-five million dollars ($25,000,000) to finance the capital improvement costs of acquiring State land throughout The University of North Carolina System. No more than a maximum aggregate amount of ten million dollars ($10,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2011.

"(16) In the maximum aggregate principal amount of thirty-four million dollars ($34,000,000) to finance the capital improvement costs of purchasing State judicial facilities located at 901 Corporate Drive, Raleigh, NC, and more particularly described as Phase Two, Tract A of Raleigh Corporate Center consisting of 17.28 acres and as shown on the map recorded in Map book 1987, page 720, and Map book 1990, page 576, of the Wake County Register of Deeds.

"(17) In the maximum aggregate principal amount of forty-one million six hundred seventy thousand dollars ($41,670,000) to finance the capital facility costs of completing a health care and mental health facility at the North Carolina Correctional Institute for Women. No more than a maximum aggregate amount of twenty-seven million dollars ($27,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2009.

"(18) In the maximum aggregate principal amount of twelve million ninety-five thousand four hundred forty-five dollars ($12,095,445) to finance the capital facility costs of completing a minimum security addition at Scotland Correctional Institution. No more than a maximum aggregate amount of six million dollars ($6,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2009. No more than a maximum aggregate amount of ten million dollars ($10,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2010.

"(19) In the maximum aggregate principal amount of seventeen million six hundred seventeen thousand eight hundred eighty-four dollars ($17,617,884) to finance the capital facility costs of completing a medium security addition at Bertie Correctional Institution. No more than a maximum aggregate amount of seven million dollars ($7,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2009. No more than a maximum aggregate amount of fourteen million dollars ($14,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2010.

"(20) In the maximum aggregate principal amount of twelve million ninety-five thousand four hundred forty-five dollars ($12,095,445) to finance the capital facility costs of completing a minimum security addition at Tabor Correctional Institution. No more than a maximum aggregate amount of six million dollars ($6,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2009. No more than a maximum aggregate amount of ten million dollars ($10,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2010.

"(21) In the maximum aggregate principal amount of seventeen million six hundred seventeen thousand eight hundred eighty-four dollars ($17,617,884) to finance the capital facility costs of completing a medium security addition at Lanesboro Correctional Institution. No more than a maximum aggregate amount of seven million dollars ($7,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2009. No more than a maximum aggregate amount of fourteen million dollars ($14,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2010.

"(22) In the maximum aggregate principal amount of two million nine hundred twenty-five thousand dollars ($2,925,000) to finance the capital facility costs of completing Phase I of the CSS Neuse State Historic Site.

"(23) In the maximum aggregate principal amount of seven million dollars ($7,000,000) to finance the capital facility costs of completing Port of Morehead City Berth Improvements and Phase I of Port of Wilmington Berth 8 Improvements.

"(24) In the maximum aggregate principal amount of three million seven hundred thousand dollars ($3,700,000) to finance the capital facility costs of completing a Southeastern North Carolina Agriculture Center Pavilion.

"(25) In the maximum aggregate principal amount of seven million four hundred fifteen thousand four hundred sixty-one dollars ($7,415,461) to finance the capital facility costs of Department of Agriculture and Consumer Services capital improvements. Sales proceeds shall be allocated between the projects in the following manner:

| **"Project** | **Allocation of Sales Proceeds** |
|---|---|
| "Bathroom and truckshed expansion at The Western North Carolina Farmers' Market | $650,000 |
| "Davis Arena renovation and expansion at The Western North Carolina Agricultural Center | $6,765,461 |

"(26) In the maximum aggregate principal amount of four million three hundred three thousand nine hundred forty-four dollars ($4,303,944) to finance the capital facility costs of completing an oyster hatchery.

"(27) In the maximum aggregate principal amount of two million seven hundred thousand dollars ($2,700,000) to finance the capital improvement costs of completing an expansion and renovation to the polar bear exhibit at the North Carolina Zoo.

"(28) In the maximum aggregate principal amount of fifty million dollars ($50,000,000) to finance the capital improvement costs of acquiring State park lands and conservation areas for the Land for Tomorrow initiative in the Department of Environment and Natural Resources. Proceeds shall be allocated to support the conservation priorities of the One North Carolina Naturally program. No more than a maximum aggregate amount of ten million dollars ($10,000,000) of special indebtedness may be issued or incurred under this subdivision prior to July 1, 2011."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Session Laws 2008-118, s. 3.8, provides: "Section 1.1 of S.L. 2004-179, as amended by Section 30.3A of S.L. 2005-276 and Section 2.1 of S.L. 2006-146, authorized the State to issue or incur special indebtedness in order to provide funds to the State for Western Carolina University to be used, together with other available funds, to pay the cost of land acquisition, site preparation, engineering, architectural, and other consulting services and construction of a building for Western Carolina University and the Mountain Area Health Education Consortium for the North Carolina Center for Health and Aging to be operated as a consortium among Western Carolina University, the University of North Carolina at Asheville, and the Mountain Area Health Education Consortium. "Western Carolina University, the University of North Carolina at Asheville, and the Mountain Area Health Education Consortium may expend available funds, including appropriations, for the operation and maintenance of this facility." Section 1.1 of Session Laws 2004-179, as amended, is noted above, in full.

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

## § 142-84. Procedure for incurrence or issuance of special indebtedness.

(a) Notice and Certificate. — Whenever the State or a State agency determines that special indebtedness is appropriate to finance capital facilities, it shall notify the Department of Administration. If the Department of Administration concurs, it shall provide written notice to the State Treasurer advising the State Treasurer of this determination.

After the filing of the notice and after any preliminary conference, the State Treasurer shall consult with the Office of State Budget and Management as to the revenues expected by that Office to be available to pay all sums to come due on the special indebtedness during its term. If, after consulting with the Office of State Budget and Management, the State Treasurer determines by written certificate that it may be desirable to use special indebtedness to finance the capital facilities, the Department of Administration shall request the Council of State to give its preliminary approval of the use of special indebtedness to finance the capital facilities. The Department of Administration must promptly file copies of the notice and certificate required by this subsection with the Governor and the Council of State.

(b) Preliminary Approval. — The Council of State, upon receipt of the notice and certificate required by subsection (a) of this section, shall adopt a resolution granting or denying preliminary approval of the financing. A resolution granting preliminary approval may include any other terms, conditions, and restrictions the Council of State considers appropriate and not inconsistent with the provisions of this Article.

(c) Final Approval. — Before any special indebtedness may be incurred or issued pursuant to this Article, the Council of State must authorize the indebtedness by resolution, either as part of or separate from the resolution required by subsection (b) of this section. The resolution must do all of the following:

(1) Authorize the providing of a particular capital facility or, in general terms, the types or classifications of capital facilities to be provided.

(2) Set the aggregate principal amount or maximum principal amount of the special indebtedness authorized.

(3) Set the maturity or maximum maturity of the special indebtedness authorized.

(4) Set the rate, rates, or maximum rate of interest, which may be fixed or vary over a period of time, of the special indebtedness authorized.

(5) Include any other conditions or matters not inconsistent with the provisions of this Article in the discretion of the Council of State, which may include the adoption or approvals as may be authorized in G.S. 142-88 and G.S. 142-89.

(d) Financing Terms. — No special indebtedness shall be incurred or issued without the prior written approval of the State Treasurer as provided in this subsection, which is in addition to the certificate given by the State Treasurer pursuant to subsection (a) of this section. In determining whether to approve the proposed financing, the State Treasurer may consider any factors the State Treasurer considers relevant in order to find and determine all of the following:

(1) The amounts to become due under the special indebtedness, including the interest component or rate, are adequate and not excessive for the purpose proposed.

(2) The increase, if any, in State revenues, including taxes, necessary to pay the sums to become due under the special indebtedness is not excessive.

(3) The special indebtedness can be incurred or issued on terms desirable to the State.

(e) Designation of Facilities. — If the Council of State has authorized in general terms the types or classifications of capital facilities to be financed, then the particular capital facilities and the principal amount of special indebtedness to be incurred or issued for each particular capital facility shall be determined by the Department of Administration after considering any factors it considers relevant in order to determine that the particular capital facility to be provided is desirable for the efficient operation of the State and its agencies and is in the best interests of the State.

(f) Type of Debt and Security. — In the absence of a determination by the Council of State, the State Treasurer, after consultation with the Department of Administration, shall determine the specific security offered and whether the special indebtedness to be issued or incurred shall be financing contract indebtedness, certificates of participation indebtedness, bonded indebtedness, or some combination of these.

(g) Administration. — The State Treasurer, after consultation with the Department of Administration, shall develop appropriate documents for use under this Article. The State Treasurer shall employ and designate the financial consultants, fiduciaries and other agents, underwriters, and bond attorneys to be associated with the incurrence or issuance of special indebtedness pursuant to this Article.

(h) Oversight by Joint Legislative Commission. — After all the requirements for approval and oversight provided in this section have been met, and at least five days before the issuance or incurrence of the special indebtedness, the State Treasurer must report to the Joint Legislative Commission on Governmental Operations. This report must include the details of the proposed special indebtedness, including the capital facilities to be financed by the indebtedness, the amount of the proposed indebtedness, the type of indebtedness to be issued or incurred, and any other information required by the Commission. (2003-284, s. 46.2; 2003-314, s. 1; 2004-203, s. 79.)

## § 142-85. Security; other requirements.

(a) Security. — In order to secure (i) lease or installment payments to be made to the lessor, seller, or other person advancing moneys or providing financing under a financing contract, (ii) payment of the principal of and interest on bonded indebtedness, or (iii) payment obligations of the State to the provider of bond insurance, a credit facility, a liquidity facility, or a derivative agreement, special indebtedness may create any combination of the following:

(1) A lien on or security interest in one or more, all, or any part of the capital facilities to be financed by the special indebtedness.

(2) If the special indebtedness is to finance construction of improvements on real property, a lien on or security interest in all or any part of the land on which the improvements are to be located.

(3) If the special indebtedness is to finance renovations or improvements to existing facilities or the installation of fixtures in existing facilities, a lien on or security interest in one or more, all, or any part of the facilities.

(b) Value of Security; Multiple Liens. — The estimated value of the property subject to the lien or security interest need not bear any particular relationship to the principal amount of the special indebtedness or other obligation it secures. This Article does not limit the right of the State to grant multiple liens or security interests in a capital facility or other property to the extent not otherwise limited by the terms of any special indebtedness.

(c) Governor's Budget. — Documentation relating to any special indebtedness may include provisions requesting the Governor to submit in the Governor's budget proposal or any amendments or supplements to the budget proposed appropriations necessary to make the payments required by the special indebtedness.

(d) Source of Repayment. — The payment of amounts payable by the State under special indebtedness or any related documents during any fiscal period shall be limited to funds appropriated for that purpose by the General Assembly in its discretion.

(e) No Deficiency Judgment or Pledge. — No deficiency judgment may be rendered against the State in any action for breach of any obligation under special indebtedness or any related documents. The taxing power of the State is not and may not be pledged directly or indirectly to secure any moneys due under special indebtedness or any related documents. In the event that the General Assembly does not appropriate sums sufficient to make payments required under any special indebtedness or any related documents, the net proceeds received from the sale or other disposition of the property subject to the lien or security interest shall be applied to satisfy these payment obligations in accordance with the deed of trust, security agreement, or other documentation relating to the lien or security interest. These net proceeds are appropriated for the purpose of making these payments. Any net proceeds in excess of the amount required to satisfy the obligations of the State under any special indebtedness or any related documents shall be paid to the State Treasurer for deposit to the General Fund.

(f) Nonsubstitution Clause. — A financing contract, issue of bonded indebtedness, or other related document shall not contain a nonsubstitution clause that restricts the right of the State to (i) continue to provide a service or conduct an activity or (ii) replace or provide a substitute for any capital facility.

(g) Protection of Lender. — Special indebtedness may contain any provisions for protecting and enforcing the rights and remedies of the person advancing moneys or providing financing under a financing contract, the owners of bonded indebtedness, or others to whom the State is obligated under special indebtedness or any related documents as may be reasonable and proper and not in violation of law. These provisions may include covenants setting forth the duties of the State in respect of any of the following:

(1) The purposes to which the proceeds of special indebtedness may be applied.

(2) The disposition and application of the revenues of the State, including taxes.

(3) Insuring, maintaining, and other duties with respect to the capital facilities financed.

(4) The disposition of any charges and collection of any revenues and administrative charges.

(5) The terms and conditions of the issuance of additional special indebtedness.

(6) The custody, safeguarding, investment, and application of all moneys.

(h) State Property Law Exception. — Chapter 146 of the General Statutes does not apply to any transfer of the State's interest in property authorized by this Article, whether to a deed of trust trustee or other secured party as security for special indebtedness, or to a purchaser of property in connection with a foreclosure or similar conveyance of property to realize upon the security for special indebtedness following the State's default on its obligations under the special indebtedness. (2003-284, s. 46.2; 2003-314, s. 1; 2004-203, s. 79.)

## § 142-86. Financing contract indebtedness.

(a) Documentation. — Financing contract indebtedness shall not be incurred until all documentation providing for its incurrence has been approved by the State Treasurer after the State Treasurer has consulted with the Department of Administration.

(b) Interest Component. — A financing contract may provide for payments under the contract to represent principal and interest components of the cost of the capital facility to be financed, as determined by the State Treasurer.

(c) Bidding. — Financing contracts may be entered into pursuant to any applicable public or competitive bidding process or any private or negotiated process, to the extent required by applicable law and, if not so required, as may be determined by the Department of Administration after consulting with the State Treasurer.

(d) Party. — All financing contracts shall be executed on behalf of the State by the State Treasurer or, upon delegation by the State Treasurer after the State Treasurer's having approved the financing contract, by the Department of Administration.

(e) Credit Facility. — If the State Treasurer determines that it is in the best interest of the State, the State Treasurer may arrange for the delivery of a credit facility to secure payment under any financing contract. The State Treasurer may also provide that payments by the State representing the interest component of the payments to be made under a financing contract may be calculated based upon a fixed or a variable rate of interest.

(f) Terms and Conditions. — All other conditions set forth elsewhere in this Article with respect to financing contract indebtedness shall also be satisfied prior to incurring any financing contract indebtedness. To the extent applicable as conclusively determined by the State Treasurer, the provisions of G.S. 142-89, 142-90, and 142-91 apply to financing contract indebtedness. (2003-284, s. 46.2; 2003-314, s. 1; 2004-203, s. 79.)

## § 142-87. Additional requirements for certificates of participation indebtedness.

(a) Documentation. — A financing contract shall not be used in connection with the delivery of certificates of participation by a special corporation until all documentation providing for its use has been approved by the State Treasurer after the State Treasurer has consulted with the Department of Administration. All documentation providing for the delivery and sale of certificates of participation must be approved by the State Treasurer.

(b) Procedure. — The special corporation, if used, shall request the approval of the State Treasurer in writing and shall furnish any information and documentation relating to the delivery and sale of the certificates of participation requested by the State Treasurer. In determining whether to approve the financing in the documentation, the State Treasurer shall consider the factors set forth in G.S. 142-84(d), as well as the effect of the proposed financing upon any scheduled or proposed sale of debt obligations by the State or a unit of local government in the State.

(c) Terms; Interest. — Certificates of participation may be sold by the State Treasurer in the manner, either at public or private sale, and for any price or prices that the State Treasurer determines to be in the best interest of the State and to effect the purposes of this Article, except that the terms of the sale must also be approved by the special corporation. Interest payable with respect to certificates of participation shall accrue at the rate or rates determined by the State Treasurer with the approval of the special corporation.

(d) Trust Agreement. — Certificates of participation may be delivered pursuant to a trust agreement or similar instrument with a corporate trustee approved by the State Treasurer, and the provisions of G.S. 142-89(h) apply to the trust agreement or similar instrument to the extent applicable.

(e) Other Conditions. — All other conditions set forth elsewhere in this Article with respect to certificates of participation indebtedness, including the conditions set forth in G.S. 142-86, must be satisfied before any certificates of participation indebtedness is incurred. (2003-284, s. 46.2; 2003-314, s. 1; 2004-203, s. 79.)

## § 142-88. Bonded indebtedness.

The State Treasurer is authorized, by and with the consent of the Council of State as provided in this Article, to issue and sell at one time or from time to time bonds of the State to be designated "State of North Carolina Limited Obligation Bonds, Series________" or notes of the State as provided in this Article, for the purpose of providing funds, with any other available funds, for the uses authorized in this Article. (2003-284, s. 46.2; 2003-314, s. 1; 2004-203, s. 79.)

## § 142-89. Issuance of limited obligation bonds and notes.

(a) Terms and Conditions. — Bonds or notes may bear any dates; may be serial or term bonds or notes, or any combination of these; may mature in any amounts and at any times, not exceeding 40 years from their dates; may be payable at any places, either within or without the United States, in any coin or currency of the United States that at the time of payment is legal tender for payment of public and private debts; may bear interest at any rates, which may vary from time to time; and may be made redeemable before maturity, at the option of the State or otherwise as may be provided by the State, at any prices, including a price greater than the face amount of the bonds or notes, and under any terms and conditions, all as may be determined by the State Treasurer, by and with the consent of the Council of State.

(b) Signatures; Form and Denomination; Registration. — Bonds or notes may be issued in certificated or uncertificated form. If issued in certificated form, bonds or notes shall be signed on behalf of the State by the Governor or bear the Governor's facsimile signature, shall be signed by the State Treasurer or bear the State Treasurer's facsimile signature, and shall bear the great seal of the State or a facsimile of the seal impressed or imprinted on them. If bonds or notes bear the facsimile signatures of the Governor and the State Treasurer, the bonds or notes shall also bear a manual signature which may be that of a bond registrar, trustee, paying agent, or designated assistant of the State Treasurer. If any officer whose signature or facsimile signature appears on bonds or notes issued under this Article ceases to be that officer before the delivery of the bonds or notes, the signature or facsimile signature shall nevertheless have the same validity for all purposes as if the officer had remained in office until delivery of the bonds or notes. Bonds or notes issued under this Article may bear the facsimile signatures of persons who, at the actual time of the execution of the bonds or notes, were the proper officers to sign any bond or note although at the date of the bond or note those persons may not have been officers.

The form and denomination of bonds or notes, including the provisions with respect to registration of the bonds or notes and any system for their registration, shall be as prescribed by the State Treasurer in conformity with this Article.

(c) Manner of Sale; Expenses. — Subject to the approval by the Council of State as to the manner in which bonds or notes will be offered for sale, whether at public or private sale, whether within or without the United States, and whether by publishing notices in certain newspapers and financial journals, mailing notices, inviting bids by correspondence, negotiating contracts of purchase, or otherwise, the State Treasurer is authorized to sell bonds or notes at one time or from time to time at any rates of interest, which may vary from time to time, and at any prices, including a price less than the face amount of the bonds or notes, as the State Treasurer may determine. All expenses incurred in the preparation, sale, and issuance of bonds or notes shall be paid by the State Treasurer from the proceeds of bonds or notes or other available moneys.

(d) Application of Proceeds. — The proceeds of any bonds or notes shall be used solely for the purposes for which the bonds or notes were issued and shall be disbursed in the manner and under the restrictions, if any, that the Council of State may provide in the resolution authorizing the issuance of, or in any trust agreement securing, the bonds or notes.

Any additional moneys that may be received by means of a grant or grants from the United States or any agency or department thereof or from any other source to aid in financing the cost of a capital facility may be disbursed, to the extent permitted by the terms of the grant or grants, without regard to any limitations imposed by this Article.

(e) Notes; Repayment. — By and with the consent of the Council of State, the State Treasurer is authorized to borrow money and to execute and issue notes of the State for the same, but only in any of the following circumstances and under the following conditions:

(1) For anticipating the sale of bonds, the issuance of which the Council of State has approved, if the State Treasurer considers it advisable to postpone the issuance of the bonds.

(2) For the payment of interest on or any installment of principal of any bonds then outstanding, if there are not sufficient funds in the State treasury with which to pay the interest or installment of principal as they respectively become due.

(3) For the renewal of any loan evidenced by notes authorized in this Article.

(4) For the purposes authorized in this Article.

(5) For refunding bonds or notes or financing contract indebtedness as authorized in this Article.

Funds derived from the sale of limited obligation bonds or notes may be used in the payment of any bond anticipation notes issued under this Article. Funds provided by the General Assembly for the payment of interest on or principal of bonds shall be used in paying the interest on or principal of any notes and any renewals thereof, the proceeds of which have been used in paying interest on or principal of the bonds.

(f) Refunding Bonds and Notes. — By and with the consent of the Council of State, the State Treasurer is authorized to issue and sell refunding bonds and notes for the purpose of refunding special indebtedness and to pay the cost of issuance of the refunding bonds or notes. The refunding bonds and notes may be combined with any other issues of State bonds and notes issued pursuant to this Article. Refunding bonds or notes may be issued at any time prior to the final maturity of the debt or obligation to be refunded. The proceeds from the sale of any refunding bonds or notes shall be applied to the immediate payment and retirement of the obligations being refunded or, if not required for the immediate payment of the obligations being refunded, the proceeds shall be deposited in trust to provide for the payment and retirement of the obligations being refunded and to pay any expenses incurred in connection with the refunding. Money in a trust fund may be invested in (i) direct obligations of the United States government, (ii) obligations the principal of and interest on which are guaranteed by the United States government, (iii) to the extent then permitted by law, obligations of any agency or instrumentality of the United States government, or (iv) certificates of deposit issued by a bank or trust company located in the State if the certificates are secured by a pledge of any of the obligations described in (i), (ii), or (iii) above having an aggregate market value, exclusive of accrued interest, equal at least to the principal amount of the certificates so secured. This section does not limit the duration of any deposit in trust for the retirement of obligations being refunded but that have not matured and are not presently redeemable or, if presently redeemable, have not been called for redemption.

(g) Security. — Payment of the principal of and the interest on bonds and notes shall be secured as provided in G.S. 142-85.

(h) Trust Agreement. — In the discretion of the State Treasurer, any bonds and notes issued under this Article may be secured by a trust agreement or similar instrument between the State and a corporate trustee or by a resolution of the Council of State providing for the appointment of a corporate trustee. The corporate trustee may be, in either case, any trust company or bank that has the powers of a trust company within or without the State. The trust agreement or similar instrument or resolution, hereinafter referred to as "the trust", may provide for security and pledges and assignments that are permitted under this Article and may provide for the granting of a lien or security interest as authorized by G.S. 142-85. The trust may contain any provisions for protecting and enforcing the rights and remedies of the owners of any bonds or notes issued under the trust that are reasonable and not in violation of law, including covenants setting forth the duties of the State with respect to the purposes for which bond or note proceeds may be applied, the disposition and application of the revenues or assets of the State, the duties of the State with respect to the capital facilities financed, the disposition of any charges and collection of any revenues and administrative charges, the terms and conditions of the issuance of additional bonds and notes, and the custody, safeguarding, investment, and application of all moneys. All bonds and notes issued under this Article pursuant to the same trust shall be equally and ratably secured as provided in the trust, without priority by reasons of number, dates of bonds or notes, execution, or delivery, in accordance with the provisions of this Article and of the trust. The trust may, however, provide that bonds or notes issued pursuant to the trust shall, to the extent and in the manner prescribed in the trust, be subordinated and junior in standing, with respect to the payment of principal and interest and to the security of the payment, to any other bonds or notes issued pursuant to the trust. It is lawful for any bank or trust company that may act as depositary of the proceeds of bonds or notes, revenues, or any other money under this Article to furnish any indemnifying bonds or to pledge any securities that may be required by the

State Treasurer. The trust may set out the rights and remedies of the owners of any bonds or notes and of any trustee and may restrict the individual rights of action by the owners. In addition to the foregoing, the trust may contain any other provisions the State Treasurer considers appropriate for the security of the owners of any bonds or notes. Expenses incurred in carrying out the provisions of the trust may be treated as a part of the cost of any capital facility or as an administrative charge and may be paid from the proceeds of the bonds or notes or from any other available funds. (2003-284, s. 46.2; 2003-314, s. 1; 2004-203, s. 79.)

## § 142-90. Variable rate demand bonds and notes and financing contract indebtedness.

(a) In fixing the details of special indebtedness, the State Treasurer may make the special indebtedness subject to any of the following conditions:

(1) It is payable from time to time on demand or tender for purchase by the owner thereof if a credit facility supports the special indebtedness, unless the State Treasurer specifically determines that a credit facility is not required upon a determination by the State Treasurer that the absence of a credit facility will not materially and adversely affect the financial position of the State or the marketing of the bonds or notes or financing contract indebtedness at a reasonable interest cost to the State.

(2) It is additionally supported by a credit facility.

(3) It is subject to redemption or mandatory tender for purchase prior to maturity.

(4) It bears interest at a rate or rates that may be fixed or may vary over any period of time, as may be provided in the proceedings providing for the issuance or incurrence of the special indebtedness, including any variations that may be permitted pursuant to a par formula.

(5) It is the subject of a remarketing agreement under which an attempt is made to remarket special indebtedness to new purchasers before its presentment for payment to the provider of the credit facility or to the State.

(b) If the aggregate principal amount payable by the State under a credit facility is in excess of the aggregate principal amount of special indebtedness secured by the credit facility, whether as a result of the inclusion in the credit facility of a provision for the payment of interest for a limited period of time or the payment of a redemption premium or for any other reason, then the amount of authorized but unissued bonds or notes and financing contract indebtedness during the term of the credit facility shall not be less than the amount of the excess, unless the payment of the excess is otherwise provided for by agreement of the State executed by the State Treasurer. (2003-284, s. 46.2; 2003-314, s. 1; 2004-203, s. 79.)

## § 142-91. Other agreements.

The State Treasurer may authorize, execute, obtain, or otherwise provide for bond insurance, investment contracts, credit and liquidity facilities, credit enhancement facilities, interest rate swap agreements and other derivative products, and any other related instruments and matters the State Treasurer determines are desirable in connection with the issuance of special indebtedness. The State Treasurer is authorized to employ and designate any financial consultants, underwriters, fiduciaries, and bond attorneys to be associated with any incurrence or issuance of special indebtedness under this Article as the State Treasurer considers appropriate. (2003-284, s. 46.2; 2003-314, s. 1; 2004-203, s. 79.)

## § 142-92. Tax exemption.

Special indebtedness shall at all times be free from taxation by the State or any political subdivision or any of their agencies, excepting estate, inheritance, and gift taxes; income taxes on the gain from the transfer of the indebtedness; and franchise taxes. The interest component of any payments made by the State under special indebtedness, including the interest component of any certificates of participation, is not subject to taxation as to income. (2003-284, s. 46.2; 2003-314, s. 1; 2004-203, s. 79.)

## § 142-93. Investment eligibility.

Special indebtedness are securities or obligations in which all of the following may invest, including capital in their control or belonging to them: public officers, agencies, and public bodies of the State and its political subdivisions; insurance companies, trust companies, investment companies, banks, savings banks, savings and loan associations, credit unions, pension or retirement funds, and other financial institutions engaged in business in the State; and executors, administrators, trustees, and other fiduciaries. Special indebtedness are securities or obligations that may properly and legally be deposited with and received by any officer or agency of the State or political subdivision of the State for any purpose for which the deposit of bonds, notes, or obligations of the State or any political subdivision of the State is now or may later be authorized by law. (2003-284, s. 46.2; 2003-314, s. 1; 2004-203, s. 79.)

## § 142-94. Procurement of capital facilities.

The provisions of Articles 3, 3B, 3C, 3D, and 8 of Chapter 143 of the General Statutes and any other laws or rules of the State that relate to the acquisition and construction of State property apply to the financing of capital facilities through the use of special indebtedness pursuant to this Article. This section does not apply to the construction and lease-purchase, including leases with an option to purchase at the end of the lease term for a nominal sum, of State office buildings pursuant to proposals submitted before the effective date of this Article in response to requests for proposals, to the extent any of those proposals, as they may be supplemented or amended, are approved by the Department of Administration and any of these leases or lease-purchase agreements are approved by the Council of State in accordance with G.S. 143-341(4)d2. With the exception of Article 8 of Chapter 143 of the General Statutes, this section does not apply to any special indebtedness issued pursuant to this Article for the purchase, construction, or operation of capital facilities by Gateway University Research Park, Inc., a joint Millennial Campus in Greensboro. (2003-284, s. 46.2; 2003-314, s. 1; 2004-203, s. 79; 2008-204, s. 3.)

**Effect of Amendments.** — Session Laws 2008-204, s. 3, effective August 8, 2008, added the last sentence.

**§ 142-95:** Repealed by Session Laws 2007-527, s. 39, effective August 31, 2007.

**§§ 142-96 through 142-99:** Reserved for future codification purposes.

## Article 10.

## *Managing Debt Capacity.*

### § 142-100. Purpose.

The purpose of this Article is to provide tools for sound debt management by providing an annual debt affordability study to establish guidelines for maintaining prudent debt levels and by establishing a system for prioritizing State capital needs when the needs exceed the State's capacity for new debt. (2004-179, s. 5.1.)

### § 142-101. Debt Affordability Advisory Committee.

(a) Membership. — The Debt Affordability Advisory Committee is created in the Department of State Treasurer. The Committee shall consist of five ex officio members or their designees and four appointed members, as follows:

(1) The State Treasurer.
(2) The Secretary of Revenue.
(3) The State Budget Officer.
(4) The State Auditor.
(5) The State Controller.
(6) Two members of the public appointed by the President Pro Tempore of the Senate.
(7) Two members of the public appointed by the Speaker of the House of Representatives.

(b) Officers and Staff. — The State Treasurer shall serve as the chair of the Committee. The Committee shall meet at the call of the chair. The Department of State Treasurer shall provide space for the Committee to meet. The Department shall also provide the Committee with necessary staff and supplies to enable it to carry out its duties in an effective manner.

(c) Compensation. — Members of the Committee shall serve without pay but shall receive per diem and allowances provided by G.S. 138-5 and G.S. 138-6.

(d) Duties. — The Debt Affordability Advisory Committee shall annually advise the Governor and the General Assembly on the estimated debt capacity of the State for the upcoming 10 fiscal years. The Committee shall oversee the undertaking of an annual debt affordability study and the establishment of guidelines for evaluating the State's debt burden. The guidelines should include target and ceiling ratios of net tax-supported debt to personal income and debt service to revenues, target and floor percentages for the 10-year payout ratio, and target and floor percentages for the unreserved General Fund balance. The Committee's recommendations shall include recommendations on debt capacities for debt supported by the General Fund, the Highway Fund, and the Highway Trust Fund. The Committee shall also recommend any other debt management policies it considers desirable and consistent with sound management of the State's debt.

(e) Reports. — The Committee shall report its findings and recommendations to the Governor, the President Pro Tempore of the Senate, the Speaker of the House of Representatives, and the Fiscal Research Division by February 1 of each year. (2004-179, s. 5.1; 2007-551, s. 1.)

**§§ 142-102 through 142-106:** Reserved for future codification purposes.

# Chapter 143.

# State Departments, Institutions, and Commissions.

## Article 1.

## Executive Budget Act.

Sec.
143-1 through 143-34.9. [Repealed.]

## Article 1A.

## Periodic Review of Certain State Agencies.

143-34.10. [Repealed.]
143-34.11. Certain General Statutes provisions repealed effective July 1, 1979.
143-34.12 through 143-34.21. [Repealed.]
143-34.22 through 143-34.24. [Reserved.]

## Article 1.2.

## Legislative Committee on Agency Review.

143-34.25 through 143-34.27. [Expired.]
143-34.28 through 143-34.39. [Reserved.]

## Article 1B.

## Capital Improvement Planning Act.

143-34.40 through 143-34.45. [Repealed.]

## Article 2.

## State Personnel Department.

143-35 through 143-47. [Repealed.]

## Article 2A.

## Incentive Award Program for State Employees.

143-47.1 through 143-47.5. [Repealed.]

## Article 2B.

## Notice of Appointments to Public Offices.

143-47.6. Definitions.
143-47.7. Notice and record of appointment required.
143-47.8. [Repealed.]
143-47.9. Subsistence, per diem compensation, and travel allowances conditioned on filing of notice.
143-47.10 through 143-47.14. [Reserved.]

## Article 2C.

## Limit on Number of State Employees.

143-47.15 through 143-47.20. [Repealed.]

## Article 2D.

## North Carolina Board for Need-Based Student Loans.

Sec.
143-47.21 through 143-47.24. [Repealed.]

## Article 3.

## Purchases and Contracts.

143-48. State policy; cooperation in promoting the use of small contractors, minority contractors, physically handicapped contractors, and women contractors; purpose; required annual reports.
143-48.1. Medicaid program exemption.
143-48.2. Procurement program for nonprofit work centers for the blind and the severely disabled.
143-48.3. Electronic procurement.
143-48.4. Statewide uniform certification of historically underutilized businesses.
143-49. Powers and duties of Secretary.
143-49.1. Purchases by volunteer nonprofit fire department and lifesaving and rescue squad.
143-50. Certain contractual powers exercised by other departments transferred to Secretary.
143-51. Reports to Secretary required of all agencies as to needs.
143-52. Competitive bidding procedure; consolidation of estimates by Secretary; bids; awarding of contracts.
143-52.1. Board of Awards.
143-53. Rules.
143-53.1. Setting of benchmarks; increase by Secretary.
143-54. Certification that bids were submitted without collusion.
143-55. Requisitioning for supplies by agencies; must purchase through sources certified.
143-56. Certain purchases excepted from provisions of Article.
143-57. Purchases of articles in certain emergencies.
143-57.1. Furniture requirements contracts.
143-58. Contracts contrary to provisions of Article made void.
143-58.1. Unauthorized use of public purchase or contract procedures for private benefit.

Sec.
143-58.2. State policy; bid procedures and specifications; identification of products.
143-58.3. Purchase of recycled paper and paper products; goals.
143-58.4. Energy credit banking and selling program.
143-58.5. Alternative Fuel Revolving Fund.
143-59. Preference given to North Carolina products and citizens, and articles manufactured by State agencies; reciprocal preferences.
143-59.1. Contracts with certain foreign vendors.
143-59.1A. Preference given to products made in United States.
143-59.2. Certain vendors prohibited from contracting with State.
143-59.3. Contracts for the purchase of reconstituted or recombined fluid milk products prohibited.
143-59.4. Contracts performed outside the United States.
143-60. Rules covering certain purposes.
143-61. [Repealed.]
143-62. Law applicable to printing Supreme Court Reports not affected.
143-63. Financial interest of officers in sources of supply; acceptance of bribes.
143-63.1. Sale, disposal and destruction of firearms.
143-64. Beverages contracts.

### Article 3A.

### Surplus Property.

Part 1. State Surplus Property Agency.

143-64.01. Department of Administration designated State Surplus Property Agency.
143-64.02. Definitions.
143-64.03. Powers and duties of the State agency for surplus property.
143-64.04. Powers of the Secretary to delegate authority.
143-64.05. Service charge; receipts.

Part 2. State Agency for Federal Surplus Property.

143-64.1. Department of Administration designated State agency for federal surplus property.
143-64.2. Authority and duties of the State agency for federal surplus property.
143-64.3. Power of Department of Administration and Secretary to delegate authority.
143-64.4. Warehousing, transfer, etc., charges.
143-64.5. Department of Agriculture and Consumer Services exempted from application of Article.

Part 3. Public Agencies.

143-64.6. [Repealed.]
143-64.7 through 143-64.9. [Reserved.]

### Article 3B.

### Conservation of Energy, Water, and Other Utilities in Government Facilities.

Part 1. Energy Policy and Life-Cycle Cost Analysis.

143-64.10. Findings; policy.
143-64.11. Definitions.
143-64.12. Authority and duties of the Department; State agencies and State institutions of higher learning.
143-64.13. [Repealed.]
143-64.14. [Recodified.]
143-64.15. Life-cycle cost analysis.
143-64.15A. Certification of life-cycle cost analysis.
143-64.16. Application of Part.

Part 2. Guaranteed Energy Savings Contracts for Governmental Units.

143-64.17. Definitions.
143-64.17A. Solicitation of guaranteed energy savings contracts.
143-64.17B. Guaranteed energy savings contracts.
143-64.17C. [Repealed.]
143-64.17D. Contract continuance.
143-64.17E. Payments under contract.
143-64.17F. State agencies to use contracts when feasible; rules; recommendations.
143-64.17G. Report on guaranteed energy savings contracts entered into by local governmental units.
143-64.17H. Report on guaranteed energy savings contracts entered into by State governmental units.
143-64.17I. Installment and lease purchase contracts.
143-64.17J. Financing by State governmental units.
143-64.17K. Inspection and compliance certification for State governmental units.
143-64.17L through 143-64.19. [Reserved.]

### Article 3C.

### Contracts to Obtain Consultant Services.

143-64.20. "Agency" defined; Governor's approval required.
143-64.21. Findings to be made by Governor.
143-64.22. Contracts with other State agencies; competitive proposals.

Sec.
143-64.23. Compliance required; penalty for violation of Article.
143-64.24. Applicability of Article.
143-64.25 through 143-64.30. [Reserved.]

### Article 3D.

### Procurement of Architectural, Engineering, and Surveying Services.

143-64.31. Declaration of public policy.
143-64.32. Written exemption of particular contracts.
143-64.33. Advice in selecting consultants or negotiating consultant contracts.
143-64.34. Exemption of certain projects.
143-64.35 through 143-64.49. [Reserved.]

### Article 3E.

### State/Public School Child Care Contracts.

143-64.50. State/public school-contracted on-, near-site day care facilities; location authorization; contract for program services authorization.
143-64.51. State/public school-contracted child care facilities; licensing requirements.
143-64.52. State/public school-contracted child care facilities; limitation of State/local board liability.

### Article 3F.

### State Privacy Act.

143-64.60. State Privacy Act.
143-64.61 through 143-64.69. [Reserved.]

### Article 3G.

### Personal Service Contracts.

143-64.70. Personal service contracts — reporting requirements.
143-64.71 through 143-64.79. [Reserved.]

### Article 3H.

### Overpayments of State Funds.

143-64.80. Overpayments of State funds to persons in State-supported positions; recoupment required.
143-64.81 through 143-64.85. [Reserved.]

### Article 4.

### World War Veterans Loan Administration.

143-65 through 143-105. [Deleted.]

### Article 5.

### Check on License Forms, Tags and Certificates Used or Issued.

143-106. [Repealed.]
143-107. [Transferred.]

### Article 6.

### Officers of State Institutions.

Sec.
143-108. Secretary to be elected from directors.
143-109. Directors to elect officers and employees.
143-110. Places vacated for failure to attend meetings.
143-111. Director not to be elected to position under board.
143-112. Superintendents to be within call of board meetings.
143-113. Trading by interested officials forbidden.
143-114. Diversion of appropriations to State institutions.
143-115. Trustee, director, officer or employee violating law guilty of misdemeanor.
143-116. Venue for trial of offenses.
143-116.1 through 143-116.5. [Reserved.]

### Article 6A.

### Rules of Conduct; Traffic Laws for Institutions.

143-116.6. Rules concerning conduct; violation.
143-116.7. Motor vehicle laws applicable to streets, alleys and driveways on the grounds of Department of Health and Human Services institutions; traffic regulations; registration and regulation of motor vehicles.
143-116.8. Motor vehicle laws applicable to State parks and forests road system.

### Article 7.

### Persons Admitted to Department of Health and Human Services Institutions to Pay Costs.

143-117. Institutions included.
143-117.1. Definitions.
143-118. Secretary of Health and Human Services to fix cost and charges.
143-118.1. [Repealed.]
143-119. Payments.
143-120. [Repealed.]
143-121. Action to recover costs.
143-121.1. Ratification of past acts.
143-122. No limitation of action.
143-123. Power to admit indigent persons.
143-124. Suit by Attorney General; venue.
143-125. Judgment; never barred.
143-126. Death of a person admitted; lien on estate.
143-126.1. Lien on property for unpaid balance due institution.
143-127. Money paid into State treasury.
143-127.1. Parental liability for payment of

Sec.

cost of care for long-term patients in Department of Health and Human Services facilities.

### Article 7A.

### Damage of Personal Property in State Institutions.

143-127.2. Repair or replacement of personal property.
143-127.3. Negligence.
143-127.4. Other remedies.
143-127.5. Limitations.
143-127.6. Administrative and judicial review.

### Article 8.

### Public Contracts.

143-128. Requirements for certain building contracts.
143-128.1. Construction management at risk contracts.
143-128.2. Minority business participation goals.
143-128.3. Minority business participation administration.
143-128.4. Historically underutilized business defined; statewide uniform certification.
143-129. Procedure for letting of public contracts.
143-129.1. Withdrawal of bid.
143-129.2. Construction, design, and operation of solid waste management and sludge management facilities.
143-129.3. Exemption of General Assembly from certain purchasing requirements.
143-129.4. Guaranteed energy savings contracts.
143-129.5. Purchases from nonprofit work centers for the blind and severely disabled.
143-129.6. [Reserved.]
143-129.7. Purchase with trade-in of apparatus, supplies, materials, and equipment.
143-129.8. Purchase of information technology goods and services.
143-129.8A. Purchase of certain goods and services for the North Carolina Zoological Park.
143-129.9. Alternative competitive bidding methods.
143-130. Allowance for convict labor must be specified.
143-131. When counties, cities, towns and other subdivisions may let contracts on informal bids.
143-132. Minimum number of bids for public contracts.
143-133. No evasion permitted.

Sec.

143-134. Applicable to Department of Transportation and Department of Correction; exceptions.
143-134.1. Interest on final payments due to prime contractors; payments to subcontractors.
143-134.2. Actions by contractor on behalf of subcontractor.
143-134.3. No damage for delay clause.
143-135. Limitation of application of Article.
143-135.1. State buildings exempt from county and municipal building requirements; consideration of recommendations by counties and municipalities.
143-135.2. Contracts for restoration of historic buildings with private donations.
143-135.3. Adjustment and resolution of State board construction contract claim.
143-135.4. Authority of Department of Administration not repealed.
143-135.5. State policy; cooperation in promoting the use of small, minority, physically handicapped and women contractors; purpose.
143-135.6. Adjustment and resolution of community college board construction contract claim.
143-135.7. Safety officers.
143-135.8. Prequalification.
143-135.9. Best Value procurements.

### Article 8A.

### Board of State Contract Appeals.

143-135.10 through 143-135.24. [Repealed.]

### Article 8B.

### State Building Commission.

143-135.25. State Building Commission — Creation; staff; membership; appointments; terms; vacancies; chairman; compensation.
143-135.26. Powers and duties of the Commission.
143-135.27. (Effective until October 1, 2011) Definition of capital improvement project.
143-135.27. (Effective October 1, 2011) Definition of capital improvement project.
143-135.28. Conflict of interest.
143-135.29 through 143-135.34. [Reserved.]

### Article 8C.

### Performance Standards for Sustainable, Energy-Efficient Public Buildings.

143-135.35. Findings; legislative intent.

Sec.
143-135.36. Definitions.
143-135.37. Energy and water use standards for public major facility construction and renovation projects; verification and reporting of energy and water use.
143-135.38. Use of other standard when standard not practicable.
143-135.39. Guidelines for administering the Sustainable Energy-Efficient Buildings Program.
143-135.40. Monitor construction standards and sustainable building standards.

## Article 9.

## Building Code Council and Building Code.

143-136. Building Code Council created; membership.
143-137. Organization of Council; rules; meetings; staff; fiscal affairs.
143-138. North Carolina State Building Code.
143-138.1. Introduction and instruction of the North Carolina Building Code.
143-139. Enforcement of Building Code.
143-139.1. Certification of manufactured buildings, structures or components by recognized independent testing laboratory; minimum standards for modular homes.
143-139.2. Enforcement of insulation requirements; certificate for occupancy; no electric service without compliance.
143-139.3. Inspection of liquified petroleum gas piping systems for residential structures.
143-140. Hearings before enforcement agencies as to questions under Building Code.
143-140.1. Appeals of alternative design construction and methods.
143-141. Appeals to Building Code Council.
143-142. Further duties of the Building Code Council.
143-143. Effect on certain existing laws.
143-143.1. [Repealed.]
143-143.2. Electric wiring of houses, buildings, and structures.
143-143.3. Temporary toilet facilities at construction sites.
143-143.4. Door lock exemption for certain businesses.
143-143.5. Access to toilets in shopping malls.
143-143.6. [Expired.]
143-143.7. [Reserved.]

## Article 9A.

## North Carolina Manufactured Housing Board — Manufactured Home Warranties.

### Part 1. Duties, Warranties, Purchase Transaction.

Sec.
143-143.8. Purpose.
143-143.9. Definitions.
143-143.10. Manufactured Housing Board created; membership; terms; meetings.
143-143.10A. Criminal history checks of applicants for licensure.
143-143.11. License required; application for license.
143-143.11A. Notification of change of address, control of ownership, and bankruptcy.
143-143.11B. Continuing education.
143-143.12. Bond required.
143-143.13. Grounds for denying, suspending, or revoking licenses; civil penalties.
143-143.14. Hearings; rules.
143-143.15. Set-up requirements.
143-143.16. Warranties.
143-143.17. Presenting claims for warranties and substantial defects.
143-143.18. Warranty service.
143-143.19. Dealer alterations.
143-143.20. Disclosure of manner used in determining length of manufactured homes.
143-143.20A. Display of pricing on manufactured homes.
143-143.21. [Repealed.]
143-143.21A. Purchase agreements; buyer cancellations.
143-143.21B. Dealer cancellation; deposit refund.
143-143.22. Inspection of service records.
143-143.23. Other remedies not excluded.
143-143.24. Engaging in business without license a Class 1 misdemeanor.
143-143.25. Staff support for Board.
143-143.26 through 143-143.49. [Reserved.]

### Part 2. Buyer Deposit, Escrow or Trust Accounts.

143-143.50. Escrow or trust account required.
143-143.51. Use of escrow or trust funds; penalty for violations.
143-143.52. Minimum requirements for dealer records for escrow or trust accounts at banks.

Sec.
143-143.53. Accountings for escrow or trust funds.
143-143.54. Audits and record inspection.

### Article 9B.

### Uniform Standards Code For Manufactured Homes.

143-144. Short title.
143-145. Definitions.
143-146. Statement of policy; rule-making power.
143-147. Structures built under previous standards.
143-148. Certain structures excluded from coverage.
143-149. Necessity for obtaining label for purposes of sale.
143-150. No electricity to be furnished units not in compliance.
143-151. Penalties.
143-151.1. Enforcement.
143-151.2. Fees.
143-151.3. Reports.
143-151.4. Notification of defects and correction procedures.
143-151.5. Prohibited acts.
143-151.6, 143-151.7. [Reserved.]

### Article 9C.

### North Carolina Code Officials Qualification Board.

143-151.8. Definitions.
143-151.9. North Carolina Code Officials Qualification Board established; members; terms; vacancies.
143-151.10. Compensation.
143-151.11. Chairman; vice-chairman; other officers; meetings; reports.
143-151.12. Powers.
143-151.13. Required standards and certificates for Code-enforcement officials.
143-151.13A. Professional development program for officials.
143-151.14. Comity.
143-151.15. Return of certificate to Board; reissuance by Board.
143-151.16. Certification fees; renewal of certificates; examination fees.
143-151.17. Grounds for disciplinary actions; investigation; administrative procedures.
143-151.18. Violations; penalty; injunction.
143-151.19. Administration.
143-151.20. Donations and appropriations.
143-151.21. Disposition of fees.
143-151.22 through 143-151.25. [Reserved.]

### Article 9D.

### Enforcement of Building Code Insulation and Energy Utilization Standards.

Sec.
143-151.26 through 143-151.41. [Repealed.]

### Article 9E.

### Master Electrical and Natural Gas Meters Prohibited.

143-151.42. Prohibition of master meters for electric and natural gas service.

### Article 9F.

### North Carolina Home Inspector Licensure Board.

143-151.43. Short title.
143-151.44. Purpose.
143-151.45. Definitions.
143-151.46. North Carolina Home Inspector Licensure Board established; members; terms; vacancies.
143-151.47. Compensation of Board members.
143-151.48. Election of officers; meetings of Board.
143-151.49. (Effective until October 1, 2011) Powers and responsibilities of Board.
143-151.49. (Effective October 1, 2011) Powers and responsibilities of Board.
143-151.50. (Effective until October 1, 2013) License required to perform home inspections for compensation or to claim to be a "licensed home inspector".
143-151.50. (Effective October 1, 2013) License required to perform home inspections for compensation or to claim to be a "licensed home inspector".
143-151.51. (Effective until October 1, 2011) Requirements to be licensed as a home inspector.
143-151.51. (Effective October 1, 2011) Requirements to be licensed as a home inspector.
143-151.52. (Repealed effective October 1, 2013) Requirements to be licensed as an associate home inspector.
143-151.53. Notification to applicant following evaluation of application.
143-151.54. Miscellaneous license provisions.
143-151.55. Renewal of license; inactive licenses; lapsed licenses.
143-151.56. Suspension, revocation, and refusal to renew license.
143-151.57. Fees.
143-151.58. (Effective until October 1, 2013) Duties of licensed home inspector or licensed associate home inspector.

Sec.
143-151.58. (Effective October 1, 2013) Duties of licensed home inspector.
143-151.59. Violation is a misdemeanor.
143-151.60. Injunctions.
143-151.61. (Repealed effective October 1, 2013) Certain applicants do not have to be licensed as an associate home inspector before being eligible for licensure as a home inspector.
143-151.62. Persons and practices not affected.
143-151.63. Administration.
143-151.64. Continuing education requirements.

### Article 10.

### Various Powers and Regulations.

143-152. Injury to water supply misdemeanor.
143-153. Keeping swine near State institutions; penalty.
143-154. Expenditures for departments and institutions; accounting and warrants.
143-155. [Repealed.]
143-156. Certain institutions to report to Governor and General Assembly.
143-157. Reports of departments and institutions; investigations and audits.
143-157.1. Reports on gender-proportionate appointments to statutorily created decision-making regulatory bodies.
143-158. Special investigations.
143-159. Governor given authority to direct investigation.
143-160. Conduct of investigation.
143-161. Stenographic record of proceedings.
143-162. [Repealed.]
143-162.1. First menu operator access.
143-162.2. Use of public property by production companies.

### Article 11.

### Revenue Bonds and Governmental Aid.

143-163. State agencies may issue bonds to finance certain public undertakings.
143-164. Acceptance of federal loans and grants permitted.
143-165. Approval by Governor and Council of State necessary; covenants in resolutions authorizing bonds.

### Article 12.

### Law-Enforcement Officers' Retirement System.

143-166 through 143-166.04. [Repealed.]

### Article 12A.

### Law-Enforcement Officers', Firemen's, Rescue Squad Workers' and Civil Air Patrol Members' Death Benefits Act.

Sec.
143-166.1. Purpose.
143-166.2. Definitions.
143-166.3. Payments; determination.
143-166.4. Funds; conclusiveness of award.
143-166.5. Other benefits not affected.
143-166.6. Awards exempt from taxes.
143-166.7. Applicability of Article.
143-166.8 through 143-166.12. [Reserved.]

### Article 12B.

### Salary Continuation Plan for Certain State Law-Enforcement Officers.

143-166.13. Persons entitled to benefits under Article.
143-166.14. Payment of salary notwithstanding incapacity; Workers' Compensation Act applicable after two years; duration of payment.
143-166.15. Application of § 97-27; how payments made.
143-166.16. Effect on workers' compensation and other benefits; application of § 97-24.
143-166.17. Period of incapacity not charged against sick leave or other leave.
143-166.18. Report of incapacity.
143-166.19. Determination of cause and extent of incapacity; hearing before Industrial Commission; appeal; effect of refusal to perform duties.
143-166.20. Subrogation.
143-166.21 through 143-166.29. [Reserved.]

### Article 12C.

### Retirement Benefits for State Law-Enforcement Officers.

143-166.30. Retirement benefits for State law-enforcement officers.
143-166.31 through 143-166.39. [Reserved.]

### Article 12D.

### Separation Allowances for Law-Enforcement Officers.

143-166.40. Rules for selection and retention of law-enforcement officers; rules exempt from Administrative Procedure Act.
143-166.41. Special separation allowance.
143-166.42. Special separation allowances for local officers.
143-166.43 through 143-166.49. [Reserved.]

### Article 12E.

### Retirement Benefits for Local Governmental Law-Enforcement Officers.

Sec.
143-166.50. Retirement benefits for local governmental law-enforcement officers.
143-166.51 through 143-166.59. [Reserved.]

### Article 12F.

### Separate Insurance Benefits Plan for State and Local Governmental Law-Enforcement Officers.

143-166.60. Separate insurance benefits plan for law-enforcement officers.
143-166.61 through 143-166.69. [Reserved.]

### Article 12G.

### Transfers of Assets of Law-Enforcement Officers' Retirement System to Other Retirement Systems.

143-166.70. Transfers of assets of Law-Enforcement Officers' Retirement System to other retirement systems.
143-166.71 through 143-166.79. [Reserved.]

### Article 12H.

### Sheriffs' Supplemental Pension Fund Act of 1985.

143-166.80. Short title and purpose.
143-166.81. Scope.
143-166.82. Assets.
143-166.83. Disbursements.
143-166.84. Eligibility.
143-166.85. Benefits.

### Article 13.

### Publications.

143-167. [Transferred.]
143-168. Reports; conciseness.
143-169. Limitations on publications.
143-169.1. State agency public document mailing lists to be updated.
143-169.2. Definitions.
143-170. [Repealed.]
143-170.1. Statement of cost of public documents; chief administrator charged with compliance.
143-170.2. Publication procedure manuals.
143-170.3. Reports; audits.
143-170.4. Administrative Office of the Courts; publications procedures manual; reports.
Sec.
143-170.5. Designated public documents to be printed on alkaline paper.

### Article 14.

### North Carolina Zoological Authority.

143-171 through 143-176.1. [Repealed.]
143-177. Right to receive gifts.
143-177.1. North Carolina Zoological Park Fund.
143-177.2. Cities and counties.
143-177.3. Sources of funds.

### Article 15.

### Council of State Governments.

143-178 through 143-185. [Repealed.]
143-186. Council of State Governments a joint governmental agency.
143-187. [Transferred.]
143-188. [Repealed.]

### Article 16.

### Spanish-American War Relief Fund.

143-189, 143-190. [Repealed.]

### Article 17.

### State Post-War Reserve Fund.

143-191. Appropriation for fund.
143-192. Fund to be invested by Governor and Council of State; State Treasurer custodian.
143-193. Fund to be held for such use as directed by General Assembly.
143-194. Report to General Assembly.

### Article 18.

### Rules and Regulations Filed with Secretary of State.

143-195 through 143-198.1. [Repealed.]

### Article 19.

### Roanoke Island Historical Association.

143-199. Association under patronage and control of State.
143-200. Members of board of directors; terms; appointment.
143-201. Bylaws; officers of board.
143-202. Exempt from taxation; gifts and donations.
143-203, 143-204. [Repealed.]

### Article 19A.

### Governor Richard Caswell Memorial Commission.

143-204.1 through 143-204.4. [Repealed.]

## Article 19B.

## Historic Swansboro Commission.

Sec.
143-204.5 through 143-204.7. [Repealed.]

## Article 19C.

## Outdoor Historical Dramas.

143-204.8. Allotments to outdoor historical dramas.

## Article 20.

## Recreation Commission.

143-205 through 143-210.1. [Repealed.]

## Article 21.

## Water and Air Resources.

### Part 1. Organization and Powers Generally; Control of Pollution.

143-211. Declaration of public policy.
143-212. Definitions.
143-213. Definitions.
143-214. [Repealed.]
143-214.1. Water; water quality standards and classifications; duties of Commission.
143-214.2. Prohibited discharges.
143-214.2A. Prohibited disposal of medical waste.
143-214.2B. Storage of waste on vessels.
143-214.3. Revision to water quality standard.
143-214.4. Certain cleaning agents containing phosphorus prohibited.
143-214.5. Water supply watershed protection.
143-214.6. [Repealed.]
143-214.7. Stormwater runoff rules and programs.
143-214.7A. Stormwater control best management practices.
143-214.8. Ecosystem Enhancement Program: established.
143-214.9. Ecosystem Enhancement Program: purposes.
143-214.10. Ecosystem Enhancement Program: development and implementation of basinwide restoration plans.
143-214.11. Ecosystem Enhancement Program: compensatory mitigation.
143-214.12. Ecosystem Enhancement Program: Ecosystem Restoration Fund.
143-214.13. Ecosystem Enhancement Program: reporting requirement.
143-214.14. Cooperative State-local coalition water quality protection plans.
143-214.15 through 143-214.19. [Reserved.]
143-214.20. Riparian Buffer Protection Program: Alternatives to maintaining riparian buffers; compensatory mitigation fees.
Sec.
143-214.21. Riparian Buffer Protection Program: Riparian Buffer Restoration Fund.
143-214.22. Riparian Buffer Protection Program: Department may accept donations of real property.
143-214.23. Riparian Buffer Protection Program: Delegation of riparian buffer protection requirements to local governments.
143-214.24. Riparian Buffer Protection Program: Coordination with River Basin Associations.
143-214.25. Expired.
143-214.26. Nutrient offset credits.
143-215. Effluent standards or limitations.
143-215.1. Control of sources of water pollution; permits required.
143-215.1A. Closed-loop groundwater remediation systems allowed.
143-215.1B. Extension of date for compliance with nitrogen and phosphorus discharge limits.
143-215.1C. Report to wastewater system customers on system performance; publication of notice of discharge of untreated wastewater and waste.
143-215.2. Special orders.
143-215.3. General powers of Commission and Department; auxiliary powers.
143-215.3A. Water and Air Quality Account; use of application and permit fees; Title V Account; I & M Air Pollution Control Account; reports.
143-215.3B. [Repealed.]
143-215.3C. Confidential information protected.
143-215.3D. Fee schedule for water quality permits.
143-215.4. Mailing list for rules; procedures for public input; form of order or decision; seal; official notice.
143-215.5. Judicial review.
143-215.6. [Recodified.]
143-215.6A. Enforcement procedures: civil penalties.
143-215.6B. Enforcement procedures: criminal penalties.
143-215.6C. Enforcement procedures; injunctive relief.
143-215.6D. Additional requirements applicable to certain municipal wastewater treatment facilities.
143-215.6E. Violation Points System applicable to swine farms.
143-215.7. Effect on laws applicable to public water supplies and the sanitary disposal of sewage.
143-215.8. [Repealed.]

Sec.
143-215.8A. Planning.
143-215.8B. Basinwide water quality management plans.
143-215.8C. [Repealed.]
143-215.8D. North Carolina Water Quality Workgroup; Rivernet.
143-215.9. Restrictions on authority of the Commission.
143-215.9A. Reports.
143-215.9B. Systemwide municipal and domestic wastewater collection system permit program report.
143-215.9C. Use of certain types of culverts allowed.
143-215.10. [Repealed.]

### Part 1A. Animal Waste Management Systems.

143-215.10A. Legislative findings and intent.
143-215.10B. Definitions.
143-215.10C. Applications and permits.
143-215.10D. Operations review.
143-215.10E. Violations requiring immediate notification.
143-215.10F. Inspections.
143-215.10G. Fees for animal waste management systems.
143-215.10H. Swine integrator registration.
143-215.10I. Performance standards for animal waste management systems that serve swine farms; lagoon and sprayfield systems prohibited.
143-215.10J through 143-215.10L. [Reserved.]
143-215.10M. Reports.

### Part 2. Regulation of Use of Water Resources.

143-215.11. Short title.
143-215.12. Declaration of purpose.
143-215.13. Declaration of capacity use areas.
143-215.14. Rules within capacity use areas; scope and procedures.
143-215.15. Permits for water use within capacity use areas — Procedures.
143-215.16. Permits for water use within capacity use areas — Duration, transfer, reporting, measurement, present use, fees and penalties.
143-215.17. Enforcement procedures.
143-215.18. Map or description of boundaries of capacity use areas.
143-215.19. Administrative inspection; reports.
143-215.20. [Repealed.]
143-215.21. Definitions.
143-215.22. Law of riparian rights not changed.
143-215.22A. Water withdrawal policy; remedies.
143-215.22B. Roanoke River Basin water rights.
143-215.22C through 143-215.22F. [Reserved.]

### Part 2A. Registration of Water Withdrawals and Transfers; Regulation of Surface Water Transfers.

Sec.
143-215.22G. Definitions.
143-215.22H. Registration of water withdrawals and transfers required.
143-215.22I. [Repealed.]
143-215.22J. [Repealed.]
143-215.22K. [Repealed.]
143-215.22L. Regulation of surface water transfers.

### Part 3. Dam Safety Law.

143-215.23. Short title.
143-215.24. Declaration of purpose.
143-215.25. Definitions.
143-215.25A. Exempt dams.
143-215.26. Construction of dams.
143-215.27. Repair, alteration, or removal of dam.
143-215.28. Action by Commission upon applications.
143-215.28A. Application fees.
143-215.29. Supervision by qualified engineers; reports and modification during work.
143-215.30. Notice of completion; certification of final approval.
143-215.31. Supervision over maintenance and operation of dams.
143-215.32. Inspection of dams.
143-215.33. Administrative hearing.
143-215.34. Investigations by Department; employment of consultants.
143-215.35. Liability for damages.
143-215.36. Enforcement procedures.
143-215.37. Rights of investigation, entry, access, and inspection.

### Part 4. Federal Water Resources Development Projects.

143-215.38. Short title.
143-215.39. Public policy.
143-215.40. Resolutions and ordinances assuring local cooperation.
143-215.41. Items of cooperation to which localities and the State may bind themselves.
143-215.42. Acquisition of lands.
143-215.43. Additional powers.

### Part 5. Right of Withdrawal of Impounded Water.

143-215.44. Right of withdrawal.
143-215.45. Transfer of right of withdrawal.
143-215.46. Exercise of right of withdrawal.
143-215.47. Effect of right of withdrawal on discharges of water.
143-215.48. Determining streamflows.

Sec.
143-215.49. Right of withdrawal for use in community water supply.
143-215.50. Interpretation with other statutes.

Part 6. Floodplain Regulation.

143-215.51. Purposes.
143-215.52. Definitions.
143-215.53. [Repealed.]
143-215.54. Regulation of flood hazard areas; prohibited uses.
143-215.54A. Minimum standards for ordinances; variances for prohibited uses.
143-215.55. Acquisition of existing structures.
143-215.56. Delineation of flood hazard areas and 100-year floodplains; powers of Department; powers of local governments and of the Department.
143-215.56A. Floodplain Mapping Fund.
143-215.57. Procedures in issuing permits.
143-215.58. Violations and penalties.
143-215.59. Other approvals required.
143-215.60. Liability for damages.
143-215.61. Floodplain management.

Part 6A. Hurricane Flood Protection and Beach Erosion Control Project Revolving Fund.

143-215.62. Revolving fund established; conditions and procedures.

Part 7. Water and Air Quality Reporting.

143-215.63. Short title.
143-215.64. Purpose.
143-215.65. Reports required.
143-215.66. Monitoring required.
143-215.67. Acceptance of wastes to disposal systems and air-cleaning devices.
143-215.68. [Repealed.]
143-215.69. Enforcement procedures.

Part 8. Grants for Water Resources Development Projects.

143-215.70. Secretary of Environment and Natural Resources authorized to accept applications.
143-215.71. Purposes for which grants may be requested.
143-215.72. Review of applications.
143-215.73. Recommendation and disbursal of grants.

Part 8A. Water Resources Development Projects.

143-215.73A. Water Resources Development Plan.

Part 9. Nonpoint Source Pollution Control Program.

143-215.74. Agriculture cost share program.
143-215.74A. Program participation.
Sec.
143-215.74B. Committee established.

Part 9A. Application of Animal Waste.

143-215.74C through 143-215.74E. [Repealed.]

Part 10. Stream Watch Program.

143-215.74F. Program authorized.
143-215.74G. Applications.
143-215.74H. Assistance.
143-215.74I. Projects.
143-215.74J. throuhg 143-215.74L. [Reserved.]

Part 11. Community Conservation Assistance Program.

143-215.74M. Community Conservation Assistance Program.

## Article 21A.

## Oil Pollution and Hazardous Substances Control.

Part 1. General Provisions.

143-215.75. Title.
143-215.76. Purpose.
143-215.77. Definitions.
143-215.77A. Designation of hazardous substances and determination of quantities which may be harmful.
143-215.78. Oil pollution control program.
143-215.79. Inspections and investigations; entry upon property.
143-215.80. Confidential information.
143-215.81. Authority supplemental.
143-215.82. Local ordinances.

Part 2. Oil Discharge Controls.

143-215.83. Discharges.
143-215.84. Removal of prohibited discharges.
143-215.85. Required notice.
143-215.85A. Recordation of oil or hazardous substance discharge sites.
143-215.86. Other State agencies and State-designated local agencies.
143-215.87. Oil or Other Hazardous Substances Pollution Protection Fund.
143-215.88. Payment to State agencies or State-designated local agencies.
143-215.88A. Enforcement procedures: civil penalties.
143-215.88B. Enforcement procedures: criminal penalties.
143-215.89. Multiple liability for necessary expenses.
143-215.90. Liability for damage to public resources.
143-215.91. [Recodified.]
143-215.91A. Limited liability for volunteers

Sec.

in oil and hazardous substance abatement.

143-215.92. Lien on vessel.

143-215.93. Liability for damage caused.

143-215.93A. Limitation on liability of persons engaged in removal of oil discharges.

143-215.94. Joint and several liability.

### Part 2A. Leaking Petroleum Underground Storage Tank Cleanup.

143-215.94A. Definitions.

143-215.94B. Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund.

143-215.94C. Commercial leaking petroleum underground storage tank cleanup fees.

143-215.94D. Noncommercial Leaking Petroleum Underground Storage Tank Cleanup Fund.

143-215.94E. Rights and obligations of the owner or operator.

143-215.94F. Limited amnesty.

143-215.94G. Authority of the Department to engage in cleanups; actions for fund reimbursement.

143-215.94H. Financial responsibility.

143-215.94I. Insurance pools authorized; requirements.

143-215.94J. Limitation of liability of the State of North Carolina.

143-215.94K. Enforcement.

143-215.94L. Definitions.

143-215.94M. Reports.

143-215.94N. Applicability.

143-215.94O. Petroleum Underground Storage Tank Funds Council.

143-215.94P. Groundwater Protection Loan Fund.

143-215.94Q through 143-215.94S. [Reserved.]

### Part 2B. Underground Storage Tank Regulation.

143-215.94T. Adoption and implementation of regulatory program.

143-215.94U. Registration of petroleum commercial underground storage tanks; operation of petroleum underground storage tanks; operating permit required.

143-215.94V. Standards for petroleum underground storage tank cleanup.

143-215.94W. Enforcement procedures: civil penalties.

143-215.94X. Enforcement procedures: criminal penalties.

143-215.94Y. Enforcement procedures; injunctive relief.

143-215.94Z. [Reserved.]

### Part 2C. Offshore Oil and Gas Activities. Adverse Environmental Impact Protection.

Sec.

143-215.94AA. Declaration of public policy.

143-215.94BB. Definitions.

143-215.94CC. Liability under this section; exceptions.

143-215.94DD. Joint and several liability; damages; personal injury.

143-215.94EE. Removal of prohibited discharges.

143-215.94FF. Authorization of the Attorney General; citizens' suits.

143-215.94GG. Notification by persons responsible for discharge.

143-215.94HH. Oil spill contingency plan.

143-215.94II. Emergency proclamation; Governor's powers.

143-215.94JJ. Federal law.

### Part 3. Oil Terminal Facilities.

143-215.95. Duties of Secretary.

143-215.96. Oil terminal facility registration.

143-215.97. Rules.

143-215.98. Violations.

143-215.99. [Repealed.]

### Part 4. Oil Refining Facility Permits.

143-215.100. Oil refining facility permits.

143-215.101. Powers of the Secretary.

143-215.102. Penalties.

### Part 5. Limitation on Liability for Hazardous Materials Abatement.

143-215.103. Definitions.

143-215.104. Limited liability for volunteers in hazardous material abatement.

### Part 6. Dry-Cleaning Solvent Cleanup.

143-215.104A. (See note for repeal of Part 6) Title; sunset.

143-215.104B. (Expires January 1, 2022 — see notes) Definitions.

143-215.104C. (Expires January 1, 2022 — see notes) Dry-Cleaning Solvent Cleanup Fund.

143-215.104D. (Expires January 1, 2022 — see notes) Powers of the Commission.

143-215.104E. [Repealed.]

143-215.104F. (Expires January 1, 2022 — see notes) Requirements for certification, assessment agreements, and remediation agreements.

143-215.104G. (Expires January 1, 2022 — see notes) Certification of facilities and abandoned sites.

143-215.104H. (Expires January 1, 2022 — see

Sec.

notes) Dry-Cleaning Solvent Assessment Agreements.

143-215.104I. (Expires January 1, 2022 — see notes) Dry-Cleaning solvent remediation agreements.

143-215.104J. (Expires January 1, 2022 — see notes) Decertification; termination of assessment agreements and remediation agreements.

143-215.104K. (Expires January 1, 2022 — see notes) Liability protection.

143-215.104L. (Expires January 1, 2022 — see notes) Public notice and community involvement.

143-215.104M. (Expires January 1, 2022 — see notes) Notice of Dry-Cleaning Solvent Remediation; land-use restrictions in deeds.

143-215.104N. (Expires January 1, 2022 — see notes) Disbursement of dry-cleaning solvent assessment and remediation costs; limitations; cost recovery.

143-215.104O. (Expires January 1, 2022 — see notes) Remediation of uncertified sites.

143-215.104P. (Expires January 1, 2022 — see notes) Enforcement procedures; civil penalties.

143-215.104Q. (Expires January 1, 2022 — see notes) Enforcement procedures; criminal penalties.

143-215.104R. (Expires January 1, 2022 — see notes) Enforcement procedures; injunctive relief.

143-215.104S. (Expires January 1, 2022 — see notes) Appeals.

143-215.104T. (Expires January 1, 2022 — see notes) Construction of this Part.

143-215.104U. (Expires January 1, 2022 — see notes) Reporting requirements.

### Article 21B.

### Air Pollution Control.

143-215.105. Declaration of policy; definitions.

143-215.106. Administration of air quality program.

143-215.106A. Assessments to establish Title V program.

143-215.107. Air quality standards and classifications.

143-215.107A. Motor vehicle emissions testing and maintenance program.

143-215.107B. Statewide goals for reduction in emissions of oxides of nitrogen; report.

143-215.107C. State agency goals, plans, duties, and reports.

143-215.107D. Emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) from certain coal-fired generating units.

143-215.108. Control of sources of air pollution; permits required.

143-215.108A. Control of sources of air pollution; construction of new facilities; alteration or expansion of existing facilities.

143-215.109. Control of complex sources.

143-215.110. Special orders.

143-215.111. General powers of Commission; auxiliary powers.

143-215.112. Local air pollution control programs.

143-215.113. [Repealed.]

143-215.114. [Recodified.]

143-215.114A. Enforcement procedures: civil penalties.

143-215.114B. Enforcement procedures: criminal penalties.

143-215.114C. Enforcement procedures: injunctive relief.

### Article 22.

### State Ports Authority.

143-216 through 143-228.1. [Recodified.]

### Article 23.

### Armories.

143-229 through 143-236.1. [Repealed.]

### Article 23A.

### Stadium Authority.

143-236.2 through 143-236.28. [Repealed.]

### Article 24.

### Wildlife Resources Commission.

143-237. Title.

143-238. Definitions.

143-239. Statement of purpose.

143-240. Creation of Wildlife Resources Commission; districts; qualifications of members.

143-241. Appointment and terms of office of Commission members; filling of vacancies.

143-242. Vacancies by death, resignation or otherwise.

143-243. Organization of the Commission; election of officers; Robert's Rules of Order.

143-244. Location of offices.

143-245. [Repealed.]

143-246. Executive Director; appointment, qualifications and duties.

143-247. Transfer of powers, duties, jurisdiction, and responsibilities.

143-247.1. Commission may accept gifts.

Sec.
143-247.2. Wildlife Conservation Account; emblems for those who donate to the Account.
143-248. Transfer of lands, buildings, records, equipment, and other properties.
143-249. Transfer of personnel.
143-250. Wildlife Resources Fund.
143-250.1. Wildlife Endowment Fund.
143-251. Cooperative agreements.
143-252. Article subject to Chapter 113.
143-253. Jurisdictional questions.
143-254, 143-254.1. [Repealed.]
143-254.2. Enforcement of local laws.
143-254.5. Disclosure of personal identifying information.

### Article 25.

### National Park, Parkway and Forests Development Commission.

143-255 through 143-257. [Repealed.]
143-258. [Repealed.]
143-259, 143-260. [Repealed.]

### Article 25A.

### Historic Sites Commission; Historic and Archeological Sites.

143-260.1 through 143-260.5. [Repealed.]

### Article 25B.

### State Nature and Historic Preserve Dedication Act.

143-260.6. Short title.
143-260.7. Purpose.
143-260.8. Procedures.
143-260.9. Dedication shall not affect maintenance and improvement of existing structures or facilities.
143-260.10. Components of State Nature and Historic Preserve.
143-260.10A, 143-260.10B. [Repealed.]
143-260.10C. Removal of land in Hemlock Bluffs from the State Nature and Historic Preserve.
143-260.10D. Removal of land at Hammocks Beach State Park from the State Nature and Historic Preserve.
143-260.10E. Utility easement at William B. Umstead State Park.
143-260.10F. Road right-of-way; Pilot Mountain State Park.
143-260.10G. Removal of land in Crowders Mountain State Park from the State Nature and Historic Preserve.

### Article 26.

### State Education Commission.

143-261. Appointment and membership; duties.
143-262. Organization meeting; election of officers; status of members.
143-263. Comprehensive study of education problems.
143-264. Per diem and travel allowances.
143-265. Salary of executive secretary.
143-266. Powers of executive secretary.

### Article 27.

### Settlement of Affairs of Certain Inoperative Boards and Agencies.

143-267. Release and payment of funds to State Treasurer; delivery of other assets to Secretary of Administration.
143-268. Official records turned over to Department of Cultural Resources; conversion of other assets into cash; allocation of assets to State agency or department.
143-269. Deposit of funds by State Treasurer.
143-270. Statement of claims against board or agency; time limitation on presentation.
143-271. Claims certified to State Treasurer; payment; escheat of balance to University of North Carolina.
143-272. Audit of affairs of board or agency; payment for audit and other expenses.

### Article 28.

### Communication Study Commission.

143-273 through 143-278. [Expired.]

### Article 29.

### Commission to Study the Care of the Aged and Handicapped.

143-279. Establishment and designation of Commission.
143-280. Membership.
143-281. Appointment and removal of members.
143-282. Duties of Commission; recommendations.
143-283. Compensation.

### Article 29A.

### Governor's Council on Employment of the Handicapped.

143-283.1. Short title.
143-283.2. Purpose of Article; cooperation with President's Committee.
143-283.3. Celebration of National Employ the Physically Handicapped Week.
143-283.4 through 143-283.6. [Repealed.]
143-283.7. [Repealed.]

Sec.
143-283.8. Governor's Council nonpartisan and nonprofit.
143-283.9, 143-283.10. [Repealed.]

### Article 29B.

### Governor's Coordinating Council on Aging.

143-283.11 through 143-283.23. [Repealed.]

### Article 29C.

### Youth Councils Act.

143-283.24 through 143-283.32. [Repealed.]
143-283.33 through 143-283.40. [Reserved].

### Article 29D.

### Manpower Council.

143-283.41 through 143-283.48. [Repealed.]

### Article 30.

### Nutbush Conservation Area.

143-284 through 143-286. [Repealed.]
143-286.1. Nutbush Conservation Area.
143-287, 143-288. [Repealed.]
143-289. Contributions from certain counties and municipalities authorized; other grants or donations.
143-290, 143-290.1. [Repealed.]

### Article 31.

### Tort Claims against State Departments and Agencies.

143-291. Industrial Commission constituted a court to hear and determine claims; damages; liability insurance in lieu of obligation under Article.
143-291.1. Costs.
143-291.2. Costs and fees.
143-291.3. Counterclaims by State.
143-292. Notice of determination of claim; appeal to full Commission.
143-293. Appeals to Court of Appeals.
143-294. Appeal to Court of Appeals to act as supersedeas.
143-295. Settlement of claims.
143-295.1. Settlement of small claims against institutions of the Department of Health and Human Services.
143-296. Powers of Industrial Commission; Deputies.
143-297. Affidavit of claimant; docketing; venue; notice of hearing; answer, demurrer or other pleading to affidavit.
143-298. Duty of Attorney General; expenses; subpoenas.
143-299. Limitation on claims.

Sec.
143-299.1. Contributory negligence a matter of defense; burden of proof.
143-299.1A. Limit use of public duty doctrine as an affirmative defense.
143-299.2. Limitation on payments by the State.
143-299.3. Use of State vehicles by North Carolina Amateur Sports; State to incur no liability.
143-299.4. Payment of State excess liability.
143-300. Rules and regulations of Industrial Commission; destruction of records.
143-300.1. Claims against county and city boards of education for accidents involving school buses or school transportation service vehicles.
143-300.1A. (See Editor's note on condition precedent) Claims arising from certain smallpox vaccinations of State employees.

### Article 31A.

### Defense of State Employees, Medical Contractors and Local Sanitarians.

143-300.2. Definitions.
143-300.3. Defense of State employees.
143-300.4. Grounds for refusal of defense.
143-300.5. Regulations for providing defense counsel.
143-300.6. Payments of judgments; compromise and settlement of claims.
143-300.7. Defense of medical contractors.
143-300.8. Defense of local sanitarians.
143-300.9. Payment of excess damages relating to unconstitutional taxes.
143-300.10. Payment of excess damages relating to unconstitutional goals program.
143-300.11, 143-300.12. [Reserved.]

### Article 31B.

### Defense of Public School Employees.

143-300.13. Definition of public school employee.
143-300.14. Defense of public school employees.
143-300.15. Refusal of defense.
143-300.16. Payment of judgments and settlement of claims.
143-300.17. Employee's obligation for attorney fees.
143-300.18. Protection is additional.
143-300.19 through 14-300.29. [Reserved.]

### Article 31C.

### Service on Certification Entity.

143-300.30. Service on National Tobacco Grower Settlement Trust.

Sec.

143-300.31 through 143-300.34. [Reserved.]

### Article 31D.

### State Employee Federal Remedy Restoration Act.

143-300.35. State Employee Federal Remedy Restoration Act.

### Article 32.

### Payroll Savings Plan for State Employees.

143-301. Authority of Governor.
143-302. Expenses.
143-303. Agreements of employees with heads of departments, etc.
143-304. Salary deductions and purchase of bonds authorized.
143-305. Cancellation of agreements.

### Article 33.

### Judicial Review of Decisions of Certain Administrative Agencies.

143-306 through 143-316. [Repealed.]

### Article 33A.

### Rules of Evidence in Administrative Proceedings before State Agencies.

143-317, 143-318. [Repealed.]

### Article 33B.

### Meetings of Governmental Bodies.

143-318.1 through 143-318.8. [Repealed.]

### Article 33C.

### Meetings of Public Bodies.

143-318.9. Public policy.
143-318.10. All official meetings of public bodies open to the public.
143-318.11. Closed sessions.
143-318.12. Public notice of official meetings.
143-318.13. Electronic meetings; written ballots; acting by reference.
143-318.14. Broadcasting or recording meetings.
143-318.14A. Legislative commissions, committees, and standing subcommittees.
143-318.15. [Repealed.]
143-318.16. Injunctive relief against violations of Article.
143-318.16A. Additional remedies for violations of Article.
143-318.16B. Assessments and awards of attorneys' fees.
143-318.16C. Accelerated hearing; priority.
143-318.16D. Local acts.
143-318.17. Disruptions of official meetings.

Sec.

143-318.18. Exceptions.

### Article 34.

### Local Affairs.

143-319. [Repealed.]
143-320. Definitions.
143-321, 143-322. [Repealed.]
143-323. Functions of Department of Environment and Natural Resources.
143-324. [Repealed.]
143-325. Functions of committees.
143-326. Transfer of functions, records, property, etc.
143-327. [Repealed.]
143-328. [Reserved.]

### Article 35.

### Youth Service Commission.

143-329 through 143-333. [Expired.]

### Article 36.

### Department of Administration.

Part 1. General Provisions.

143-334. Short title.
143-335. Department of Administration created.
143-336. (Effective until October 1, 2011) Definitions.
143-336. (Effective October 1, 2011) Definitions.
143-337 through 143-339. [Repealed.]
143-340. Powers and duties of Secretary.
143-341. Powers and duties of Department.
143-341.1. [Repealed.]
143-342. Rules governing allocation of property and space.
143-342.1. State-owned office space; fees for use by self-supporting agencies.
143-343. General Services Division.
143-344. Transfer of functions, property, records, etc.
143-345. Saving clause.
143-345.1. Rules and regulations.
143-345.2. Disorderly conduct in and injury to public buildings and grounds.
143-345.3. Construction and repair of public buildings; use of Contingency and Emergency Fund.
143-345.4. Moore and Nash squares and other public lots.
143-345.5. Program for location and construction of future public buildings.
143-345.6. [Recodified.]
143-345.7. Repair and reconstruction of the Western Residence of the Governor.
143-345.8. North Carolina Purchase Directory.
143-345.9. Official "Prisoner of War/Missing in

Sec.

Action" flag to be flown over the State Capitol.
143-345.10. Parking of maintenance vehicles.
143-345.11. Secretary's approval of plans for State buildings required.
143-345.12. [Reserved.]

Part 2. Stocks of Coal and Petroleum Fuels.

143-345.13. Reporting of stocks of coal and petroleum fuels.
143-345.14. Authority to collect data; administration and enforcement; confidentiality.
143-345.15. [Repealed.]

Part 3. Energy Loan Fund.

143-345.16. Short title.
143-345.17. Legislative findings and purpose.
143-345.18. Lead agency; powers and duties.

### Article 36A.

### State Employee Incentive Bonus Program.

143-345.20. Definitions.
143-345.21. State employee incentive bonus.
143-345.22. Allocation of incentive bonus funds; nonmonetary recognition.
143-345.23. Suggestion and review process; role of agency coordinator and agency evaluator.
143-345.24. Incentive Bonus Review Committee.
143-345.25. Innovations deemed property of the State; effect of decisions regarding bonuses.

### Article 37.

### Salt Marsh Mosquito Control.

143-346, 143-347. [Repealed.]

### Article 37A.

### Marine Science Council.

143-347.1 through 143-347.9. [Repealed.]

### Article 37B.

### Marine Resources Center Administrative Board.

143-347.10 through 143-347.14. [Repealed.]

### Article 38.

### Water Resources.

143-348, 143-349. [Repealed.]
143-350. Definitions.
143-351. [Repealed.]
143-352. Purpose of Article.
143-353. [Repealed.]

Sec.

143-354. Ordinary powers and duties of the Commission.
143-355. Powers and duties of the Department.
143-355.1. Drought Management Advisory Council; drought advisories.
143-355.2. Water conservation measures for drought.
143-355.3. Water shortage emergency powers.
143-355.4. Water system efficiency.
143-355.5. Water reuse; policy; rule making.
143-355.6. Enforcement.
143-356, 143-357. [Repealed.]
143-358. Cooperation of State officials and agencies.
143-359. [Repealed.]

### Article 39.

### U.S.S. North Carolina Battleship Commission.

143-360 through 143-365. [Repealed.]
143-366 through 143-369. [Recodified.]

### Article 39A.

### Frying Pan Lightship Marine Museum Commission.

143-369.1 through 143-369.3. [Repealed.]

### Article 40.

### Advisory Commission for State Museum of Natural History.

143-370 through 143-373. [Recodified.]

### Article 41.

### Science and Technology Research Center.

143-374 through 143-377. [Recodified.]

### Article 42.

### Board of Science and Technology.

143-378 through 143-383. [Repealed.]

### Article 43.

### North Carolina Seashore Commission.

143-384 through 143-391. [Repealed.]

### Article 44.

### North Carolina Traffic Safety Authority.

143-392 through 143-395. [Repealed.]

### Article 45.

### North Carolina American Revolution Bicentennial Commission.

143-396 through 143-399. [Repealed.]

### Article 46.

### Governor's Committee on Law and Order.

Sec.
143-400 through 143-402.2. [Repealed.]

### Article 47.

### Promotion of Arts.

143-403. "Arts" defined.
143-404, 143-405. [Repealed.]
143-406. Duties of Department of Cultural Resources.
143-407. Appropriations; funds.
143-407.1. Composer laureate.
143-408. [Repealed.]

### Article 47A.

### Art Works in State Buildings.

143-408.1 through 143-408.7. [Repealed.]

### Article 48.

### Executive Mansion.

143-409. [Repealed.]
143-410. Purpose.
143-411. Powers of Department of Cultural Resources.
143-412 through 143-414. [Repealed.]
143-415. Authority, etc., of Department of Administration not affected.

### Article 49.

### North Carolina Human Relations Commission.

143-416 through 143-422. [Repealed.]

### Article 49A.

### Equal Employment Practices.

143-422.1. Short title.
143-422.2. Legislative declaration.
143-422.3. Investigations; conciliations.

### Article 50.

### Commission on the Status of Women.

143-423 through 143-428. [Repealed.]

### Article 51.

### Tobacco Museums.

143-429, 143-430. [Repealed.]
143-431. Tobacco museums.
143-432. Location of museums.

### Article 51A.

### Tax Study Commission.

143-433 through 143-433.5. [Repealed.]

### Article 51B.

### North Carolina Federal Tax Reform Allocation Committee.

Sec.
143-433.6. Legislative findings.
143-433.7. North Carolina Federal Tax Reform Allocation Committee.
143-433.8. Duties.
143-433.9. Allocation.

### Article 52.

### Pesticide Board.

Part 1. Pesticide Control Program: Organization and Functions.

143-434. Short title.
143-435. Preamble.
143-436. North Carolina Pesticide Board; creation and organization.
143-437. Pesticide Board; functions.
143-438. Commissioner of Agriculture to administer and enforce Article.
143-439. Pesticide Advisory Committee; creation and functions.

Part 2. Regulation of the Use of Pesticides.

143-440. Restricted use pesticides regulated.
143-441. Handling, storage and disposal of pesticides.
143-442. Registration.
143-443. Miscellaneous prohibited acts.
143-444. Determinations.
143-445. Exemptions.
143-446. Samples; submissions.
143-447. Emergency suspensions; seizures.

Part 3. Pesticide Dealers.

143-448. Licensing of pesticide dealers; fees.
143-449. Qualifications for pesticide dealer license; examinations.
143-450. Employees of pesticide dealers; dealer's responsibility.
143-451. Denial, suspension and revocation of license.

Part 4. Pesticide Applicators and Consultants.

143-452. Licensing of pesticide applicators; fees.
143-453. Qualifications for pesticide applicator's license; examinations.
143-454. Solicitors, salesmen and operators; applicator's responsibility.
143-455. Pest control consultant license.
143-456. Denial, suspension and revocation of license.
143-457. [Repealed.]
143-458. Rules and regulations concerning methods of application.
143-459. Reporting of shipments and volumes of pesticides.

Part 5. General Provisions.

Sec.
143-460. Definitions.
143-461. General powers of Board.
143-462. Procedures for revocations and related actions affecting licenses.
143-463. Adoption and publication of rules.
143-464. Procedures concerning registration of pesticides.
143-465. Reciprocity; intergovernmental cooperation.
143-466. Records; information; inspection; enforcement.
143-467. Financial responsibility.
143-468. Disposition of fees and charges.
143-469. Penalties.
143-470. [Repealed.]
143-470.1. Report of minor violations in discretion of Board or Commissioner.

## Article 53.

## Commission for Mental Health, Mental Retardation and Substance Abuse Services.

143-471 through 143-475.1. [Repealed.]

## Article 54.

## North Carolina Council on State Goals and Policy Act.

143-476 through 143-489. [Repealed.]

## Article 55.

## The Southern Growth Policies Agreement.

143-490. Compact enacted into law.
143-491. Article I. Findings and Purposes.
143-492. Article II. The Board.
143-493. Article III. Powers.
143-494. Article IV. Avoidance of Duplication.
143-495. Article V. Advisory Committees.
143-496. Article VI. Internal Management of the Board.
143-497. Article VII. Finance.
143-498. Article VIII. Cooperation with the Federal Government and Other Governmental Entities.
143-499. Article IX. Subregional Activities.
143-500. Article X. Comprehensive Land Use Planning.
143-501. Article XI. Compacts and Agencies Unaffected.
143-502. Article XII. Eligible Parties; Entry into and Withdrawal.
143-503. Article XIII. Construction and Severability.
143-504. Copies of bylaws and amendments to be filed.
143-505. Continuance of states as parties.
143-506. Rights of State and local governments not restricted.

Sec.
143-506.1 through 143-506.5. [Reserved.]

## Article 55A.

## Balanced Growth Policy Act.

143-506.6. Title.
143-506.7. Purposes.
143-506.8. Declaration of State Balanced Growth Policy.
143-506.9. Cooperation of agencies.
143-506.10. Designation of growth centers; achieving balanced growth.
143-506.11. Citizen participation.
143-506.12. Policy areas.
143-506.13. Implementation of a State-local partnership.
143-506.14. North Carolina Office of Local Government Advocacy created; membership; terms; meetings; compensation; powers and duties; staff; cooperation by departments.

## Article 55B.

## North Carolina Commission on Jobs and Economic Growth.

143-506.15. [Expired.]

## Article 56.

## Emergency Medical Services Act of 1973.

143-507. Establishment of Statewide Emergency Medical Services System.
143-508. Department of Health and Human Services to establish program; rules and regulations of North Carolina Medical Care Commission.
143-509. Powers and duties of Secretary.
143-510. North Carolina Emergency Medical Services Advisory Council.
143-511. Powers and duties of the Council.
143-512. Regional demonstration plans.
143-513. Regional emergency medical services councils.
143-514. Scope of practice for credentialed emergency medical services personnel.
143-515. Establishment of regions.
143-516. Single State agency.
143-517. Ambulance support; free enterprise.
143-518. Confidentiality of patient information.
143-519. Emergency Medical Services Disciplinary Committee.
143-520. [Reserved.]

## Article 57.

## Crime Study Commission.

143-521 through 143-531. [Repealed.]

## Article 58.

## Committee on Inaugural Ceremonies.

Sec.
143-532. Definitions.
143-533. Creation, appointment of members; members ex officio.
143-534. Time of appointments; terms of office.
143-535. Vacancies.
143-536. Chairman; rules of procedure; quorum.
143-537. Meetings.
143-538. Powers and duties.
143-539. Offices; per diem and allowances of members; payments from appropriations.
143-540 through 143-544. [Reserved.]

## Article 59.

## Vocational Rehabilitation Services.

143-545. [Repealed.]
143-545.1. Purpose, establishment and administration of program; services.
143-546. [Repealed.]
143-546.1. Duties of Secretary; cooperation with federal rehabilitation services administration or successor.
143-547. Subrogation rights; withholding of information a misdemeanor.
143-548. Vocational Rehabilitation Council.
143-549 through 143-551. [Reserved.]

## Article 60.

## State and Certain Local Educational Entity Employees, Nonsalaried Public Officials, and Legislators Required to Repay Money Owed to State.

### Part 1. State and Local Educational Entity Employees.

143-552. Definitions.
143-553. Conditional continuing employment; notification among employing entities; repayment election.
143-554. Right of employee appeal.

### Part 2. Public Officials.

143-555. Definitions.
143-556. Notification of the appointing authority; investigation.
143-557. Conditional continuing appointment; repayment election.

### Part 3. Legislators.

143-558. Definition of employing entity.
143-559. Notification to the Legislative Ethics Committee; investigation.

### Part 4. Confidentiality Exemption, Preservation of Federal Funds, and Limitation of Actions.

143-560. Confidentiality exemption.
143-561. Preservation of federal funds.

Sec.
143-562. Applicability of a statute of limitations.

## Article 61.

## Commission on the Bicentennial of the United States Constitution.

143-563 through 143-570. [Expired.]

## Article 62.

## North Carolina Child Fatality Prevention System.

143-571 through 143-579. [Repealed.]

## Article 63.

## State Employees Workplace Requirements Program for Safety and Health.

### Part 1. Executive Branch Programs.

143-580. Definition.
143-581. Program goals.
143-582. Program requirements.
143-583. Model program; technical assistance; reports.
143-584. State agency safety and health committees.
143-585 through 143-588. [Reserved.]

### Part 2. Legislative and Judicial Branch Programs.

143-589. Legislative and judicial branch safety and health programs.
143-590 through 143-594. [Reserved.]

## Article 64.

## Smoking in Public Places.

143-595. Legislative intent.
143-596. Definitions.
143-597. Nonsmoking areas in State-controlled buildings.
143-598. Prohibited acts related to nonsmoking areas.
143-599. Exemptions.
143-600. Construction of Article.
143-601. Applicability of Article; local government may enact.
143-602 through 143-609. [Reserved.]

## Article 65.

## Medical Education and Primary Care.

143-610 through 143-612. [Repealed.]
143-612A. [Repealed.]
143-613. Medical education; primary care physicians and other providers.
143-614. [Repealed.]
143-615 through 143-620. [Reserved.]

### Article 66.
### Health Care Purchasing Alliance Act.

Sec.
143-621 through 143-639. [Repealed.]

### Article 67.
### First Flight Centennial Commission.

143-640. Commission established; purpose; members; terms of office; quorum; compensation; termination.
143-641. Powers and duties of the Commission.
143-642. Assignment of property; offices.
143-643. Commission reports.
143-644 through 143-649. [Reserved.]

### Article 68.
### Regulation of Boxing.

143-650. [Repealed.]
143-651. Definitions.
143-652. [Repealed.]
143-652.1. Regulation of boxing, kickboxing, mixed martial arts, and toughman events.
143-652.2. Boxing Advisory Commission.
143-653. Unauthorized matches prohibited.
143-654. Licensing and permitting.
143-655. Fees; State Boxing Revenue Account.
143-656. Contracts and financial arrangements.
143-657. [Repealed.]
143-657.1. Sanctioned amateur matches.
143-658. Violations.
143-659. [Reserved.]

### Article 69.
### Criminal Justice Information Network Governing Board.

143-660. Definitions.
143-661. Criminal Justice Information Network Governing Board — creation; purpose; membership; conflicts of interest.
143-662. Compensation and expenses of Board members; travel reimbursements.
143-663. Powers and duties.
143-664. Election of officers; meetings; staff, etc.
143-665 through 143-669. [Reserved.]

### Article 70.
### Adopt-A-Beach Program.

143-670 through 143-674. [Repealed.]

### Article 71.
### North Carolina Postal History Commission.

143-675. Commission established; purpose; members; terms of office; quorum; compensation; termination.

Sec.
143-676. Powers and duties of the Commission.
143-677. Assignment of property; offices.
143-678. Commission reports.
143-679. Application of Article.
143-680, 143-681. [Reserved.]

### Article 72.
### Commission On Children With Special Health Care Needs.

143-682. Commission established.
143-683. Powers and duties of the Commission.
143-684. Compensation and expenses of Commission members; travel reimbursements.
143-685 through 143-689. [Reserved.]

### Article 73.
### [Reserved.]

143-690 through 143-693. [Reserved.]

### Article 74.
### North Carolina Government Competition Act.

143-701 through 143-709. [Repealed.]
143-710 through 143-714. [Reserved.]

### Article 75.
### Tobacco Trust Fund.

143-715. Policy; purpose.
143-716. Definitions.
143-717. Commission.
143-718. Powers and duties.
143-719. Tobacco Trust Fund; creation; investment; priority use.
143-720. Benefits and administration of Fund for compensatory programs.
143-721. Benefits and administration of Fund for qualified agricultural programs.
143-722. Reporting.
143-723. Open meetings; public records; audit.
143-724. [Reserved.]

### Article 76.
### North Carolina Geographic Information Coordinating Council.

143-725. Council established; role of the Center for Geographic Information and Analysis.
143-726. Council membership; organization.
143-727. Compensation and expenses of Council members; travel reimbursements.
143-728, 143-729. [Reserved.]

**Article 77.**

**Managed Care Patient Assistance Program.**

Sec.
143-730. Managed Care Patient Assistance Program.
143-731 through 143-734. [Reserved.]

**Article 78.**

**Commission on State Property.**

143-735 through 143-737. [Repealed.]
143-738 through 143-744. [Reserved.]

**Article 79.**

**Internal Auditing.**

Sec.
143-745. Definitions; intent; applicability.
143-746. Internal auditing required.
143-747. Council of Internal Auditing.

## ARTICLE 1.

## *Executive Budget Act.*

**§§ 143-1 through 143-34.9:** Repealed by Session Laws 2006-203, s. 1, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter.

**Local Modification.** — Town of Huntersville: (As to Chapter 143) 2009-298.

**Cross References.** — For present provisions relating to the State Budget Act, see Chapter 143C.

**Editor's Note.** — Session Laws 2006-2003, s. 1, provided, in part: "Prosecutions for offenses committed before July 1, 2007 are not abated or affected by the act, and the statutes that would be applicable but for the act remain applicable to those prosecutions."

Session Laws 2007-145, s. 6(a), provides: "Notwithstanding G.S. 143-15.2 and G.S. 143-15.3A, for the 2006-2007 fiscal year only, funds shall not be reserved to the Repairs and Renovations Reserve Account, and the State Controller shall not transfer funds from the unreserved credit balance to the Repairs and Renovations Reserve Account on June 30, 2007."

Session Laws 2007-145, s. 6(b), provides: "Notwithstanding G.S. 143-15.2 and G.S. 143-15.3, for the 2006-2007 fiscal year only, funds shall not be reserved to the Savings Reserve Account, and the State Controller shall not transfer funds from the unreserved credit balance to the Savings Reserve Account on June 30, 2007."

Session Laws 2007-323, s. 2.2(b), provides: "Notwithstanding the provisions of G.S. 143-15.2 and G.S. 143-15.3A, the State Controller shall transfer one hundred forty-five million dollars ($145,000,000) from the unreserved fund balance to the Repairs and Renovations Reserve Account on June 30, 2007. This subsection becomes effective June 30, 2007."

Session Laws 2007-323, s. 2.2(c1), provides: "Notwithstanding G.S. 143-15.2, 143-15.3, and 143C-4-2, the State Controller shall transfer only one hundred seventy-five million dollars ($175,000,000) from the unreserved fund balance to the Savings Reserve Account on June 30, 2007. This is not an 'appropriation made by law', as that phrase is used in Article V, Section 7(1) of the North Carolina Constitution. This subsection becomes effective June 30, 2007."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

## ARTICLE 1A.

## *Periodic Review of Certain State Agencies.*

**§ 143-34.10:** Repealed by Session Laws 1981, c. 932, s. 1.

**Editor's Note.** — This Article, previously numbered Article 1.1, was renumbered as Article 1A pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

### § 143-34.11. Certain General Statutes provisions repealed effective July 1, 1979.

The following statutes are repealed effective July 1, 1979, (except for purposes of the winding-up period, as provided by section 5 of this act):

Chapter 87, Article 3, entitled "Tile Contractors."
Chapter 87, Article 6, entitled "Water Well Contractors."
Chapter 66, Article 9A, entitled "Private Detectives."
Chapter 93C, entitled "Watchmakers."
Chapter 74, Article 6, entitled "Mining Registration." (1977, c. 712, s. 2; 1979, c. 616, s. 9; c. 629; c. 712, s. 6; c. 713, s. 9; c. 736, s. 1; c. 740, s. 1; c. 744, ss. 1-3; c. 750, s. 1; c. 780, s. 3; c. 819, s. 7; c. 834, s. 13; c. 871, s. 2; c. 872, s. 6; c. 904, s. 15.)

**§§ 143-34.12 through 143-34.21:** Repealed by Session Laws 1981, c. 932, s. 1.

**§§ 143-34.22 through 143-34.24:** Reserved for future codification purposes.

## ARTICLE 1.2.

## *Legislative Committee on Agency Review.*

**§§ 143-34.25 through 143-34.27:** Expired.

**Editor's Note.** — This Article has expired pursuant to G.S. 143-34.25(d), which provided that the Committee would terminate and the authority granted by the Article would expire on June 30, 1983.

**§§ 143-34.28 through 143-34.39:** Reserved for future codification purposes.

## ARTICLE 1B.

## *Capital Improvement Planning Act.*

**§§ 143-34.40 through 143-34.45:** Repealed by Session Laws 2006-203, s. 2, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter.

**Editor's Note.** — This article, enacted as Article 1A by S.L. 1997-443, s. 34.9, was redesignated as Article 1B, and the sections in the article enacted as G.S. 143-34.8 to 143-34.8E were redesignated as G.S. 143-34.40 to 143.34.45 at the direction of the Revisor of Statutes.

Session Laws 2006-203, s. 2, provides in part: "Prosecutions for offenses committed before July 1, 2007 are not abated or affected by the act, and the statutes that would be applicable but for the act remain applicable to those prosecutions."

## ARTICLE 2.

## *State Personnel Department.*

### §§ 143-35 through 143-47: Repealed by Session Laws 1965, c. 640, s. 1.

**Cross References.** — For present provisions as to the State Personnel System, see G.S. 126-1 through 126-12.

## ARTICLE 2A.

## *Incentive Award Program for State Employees.*

### §§ 143-47.1 through 143-47.5: Repealed by Session Laws 1965, c. 640, s. 1.

**Cross References.** — For present provisions as to the State Personnel System, see G.S. 126-1 through 126-12.

## ARTICLE 2B.

## *Notice of Appointments to Public Offices.*

### § 143-47.6. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) "Appointing authority" means the Governor, Chief Justice of the Supreme Court, Lieutenant Governor, Speaker of the House, President pro tempore of the Senate, members of the Council of State, all heads of the executive departments of State government, the Board of Governors of The University of North Carolina, and any other person or group authorized by law to appoint to a public office.

(2) "Public office" means appointive membership on any State commission, council, committee, board, including occupational licensing boards as defined in G.S. 93B-1, board of trustees, including boards of constituent institutions of The University of North Carolina and boards of community colleges operated pursuant to Chapter 115D of the General Statutes, and any other State agency created by law, where the appointee is entitled to draw subsistence, per diem compensation, or travel allowances, in whole or in part from funds deposited with the State Treasurer or any other funds subject to being audited by the State Auditor, by reason of his service in the public office; provided that "public office" does not include an office for which a regular salary is paid to the holder as an employee of the State or of one of its departments, agencies, or institutions. (1979, c. 477, s. 1; 1987, c. 564, s. 27.)

## § 143-47.7. Notice and record of appointment required.

(a) Within 30 days after acceptance of appointment by a person appointed to public office, the appointing authority shall file written notice of the appointment with the Governor, the Secretary of State, the Legislative Library, the State Library, the State Ethics Commission, and the State Controller. For the purposes of this section, a copy of the letter from the appointing authority, a copy of the properly executed notice of appointment as set forth in subsection (c) of this section, or a copy of the properly executed Commission of Appointment shall be sufficient to be filed if the copy contains the information required in subsection (b) of this section.

(b) The notice required by this Article shall contain the following information:

(1) The name and office of the appointing authority;
(2) The public office to which the appointment is made;
(3) The name and address of the appointee;
(4) The county of residence of the appointee;
(5) The citation to the law or other authority authorizing the appointment;
(6) The specific statutory qualification for the public office to which the appointment is made, if applicable;
(7) The name of the person the appointee replaces, if applicable;
(8) The date the term of the appointment begins; and
(9) The date the term of the appointment ends.

(c) The following form may be used to comply with the requirements of this section:

"NOTICE OF APPOINTMENT

Notice is given that ____________ is hereby appointed to the following
Name
public office:
Public Office: ______________________________
Citation to Law or Other Authority Authorizing the Appointment:
______________________________
Specific Statutory Qualification for the Public Office, if Applicable:
______________________________
Address of the Appointee: ______________________________
______________________________
______________________________
County of Residence of the Appointee: ______________________________
Date Term of Appointment Begins: ______________________________
Date Term of Appointment Ends: ______________________________
Name of Person the Appointee Replaces, if applicable:
______________________________

______________________________ ______________________________
Date of Appointment Signature
______________________________
Office of Appointing Authority

Distribution:
Governor
Secretary of State
Legislative Library
State Library
State Ethics Commission
State Controller" (1979, c. 477, s. 1; 1991, c. 542, s. 8; 2003-374, s. 2; 2009-549, s. 18.)

**Editor's Note.** — This section, as rewritten by Session Laws 2003-374, s. 2, effective August 31, 2003, is applicable only to appointments made after that date.

**Effect of Amendments.** — Session Laws 2009-549, s. 18, effective August 28, 2009, inserted "the State Ethics Commission," in the first sentence of subsection (a); and added "State Ethics Commission" in the distribution list of the "Notice of Appointment" in subsection (c).

**§ 143-47.8:** Repealed by Session Laws 2003-374, s. 3, effective August 31, 2003.

### § 143-47.9. Subsistence, per diem compensation, and travel allowances conditioned on filing of notice.

No person who has been appointed to any public office and has accepted that appointment shall be entitled to receive subsistence, per diem compensation, or travel allowances unless and until compliance is made with the provisions of G.S. 143-47.7. (1979, c. 477, s. 1.)

**§§ 143-47.10 through 143-47.14:** Reserved for future codification purposes.

## Article 2C.

## *Limit on Number of State Employees.*

**§§ 143-47.15 through 143-47.20:** Repealed by Session Laws 1989, c. 752, s. 45.

**Editor's Note.** — Former G.S. 143-47.16 through 143-47.20 had been reserved for future codification purposes.

## Article 2D.

## *North Carolina Board for Need-Based Student Loans.*

**§§ 143-47.21 through 143-47.24:** Repealed by Session Laws 1987, c. 738, s. 41(c).

**Editor's Note.** — Session Laws 1987, c. 738, s. 41(b) provides: "All funds previously appropriated but not encumbered or expended by the Office of Budget and Management for student loans and scholarships pursuant to G.S. 143-47.21 through G.S. 143-47.24 as repealed by subsection (c) of this section and for administration thereof shall be transferred to The University of North Carolina to be administered by the State Education Assistance Authority, under such rules and regulations as the State Education Assistance Authority may require including all loans or scholarships repaid to the State pursuant to law. The transfer from the Office of Budget and Management to The University of North Carolina, State Education Assistance Authority, has all the elements of a Type I transfer as defined in G.S. 143A-6(a)."

## ARTICLE 3.

## *Purchases and Contracts.*

### § 143-48. State policy; cooperation in promoting the use of small contractors, minority contractors, physically handicapped contractors, and women contractors; purpose; required annual reports.

(a) Policy. — It is the policy of this State to encourage and promote the use of small contractors, minority contractors, physically handicapped contractors, and women contractors in State purchasing of goods and services. All State agencies, institutions and political subdivisions shall cooperate with the Department of Administration and all other State agencies, institutions and political subdivisions in efforts to encourage the use of small contractors, minority contractors, physically handicapped contractors, and women contractors in achieving the purpose of this Article, which is to provide for the effective and economical acquisition, management and disposition of goods and services by and through the Department of Administration.

(b) Reporting. — Every governmental entity required by statute to use the services of the Department of Administration in the purchase of goods and services, every local school administrative unit, and every private, nonprofit corporation other than an institution of higher education or a hospital that receives an appropriation of five hundred thousand dollars ($500,000) or more during a fiscal year from the General Assembly shall report to the department of Administration annually on what percentage of its contract purchases of goods and services, through term contracts and open-market contracts, were from minority-owned businesses, what percentage from female-owned businesses, what percentage from disabled-owned businesses, what percentage from disabled business enterprises and what percentage from nonprofit work centers for the blind and the severely disabled. The same governmental entities shall include in their reports what percentages of the contract bids for such purchases were from such businesses. The Department of Administration shall provide instructions to the reporting entities concerning the manner of reporting and the definitions of the businesses referred to in this act, provided that, for the purposes of this act:

(1) Except as provided in subdivision (1a) of this subsection, a business in one of the categories above means one:
  a. In which at least fifty-one percent (51%) of the business, or of the stock in the case of a corporation, is owned by one or more persons in the category; and
  b. Of which the management and daily business operations are controlled by one or more persons in the category who own it.

(1a) A "disabled business enterprise" means a nonprofit entity whose main purpose is to provide ongoing habilitation, rehabilitation, independent living, and competitive employment for persons who are handicapped through supported employment sites or business operated to provide training and employment and competitive wages.

(1b) A "nonprofit work center for the blind and the severely disabled" means an agency:
  a. Organized under the laws of the United States or this State, operated in the interest of the blind and the severely disabled, the net income of which agency does not inure in whole or in part to the benefit of any shareholder or other individual;
  b. In compliance with any applicable health and safety standard prescribed by the United States Secretary of Labor; and

c. In the production of all commodities or provision of services, employs during the current fiscal year severely handicapped individuals for (i) a minimum of seventy-five percent (75%) of the hours of direct labor required for the production of commodities or provision of services, or (ii) in accordance with the percentage of direct labor required under the terms and conditions of Public Law 92-28 (41 U.S.C. § 46, et seq.) for the production of commodities or provision of services, whichever is less.

(2) A female or a disabled person is not a minority, unless the female or disabled person is also a member of one of the minority groups described in G.S. 143-128(2)a. through d.

(3) A disabled person means a person with a handicapping condition as defined in G.S. 168-1 or G.S. 168A-3.

(c) The Department of Administration shall compile information on small and medium-sized business participation in State contracts subject to this Article and report the information as provided in subsection (d) of this section. The report shall analyze (i) contract awards by business size category, (ii) historical trends in small and medium-sized business participation in these contracts, and (iii) to the extent feasible, participation by small and medium-sized businesses in the State procurement process as dealers, service companies, and other indirect forms of participation. The Department may require reports on contracting by business size in the same manner as reports are required under subsection (b) of this section.

(d) The Department of Administration shall collect and compile the data described in this section and report it annually to the General Assembly.

(d1) Repealed by Session Laws 2007-392, s. 1, effective October 1, 2007.

(e) In seeking contracts with the State, a disabled business enterprise must provide assurances to the Secretary of Administration that the payments that would be received from the State under these contracts are directed to the training and employment of and payment of competitive wages to handicapped employees. (1931, c. 261, s. 1; c. 396; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1983, c. 692, s. 2; 1989 (Reg. Sess., 1990), c. 1051, s. 1; 1993, c. 252, s. 1; 1995, c. 265, s. 2; 1999-20, s. 1; 1999-407, s. 1; 2003-147, s. 6; 2004-203, s. 72(b); 2005-270, s. 1; 2007-392, s. 1.)

**Local Modification.** — (As to Chapter 143, Article 3) Piedmont Triangle International Authority: 1998-55, s. 11; 2002-146, 2.8 (expires January 1, 2010).

**State Government Reorganization.** — The Purchase and Contract Division remains in the Department of Administration under G.S. 143B-368, enacted by Session Laws 1975, c. 879, which repealed former G.S. 143A-82.

**Certification as E-Procurement Compliant.** — Session Laws 2003-147, s. 10(a) through (e) contains provisions encouraging local school administrative units to use the NC E-procurement Service for their purchasing requirements. See same catchline in note to G.S. 115C-522.

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 24.2 provides: "The Director of the Administrative Office of the Courts may establish local community penalties programs and appoint staff the Director considers necessary. These personnel may serve as full-time or part-time State employees or, alternatively, their activities may be provided on a contractual basis when determined appropriate by the Director. The contracts shall be exempt from competitive bidding procedures under Chapter 143 of the General Statutes. The Administrative Office of the Courts shall adopt rules necessary and appropriate for the administration of the program, including rules that allow plans to be presented at the request of the sentencing judge. Funds appropriated by the General Assembly for the establishment and maintenance of community penalties programs under this Article shall be administered by the Administrative Office of the Courts. Any contract entered into under the authority of this section shall expire not later than June 30, 1995."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1997-443, s. 8.24, provides for an appropriation to establish a public-private partnership to encourage, promote, and expand technology in North Carolina Public Schools, provides for the purposes of the partnership, establishes a vocational education computer recycling pilot program, provides that the provisions of Article 3 of Chapter 143 of the General Statutes do not apply to contracts for supplies, materials, equipment, and contractual services to implement these programs, and that the Department of Administration may make its services available to the State Board of Education, when requested. The State Board shall contract with ExplorNet, and ExplorNet shall evaluate the technical components of the program and report to the Information Resources Management Commission by May 15, 1999; the Commission shall submit the evaluation and its comments to the State Board of Education by August 15, 1999, which shall report to the Joint Legislative Education Oversight Committee by September 15, 1999.

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 2003-147, s. 11, provides: "Nothing in this act shall be construed to limit the authority of the Department of Administration to develop, implement, and monitor a pilot program for reverse auctions for public school systems as provided in Section 3 of Chapter 107 of the 2002 Session Laws."

Session Laws 2003-147, s. 12, as amended by Session Laws 2004-203, s. 72(b), provides that the amendment to this section by s. 6 of the act becomes effective for a local school administrative unit when the unit is certified by the Department of Public Instruction as being E-Procurement compliant, as provided in s. 10 of the act, or April 1, 2004, whichever occurs first.

Session Laws 2003-284, s. 8.7, provides: "Notwithstanding any other provision of law, all fees collected by the Hosiery Technology Center of Catawba Valley Community College for the testing of hosiery products shall be retained by the Center and used for the operations of the Center. Purchases made by the Center using these funds are not subject to the provisions of Article 3 of Chapter 143 of the General Statutes. For similar provision, see Session Laws 2002-126, s. 8.10."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003.'"

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2003-435, 1st Ex. Sess., s. 1.2(c), effective December 16, 2003, provides: "Site development funded by money appropriated under this section is not subject to Article 8 of Chapter 143 of the General Statutes (public contracts) or Article 3 of Chapter 143 of the General Statutes (purchases and contracts), except where public funds are expended the provisions of G.S. 143-48 and G.S. 143-128.2 shall apply. Actions involving expenditures of public moneys or use of public lands for projects and programs involved in site development funded by money appropriated under this section are exempt from the requirements of Article 1 of Chapter 113A of the General Statutes. This exemption does not apply to an ordinance adopted under G.S. 113A-8."

Session Laws 2008-201, s. 1, provides: "The North Carolina Department of Administration, Division of Purchase and Contract, is directed to make the following changes to its Request for Proposal criteria for a statewide tire retread contract:

"(1) Require that the bids remain closed until a designated and advertised bid-opening day in which the bids are opened, announced, and recorded in public. The bids shall then be shown and made available to the public.

"(2) Require that the cost of the tire retread include spot repairs and that there no longer be a separate charge for a spot repair.

"(3) Include in the contract that all casings receive a state-of-the-art inspection with the use of shearography, ultrasound, electrostatic discharge, high pressure testing, or other industry standard testing methodology.

"(4) Include a threshold for the number of times a casing may be retreaded.

"(5) Include a threshold for the age of a casing that may be retreaded.

"(6) Include the number of nail hole repairs that are permissible for a casing to be retreaded.

"(7) Provide assurance that a particular fleet will receive its own casings back after retread completed.

"(8) Set minimum tread depths per category or application of the retread tire.

"(9) Consider a multiaward contract structure that includes several vendors; the Office of Purchase and Contract will take into account geographic location, proximity of vendor to customer, and the needs of the users when creating a multiaward contract.

"(10) Provide for any method of tire retreading to be bid separately."

Session Laws 2009-451, s. 9.14(b), provides: "With respect to the demonstration wind turbines and necessary support facilities authorized by subsection (a) of this section, the facilities authorized under this act shall be constructed in accordance with the provisions of general law applicable to the construction of State facilities, except that the State Property Office shall expedite and grant all easements and use agreements required for construction of the facilities without payment of any fee, royalty, or other cost. Notwithstanding any other provision of law, construction of the facilities authorized by this section shall be exempt from the following statutes and rules implementing those statutes: G.S. 143-48 through 143-64, 143-128, 143-129, 143-132, 113A-1 through 113A-10, 113A-50 through 113A-66, and 113A-116 through 113A-128. If Senate Bill 1068, 2009 Regular Session, becomes law, the provisions of Part 12 of Article 21 of Chapter 143 of the General Statutes as enacted by that act shall not apply to the facilities authorized by this section. With respect to any other environmental permits required for construction of the facilities, the Department of Environment and Natural Resources is directed to expedite permitting of the project to the extent allowed by law and shall waive any application fees that would be otherwise applicable to applications for permits required for the facilities and, where possible under applicable law, issue all permits within 40 days of receipt of a complete application." Senate Bill 1068, 2009 Regular Session, did not become law.

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

### OPINIONS OF ATTORNEY GENERAL

**Contracts with Experts, Consultants, or Other Professional Advisors to Review Conversion Plans Are Exempt from Articles 3 and 3C of Chapter 143.** — The Commissioner of Insurance has statutory authority to contract with experts, consultants, or other professional advisors to review conversion plans without adhering to the requirements set forth in Articles 3 and 3C of Chapter 143, G.S. 143-48 et seq. and G.S. 143-64.20 et seq.; the only statutory requirement that must be met by the Commissioner is that the costs for the personal professional service contracts must not exceed an amount that is reasonable and appropriate for the review of the plan. See opinion of Attorney General to Peter A. Kolbe, General Counsel, North Carolina Department of Insurance, 2001 N.C. AG LEXIS 28 (8/24/01).

## § 143-48.1. Medicaid program exemption.

(a) This Article shall not apply to any capitation arrangement or prepaid health service arrangement implemented or administered by the North Carolina Department of Health and Human Services or its delegates pursuant to the Medicaid waiver provisions of 42 U.S.C. § 1396n, or to the Medicaid program authorizations under Chapter 108A of the General Statutes.

(b) As used in this section, the following definitions apply:

(1) "Capitation arrangement" means an agreement whereby the Department of Health and Human Services pays a periodic per enrollee fee to a contract entity that provides medical services to Medicaid recipients during their enrollment period.

(2) "Prepaid health services" means services provided to Medicaid recipients that are paid on the basis of a prepaid capitation fee, pursuant to an agreement between the Department of Health and Human Services and a contract entity. (1993, c. 529, s. 7.4; 1997-443, s. 11A.118(a).)

## § 143-48.2. Procurement program for nonprofit work centers for the blind and the severely disabled.

(a) An agency subject to the provisions of this Article for the procurement of goods may purchase goods directly from a nonprofit work center for the blind and severely disabled, subject to the following provisions:

(1) The purchase may not exceed the applicable expenditure benchmark under G.S. 143-53.1.
(2) The goods must not be available under a State requirements contract.
(3) The goods must be of suitable price and quality, as determined by the agency.

(b) An agency subject to the provisions of this Article for the procurement of services may purchase services directly from a nonprofit work center for the blind and severely disabled, subject to the following provisions:

(1) The services must not be available under a State requirements contract.
(2) The services must be of suitable price and quality, as determined by the agency.

(c) The provisions of G.S. 143-52 shall not apply to purchases made pursuant to this section. However, nothing in this section shall prohibit a nonprofit work center for the blind and severely disabled from submitting bids or making offers for contracts under G.S. 143-52.

(d) For the purpose of this subsection, a "nonprofit work center for the blind and severely disabled" has the same meaning as under G.S. 143-48. (1995, c. 265, ss. 3, 5; 1999-20, s. 1.)

## § 143-48.3. Electronic procurement.

(a) The Department of Administration shall develop and maintain electronic or digital standards for procurement. The Department of Administration shall consult with the Office of the State Controller, the Office of Information Technology Services (ITS), the Department of State Auditor, the Department of State Treasurer, The University of North Carolina General Administration, the Community Colleges System Office, and the Department of Public Instruction.

(a1) The Department of Administration shall comply with the State government-wide technical architecture for information technology, as required by the State Chief Information Officer.

(b) The Department of Administration, in conjunction with the Office of the State Controller and the Office of Information Technology Services may, upon request, provide to all State agencies, universities, and community colleges, training in the use of the electronic procurement system.

(c) The Department of Administration shall utilize the Office of Information Technology Services as an Application Service Provider for an electronic procurement system. The Office of Information Technology Services shall operate this electronic procurement system, through State ownership or commercial leasing, in accordance with the requirements and operating standards developed by the Department of Administration and the financial reporting and accounting procedures of the Office of the State Controller.

(d) This section does not otherwise modify existing law relating to procurement between The University of North Carolina, UNC Health Care, community colleges, and the Department of Administration.

(e) The Board of Governors of The University of North Carolina shall exempt North Carolina State University and The University of North Carolina at Chapel Hill from the electronic procurement system authorized by this Article until May 1, 2003. Each exemption shall be subject to the Board of Governors' annual review and reconsideration. Exempted constituent institutions shall continue working with the North Carolina E-Procurement Service as that system evolves and shall ensure that their proposed procurement systems are compatible with the North Carolina E-Procurement Service so that they may take advantage of this service to the greatest degree possible. Before an exempted institution expands any electronic procurement system, that institution shall consult with the Joint Legislative Commission on Governmental Operations and the Joint Legislative Oversight Committee on Information Technology. By May 1, 2003, the General Assembly shall evaluate the efficacy of the State's electronic procurement system and the inclusion and participation of entities in the system.

(f) Any State entity or community college operating a functional electronic procurement system established prior to September 1, 2001, may until May 1, 2003, continue to operate that system independently or may opt into the North Carolina E-Procurement Service. Each entity subject to this section shall notify the Office of Information Technology Services by January 1 of each year of its intent to participate in the North Carolina E-Procurement Service. (2000-67, s. 7.8; 2000-140, ss. 95(a), 95(b); 2001-424, s. 15.6(b); 2001-513, s. 28(a); 2002-126, ss. 27.1(a), 27.1(b), 27.1(c); 2003-147, s. 7; 2004-129, ss. 40, 40A, 41; 2004-203, s. 72(b).)

**Certification as E-Procurement Compliant.** — Session Laws 2003-147, s. 10(a) through (e) contains provisions encouraging local school administrative units to use the NC E-procurement Service for their purchasing requirements. See same catchline in note to G.S. 115C-522.

**Editor's Note.** — Session Laws 2000-67, s. 7.8, enacted this section as G.S. 143B-472.70, in a new Part 17, Electronic Procurement in Government, in Chapter 143B, Article 10. Session Laws 2000-140, s. 95(a), recodified the section as G.S. 143-48.3. Session Laws 2000-140, s. 95(b), repealed Part 17 of Chapter 143B, Article 10.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 15.6(c), provides: "The Board of Governors of The University of North Carolina shall take appropriate action to encourage the effective utilization of the North Carolina Electronic Procurement Service by the constituent institutions. By April 1, 2002, and annually thereafter, the Department of Administration and the Office of Information Technology Services, in conjunction with the UNC General Administration, shall review the effect of the exemptions granted under subsection (b) of this section [s. 15.6(b) of Session Laws 2001-424] upon the North Carolina Electronic Procurement Service and shall report their findings to the Joint Select Committee on Information Technology and the Joint Legislative Commission on Governmental Operations."

Session Laws 2001-424, s. 31.11(b), provides: "In the event that G.S. 116-40.22 as enacted by this section and Section 15.6 of this act [G.S. 31.62 and 15.6 of Session Laws 2001-424] conflict, then the provisions of section 15.6 control."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5, is a severability clause.

Session Laws 2003-147, s. 11, provides: "Nothing in this act shall be construed to limit the authority of the Department of Administration to develop, implement, and monitor a pilot program for reverse auctions for public school systems as provided in Section 3 of Chapter 107 of the 2002 Session Laws."

Session Laws 2003-147, s. 12, as amended by Session Laws 2004-203, s. 72(b), provides that the amendment to this section by s. 7 of the act becomes effective for a local school administrative unit when the unit is certified by the Department of Public Instruction as being E-Procurement compliant, as provided in s. 10 of the act, or April 1, 2004, whichever occurs first.

## § 143-48.4. Statewide uniform certification of historically underutilized businesses.

(a) In addition to the powers and duties provided in G.S. 143-49, the Secretary of Administration shall have the power, authority, and duty to:

(1) Develop and administer a statewide uniform program for: (i) the certification of a historically underutilized business, as defined in G.S. 143-128.4, for use by State departments, agencies, and institutions, and political subdivisions of the State; and (ii) the creation and

maintenance of a database of the businesses certified as historically underutilized businesses.

(2) Adopt rules and procedures for statewide uniform certification of historically underutilized businesses.

(3) Provide for the certification of all businesses designated as historically underutilized businesses to be used by State departments, agencies, and institutions, and political subdivisions of the State.

(b) The Secretary of Administration shall seek input from State departments, agencies, and institutions, political subdivisions of the State, and any other entity deemed appropriate to determine the qualifications and criteria for statewide uniform certification of historically underutilized businesses.

(c) Only businesses certified in accordance with this section shall be considered by State departments, agencies, and institutions, and political subdivisions of the State as historically underutilized businesses for minority business participation purposes under this Chapter. (2007-392, s. 2; 2009-243, s. 2.)

**Editor's Note.** — Session Laws 2007-392, s. 5 provides: "Except as otherwise provided in this section, this act becomes effective October 1, 2007. The Secretary of Administration shall develop a statewide uniform program and criteria for statewide uniform certification of historically underutilized businesses as provided in G.S. 143-48.4(a)(1) and (2), as enacted by Section 2 of this act, and G.S. 143-128.4(c)(1) and (2), as enacted by Section 4 of this act, no later than March 31, 2008. G.S. 143-48.4(c), as enacted by Section 2 of this act, and G.S. 143-128.4(e), as enacted by Section 4 of this act, become effective July 1, 2009."

**Effect of Amendments.** — Session Laws 2009-243, s. 2, effective June 30, 2009, rewrote subsection (c).

## § 143-49. Powers and duties of Secretary.

The Secretary of Administration shall have power and authority, and it shall be his duty, subject to the provisions of this Article:

(1) To canvass sources of supply, including sources of supply of materials and supplies with recycled content, and to purchase or to contract for the purchase, lease and lease-purchase of all supplies, materials, equipment and other tangible personal property required by the State government, or any of its departments, institutions or agencies under competitive bidding or otherwise as hereinafter provided.

(2) To establish and enforce specifications which shall apply to all supplies, materials and equipment to be purchased or leased for the use of the State government or any of its departments, institutions or agencies.

(3) To purchase or to contract for, by sealed, competitive bidding or other suitable means, all contractual services and needs of the State government, or any of its departments, institutions, or agencies; or to authorize any department, institution or agency to purchase or contract for such services.

When the award of any contract for contractual services exceeding a cost of one hundred thousand dollars ($100,000) requires negotiation with prospective contractors, the Secretary shall request and the Attorney General shall assign a representative of the office of the Attorney General to assist in negotiation for the award of the contract. It shall be the duty of such representative to assist and advise in obtaining the most favorable contract for the State, to evaluate all proposals available from prospective contractors for that purpose, to interpret proposed contract terms and to advise the Secretary or his representatives of the liabilities of the State and validity of the contract to be awarded. All contracts and drafts of such contracts shall be prepared by the office of the Attorney General and copies thereof shall be retained by such office for a period of three years following the termination of such contracts. The term "contractual services" as used in this subsection shall mean work performed by an independent contractor requiring specialized knowledge, experience, expertise or similar capabilities wherein the service rendered does not consist primarily of acquisition by this State of equipment or materials and the rental of equipment, materials and supplies. The term "negotiation" as used herein shall not be deemed to refer to contracts entered into or to be entered into as a result of a competitive bidding process.

(4) To have general supervision of all storerooms and stores operated by the State government, or any of its departments, institutions or agencies and to have supervision of inventories of all tangible personal property belonging to the State government, or any of its departments, institutions or agencies. The duties imposed by this subdivision shall not relieve any department, institution or agency of the State government from accountability for equipment, materials, supplies and tangible personal property under its control.

(5) To make provision for or to contract for all State printing, including all printing, binding, paper stock, recycled paper stock, supplies, and supplies with recycled content, or materials in connection with the same.

(6) To make available to nonprofit corporations operating charitable hospitals, to local nonprofit community sheltered workshops or centers that meet standards established by the Division of Vocational Rehabilitation of the Department of Health and Human Services, to private nonprofit agencies licensed or approved by the Department of Health and Human Services as child placing agencies, residential child-care facilities, private nonprofit rural, community, and migrant health centers designated by the Office of Rural Health and Resource Development, to private higher education institutions that are defined as "institutions" in G.S. 116-22(1), and to counties, cities, towns, local school administrative units, governmental entities and other subdivisions of the State and public agencies thereof in the expenditure of public funds, the services of the Department of Administration in the purchase of materials, supplies and equipment under such rules, regulations and procedures as the Secretary of Administration may adopt. In adopting rules and regulations any or all provisions of this Article may be made applicable to such purchases and contracts made through the Department of Administration, and in addition the rules and regulations shall contain a requirement that payment for all such purchases be made in accordance with the terms of the contract.

(7) To evaluate the nonprofit qualifications and capabilities of qualified work centers to manufacture commodities or perform services.

(8) To establish and maintain a procurement card program for use by State agencies, community colleges, and nonexempted constituent institutions of The University of North Carolina. The Secretary of Administration may adopt temporary rules for the implementation and operation of the program in accordance with the payment policies of the State Controller, after consultation with the Office of Information Technology Services. These rules would include the establishment of appropriate order limits that leverage the cost savings and efficiencies of the procurement card program in conjunction with the fullest possible use of the North Carolina E-Procurement Service. Prior to implementing the program, the Secretary shall consult with the State Controller, the UNC General Administration, the Commu-

nity Colleges System Office, the State Auditor, the Department of Public Instruction, a representative chosen by the local school administrative units, and the Office of Information Technology Services. The Secretary may periodically adjust the order limit authorized in this section after consulting with the State Controller, the UNC General Administration, the Community Colleges System Office, the Department of Public Instruction, and the Office of Information Technology Services. (1931, c. 261, s. 2; 1951, c. 3, s. 1; c. 1127, s. 1; 1957, c. 269, s. 3; 1961, c. 310; 1971, c. 587, s. 1; 1975, c. 580; c. 879, s. 46; 1977, c. 733; 1979, c. 759, s. 1; 1983, c. 717, ss. 60, 62; 1985 (Reg. Sess., 1986), c. 955, ss. 79-82; 1989, c. 408; 1991, c. 358, s. 1; 1993, c. 256, s. 1; 1995, c. 265, ss. 1, 5; 1996, 2nd Ex. Sess., c. 18, s. 24.17; 1997-443, s. 11A.118(a); 1999-20, s. 1; 2000-67, s. 10.9(a); 2001-424, s. 15.6(a); 2001-424, s. 15.6(d); 2001-513, s. 28(b); 2003-147, s. 8; 2004-203, s. 72(b); 2005-213, s. 2; 2006-203, s. 82.)

**Cross References.** — As to settlement of affairs of inoperative boards and agencies, see G.S. 143-267 through 143-272.

**Certification as E-Procurement Compliant.** — Session Laws 2003-147, s. 10(a) through (e) contains provisions encouraging local school administrative units to use the NC E-procurement Service for their purchasing requirements. See same catchline in note to G.S. 115C-522.

**Editor's Note.** — Session Laws 2001-424, s. 15.6(a), effective September 26, 2001, repeals Session Laws 1998-212, s. 20.3, as amended by Session Laws 1999-237, s. 24(a), (b), and Session Laws 2000-67, s. 21.3, which had provided that except as provided by this section, no State agency, community college, constituent institution of The University of North Carolina, or local school administrative unit could use procurement cards for the purchase of equipment or supplies before August 1, 2001, and had provided for a pilot program on the purchase of supplies and equipment by procurement card.

Session Laws 2001-424, s. 15.6(c), provides: "The Board of Governors of The University of North Carolina shall take appropriate action to encourage the effective utilization of the North Carolina Electronic Procurement Service by the constituent institutions. By April 1, 2002, and annually thereafter, the Department of Administration and the Office of Information Technology Services, in conjunction with the UNC General Administration, shall review the effect of the exemptions granted under subsection (b) of this section [s. 15.6(c) of Session Laws 2001-424] upon the North Carolina Electronic Procurement Service and shall report their findings to the Joint Select Committee on Information Technology and the Joint Legislative Commission on Governmental Operations."

Session Laws 2001-424, s. 31.11(b), provides that "In the event that G.S. 116-40.22 as enacted by this section and Section 15.6 of this act [G.S. 31.62 and 15.6 of Session Laws 2001-424] conflict, then the provisions of section 15.6 control."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5, is a severability clause.

Session Laws 2003-147, s. 11, provides: "Nothing in this act shall be construed to limit the authority of the Department of Administration to develop, implement, and monitor a pilot program for reverse auctions for public school systems as provided in Section 3 of Chapter 107 of the 2002 Session Laws."

Session Laws 2003-147, s. 12, as amended by Session Laws 2004-203, s. 72(b), provides that the amendment to this section by s. 8 of the act becomes effective for a local school administrative unit when the unit is certified by the Department of Public Instruction as being E-Procurement compliant, as provided in s. 10 of the act, or April 1, 2004, whichever occurs first.

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 82, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, delete the former last sentence in subdivision (6), which read: "Prior to adopting rules and regulations under this subdivision, the Secretary of Administration may consult with the Advisory Budget Commission."

### CASE NOTES

**The public contracting requirements did not apply to preferred provider contracts** which were not for the needs of the State, but were for the benefit of the individual Plan members. Carolina Medicorp, Inc. v. Board of Trustees, 118 N.C. App. 485, 456 S.E.2d 116 (1995).

**Applied** in Cates v. North Carolina Dep't of Justice, 121 N.C. App. 243, 465 S.E.2d 64 (1996).

### OPINIONS OF ATTORNEY GENERAL

**Cleaning agents and germicides which are unique to hospitals** may properly be termed "hospital supplies," as contemplated under subdivision (6) of this section, which may be purchased by negotiated contract. See opinion of Attorney General to Mr. J.C. Eagles, Jr., Vice Chancellor, Finance, University of North Carolina, 40 N.C.A.G. 736 (1969).

**Proposed contract with a hospital service company** providing for specialized management, supervision and training of Memorial Hospital housecleaning employees, and the furnishing of all cleaning supplies, was not in conflict with the purchase and contract laws relating to supplies. See opinion of Attorney General to Mr. J.C. Eagles, Jr., Vice Chancellor, Finance, University of North Carolina, 40 N.C.A.G. 736 (1969).

**Contracts for Grass Mowing.** — Contracts awarded for grass mowing services along public highways are governed by subdivision (3) of this section. See opinion of Attorney General to D.W. Bailey, P.E., Chief Engineer-Operations, Department of Transportation, 60 N.C.A.G. 97 (1992).

Grass mowing is not substantially related to the functional utility of public highways. As such, contracts for grass mowing services are maintenance service contracts placed under the jurisdiction of the North Carolina Department of Administration by subdivision (3) of this section. See opinion of Attorney General to D.W. Bailey, P.E., Chief Engineer-Operations, Department of Transportation, 60 N.C.A.G. 97 (1992).

## § 143-49.1. Purchases by volunteer nonprofit fire department and lifesaving and rescue squad.

In consideration of public service, any volunteer nonprofit fire department, lifesaving and rescue squad in this State may purchase gas, oil, and tires for their official vehicles and any other materials and supplies under State contract through the Department of Administration, and may purchase surplus property through the Department of Administration on the same basis applicable to counties and municipalities.

The Department of Administration shall make its services available to these organizations in the purchase of such supplies under the same laws, rules and regulations applicable to nonprofit organizations as provided in G.S. 143-49. (1973, c. 442; 1991, c. 199, s. 1.)

## § 143-50. Certain contractual powers exercised by other departments transferred to Secretary.

All rights, powers, duties and authority relating to State printing, or to the acquisition of supplies, materials, equipment, and contractual services, now imposed upon or exercised by any State department, institution or agency under the several statutes relating thereto, are hereby transferred to the Secretary of Administration and all said rights, powers, duty and authority are hereby imposed upon and shall hereafter be exercised by the Secretary of Administration under the provisions of this Article. (1931, c. 261, s. 3; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46.)

## § 143-51. Reports to Secretary required of all agencies as to needs.

It shall be the duty of all departments, institutions, or agencies of the State government to furnish to the Secretary of Administration when requested, and on forms to be prescribed by him, estimates of all supplies, materials, contractual services and equipment needed and required by such department, institution or agency for such periods in advance as may be designated by the Secretary of Administration. (1931, c. 261, s. 4; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1981, c. 602, s. 1.)

### CASE NOTES

**The public contracting requirements did not apply to preferred provider contracts** which were not for the needs of the State, but were for the benefit of the individual Plan members. Carolina Medicorp, Inc. v. Board of Trustees, 118 N.C. App. 485, 456 S.E.2d 116 (1995).

## § 143-52. Competitive bidding procedure; consolidation of estimates by Secretary; bids; awarding of contracts.

(a) As feasible, the Secretary of Administration will compile and consolidate all such estimates of supplies, materials, printing, equipment and contractual services needed and required by State departments, institutions and agencies to determine the total requirements of any given commodity. Where such total requirements will involve an expenditure in excess of the expenditure benchmark established under the provisions of G.S. 143-53.1 and where the competitive bidding procedure is employed as hereinafter provided, sealed bids shall be solicited by advertisement in a newspaper widely distributed in this State or through electronic means, or both, as determined by the Secretary to be most advantageous, at least once and at least 10 days prior to the date designated for opening. Except as otherwise provided under this Article, contracts for the purchase of supplies, materials or equipment shall be based on competitive bids and acceptance made of the lowest and best bid(s) most advantageous to the State as determined upon consideration of the following criteria: prices offered; the quality of the articles offered; the general reputation and performance capabilities of the bidders; the substantial conformity with the specifications and other conditions set forth in the request for bids; the suitability of the articles for the intended use; the personal or related services needed; the transportation charges; the date or dates of delivery and performance; and such other factor(s) deemed pertinent or peculiar to the purchase in question, which if controlling shall be made a matter of record. Competitive bids on such contracts shall be received in accordance with rules and regulations to be adopted by the Secretary of Administration, which rules and regulations shall prescribe for the manner, time and place for proper advertisement for such bids, the time and place when bids will be received, the articles for which such bids are to be submitted and the specifications prescribed for such articles, the number of the articles desired or the duration of the proposed contract, and the amount, if any, of bonds or certified checks to accompany the bids. Bids shall be publicly opened. Any and all bids received may be rejected. Each and every bid conforming to the terms of the invitation, together with the name of the bidder, shall be tabulated and that tabulation shall become public record in accordance with the rules adopted by the Secretary. All contract information shall be made a matter of public record after the award of contract. Provided, that trade secrets, test data and similar proprietary information may remain confidential. A bond for the faithful performance of any contract may be required of the successful bidder at bidder's expense and in the discretion of the Secretary of Administration. When the dollar value of a contract for the purchase, lease, or lease/purchase of equipment, materials, and supplies exceeds the benchmark established by G.S. 143-53.1, the contract shall be reviewed by the Board of Awards pursuant to G.S. 143-52.1 prior to the contract being awarded. After contracts have been awarded, the Secretary of Administration shall certify to the departments, institutions and agencies of the State government the sources of supply and the contract price of the supplies, materials and equipment so contracted for.

(b) **(Expires June 30, 2012)**All contracts for goods, equipment, or services awarded by the Department of Administration, State departments, institutions, agencies, universities, and community colleges using funds from the American Recovery and Reinvestment Act of 2009 (ARRA) (Public Law 111-5) shall be awarded to the maximum extent practicable using fixed-priced contracts and competitive procedures. The Secretary of Administration, in coordination with the Office of Economic Recovery and Investment (OERI), shall adopt rules, regulations, and policies that will promote the efficient and expeditious award of ARRA contracts in compliance with the requirements of ARRA and ARRA's rules, regulations, directives, and guidance, as well as directives issued by OERI. (1931, c. 261, s. 5; 1933, c. 441, s. 1; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1981, c. 602, ss. 2, 3; 1983, c. 717, s. 61; 1985 (Reg. Sess., 1986), c. 955, ss. 83-86; 1989 (Reg. Sess., 1990), c. 936, s. 3(a); 1997-412, s. 2; 1999-434, s. 12; 2006-203, s. 83; 2009-475, s. 1.)

**Cross References.** — As to purchasing flexibility, see G.S. 115D-58.14.

**Editor's Note.** — Session Laws 1993, c. 321, s. 169.2(g) provides that any law that contains "Joint Legislative Highway Oversight Committee" shall be deemed to refer to the "Joint Legislative Transportation Oversight Committee."

Session Laws 1997-443, s. 32.11, provides that the Department of Transportation may enter into a design-build-warrant contract to develop, with Federal Highway Administration participation, a Congestion Avoidance and Reduction for Autos and Trucks (CARAT) system of traffic management in the Charlotte-Mecklenburg urban areas. Notwithstanding any other provision of law, contractors, their employees, and Department of Transportation employees involved in this project only do not have to be licensed by occupational licensing boards, and for the purpose of entering into contracts, the Department of Transportation is exempted from the provisions of G.S. 136-28.1, 143-52, 143-53, 143-58, 143-128, and 143-129; these exemptions are limited and available only to the extent necessary to comply with federal rules, regulations, and policies for completion of this project. The Department shall report quarterly to the Joint Legislative Transportation Oversight Committee on the project. Session Laws from 1991, 1993 and 1995 contained similar provisions.

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2008-201, s. 1, provides: "The North Carolina Department of Administration, Division of Purchase and Contract, is directed to make the following changes to its Request for Proposal criteria for a statewide tire retread contract:

"(1) Require that the bids remain closed until a designated and advertised bid-opening day in which the bids are opened, announced, and recorded in public. The bids shall then be shown and made available to the public.

"(2) Require that the cost of the tire retread include spot repairs and that there no longer be a separate charge for a spot repair.

"(3) Include in the contract that all casings receive a state-of-the-art inspection with the use of shearography, ultrasound, electrostatic discharge, high pressure testing, or other industry standard testing methodology.

"(4) Include a threshold for the number of times a casing may be retreaded.

"(5) Include a threshold for the age of a casing that may be retreaded.

"(6) Include the number of nail hole repairs that are permissible for a casing to be retreaded.

"(7) Provide assurance that a particular fleet will receive its own casings back after retread completed.

"(8) Set minimum tread depths per category or application of the retread tire.

"(9) Consider a multiaward contract structure that includes several vendors; the Office of Purchase and Contract will take into account geographic location, proximity of vendor to customer, and the needs of the users when creating a multiaward contract.

"(10) Provide for any method of tire retreading to be bid separately."

Session Laws 2009-475, s. 15, provides: "The General Assembly finds that it is in the public interest of the State of North Carolina to ensure expeditious awards of ARRA funds to maximize the economic recovery impact of the ARRA. It is the policy of the State to provide fair regulation, oversight, and transparency for the use of ARRA funds and to quickly and efficiently complete the awards of grants and contracts under the ARRA. It is also the policy of this State that, due to the historic level of federal and State oversight of ARRA grant and contract awards, restraint should be exercised in the granting of legal and injunctive relief that might forestall awards to programs and contractors."

**Effect of Amendments.** — Session Laws 2006-203, s. 83, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, deleted the former last sentence, which read: "Prior to adopting rules and regulations under this section, the Secretary of Administration may consult with the Advisory Budget Commission."

Session Laws 2009-475, s. 1, effective February 17, 2009, and expiring June 30, 2012, designated the existing provisions as subsection (a), and added subsection (b).

## CASE NOTES

**Applied** in Sperry Corp. v. Patterson, 73 N.C. App. 123, 325 S.E.2d 642 (1985).

## OPINIONS OF ATTORNEY GENERAL

**The term "lowest responsible bidder" is not to be construed literally.** In determining who is the "lowest responsible bidder," the quality and utility of the thing offered and its adaptability to the purpose for which it is required should be considered. See opinion of Attorney General to Mr. R.D. McMillan, State Purchasing Officer, Division of Purchase and Contract, 40 N.C.A.G. 545 (1969).

**Statutory requirement that the bid shall be awarded to the "lowest responsible bidder" is specifically modified** by statute when it lists the items which are to be taken into consideration, and reserves the right to reject "any bid." See opinion of Attorney General to Mr. R.D. McMillan, State Purchasing Officer, Division of Purchase and Contract, 40 N.C.A.G. 545 (1969).

**Where bids are taken on used aircraft of varying ages,** the Board of Awards may lawfully award the bid to a bidder submitting a higher price for a newer airplane, taking into consideration the age of the aircraft, its market value, its suitability for the purposes for which it will be used and compliance with the specifications. See opinion of Attorney General to Mr. R.D. McMillan, State Purchasing Officer, Division of Purchase and Contract, 40 N.C.A.G. 545 (1969).

**Public Bidding Requirements Not to Be Dispensed with.** — See opinion of Attorney General to Mr. R.D. McMillan, Jr., State Purchasing Officer, Department of Administration, 41 N.C.A.G. 48 (1970).

# § 143-52.1. Board of Awards.

(a) There is created the Board of Awards. The Board shall consist of three members at a time, appointed by the Chair of the Commission. Members of the Board shall be appointed on a rotating basis from the membership of the Commission and the Council of State. Two out of three members appointed for each meeting of the Board shall constitute a quorum of the Board.

(b) The Board shall meet weekly as called by the Chair of the Commission, except in weeks when no contracts have been submitted to the Board for review.

(c) When the dollar value of a contract exceeds the benchmark established either pursuant to G.S. 143-53.1 or G.S. 147-33.101, the Board shall review and make a recommendation on action to be taken by the Secretary of Administration on contracts to be awarded under Article 3 of Chapter 143 of the General Statutes and on contracts to be awarded by the Chief Information Officer under Article 3D of Chapter 147 of the General Statutes, prior to the awarding of the contract.

(d) The State Budget Officer shall designate a secretary for the Board. The Secretary of Administration and the State Chief Information Officer shall each submit their matters for consideration to the secretary for inclusion on the Board's agenda. Records shall be kept of each meeting and made public by the Secretary of Administration or State Chief Information Officer, as applicable unless the Secretary of Administration or State Chief Information Officer, as applicable, determines a specific record of the meeting needs to be confidential due to the nature of the contract. The Secretary of Administration or State Chief Information Officer, as applicable, may elect to proceed with the award of a contract without a recommendation of the Board in cases of emergencies or in the event that a Board is not available. In those cases, contracts awarded without Board review shall be reported to the next meeting of the Board as a matter of record.

(e) Reports on recommendations made by the Board on matters presented by the State Chief Information Officer to the Board shall be reported monthly by the Board to the chairs of the Joint Legislative Oversight Committee on Information Technology. (1999-434, s. 13; 2001-487, s. 21(e); 2004-129, s. 41A.)

**Editor's Note.** — G.S. 143B-472.63, referred to in subsection (c), was repealed by Session Laws 2000-174, s. 1, effective September 1, 2000. As to Board of Awards Review, see now G.S. 147-33.101.

Session Laws 2007-169, s. 2, as amended by Session Laws 2008-187, s. 45, and as amended by Session Laws 2009-474, s. 9, provides: "Notwithstanding G.S. 143-52.1 and S.L. 2006-203, through June 30, 2011, the members of the Advisory Budget Commission in office on June 30, 2007, shall continue to be eligible for appointment to the Board of Awards, and vacancies may be filled by the appointing authority. Through June 30, 2011, the Secretary of Administration shall appoint the Board of Awards from among those eligible."

## § 143-53. Rules.

(a) The Secretary of Administration may adopt rules governing the following:

(1) Prescribing the routine and procedures to be followed in canvassing bids and awarding contracts, and for reviewing decisions made pursuant thereto, and the decision of the reviewing body shall be the final administrative review. The Division of Purchase and Contract shall review and decide a protest on a contract valued at twenty-five thousand dollars ($25,000) or more. The Secretary shall adopt rules or criteria governing the review of and decision on a protest on a contract of less than twenty-five thousand dollars ($25,000) by the agency that awarded the contract.

(2) **(See Editor's note)** Prescribing the routine, including consistent contract language, for securing bids on items that do not exceed the bid value benchmark established under the provisions of G.S. 143-53.1 or G.S. 116-31.10. The purchasing delegation for securing offers (excluding the special responsibility constituent institutions of The University of North Carolina), for each State department, institution, agency, and community college shall be determined by the Director of the Division of Purchase and Contract. For the State agencies this shall be done following the Director's consultation with the State Budget Officer and the State Auditor. The Director for the Division of Purchase and Contract may set or lower the delegation, or raise the

delegation upon written request by the agency, after consideration of their overall capabilities, including staff resources, purchasing compliance reviews, and audit reports of the individual agency. The routine prescribed by the Secretary shall include contract award protest procedures and consistent requirements for advertising of solicitations for securing offers issued by State departments, institutions, universities (including the special responsibility constituent institutions of The University of North Carolina), agencies, community colleges, and the public school administrative units.

(3) Defining contractual services for the purposes of G.S. 143-49(3) and G.S. 143-49(5).

(4) Prescribing items and quantities, and conditions and procedures, governing the acquisition of goods and services which may be delegated to departments, institutions and agencies, notwithstanding any other provisions of this Article.

(5) Prescribing conditions under which purchases and contracts for the purchase, installment or lease-purchase, rental or lease of equipment, materials, supplies or services may be entered into by means other than competitive bidding, including, but not limited to, negotiation, reverse auctions, and acceptance of electronic bids. Reverse auctions may only be utilized for the purchase or exchange of supplies, equipment, and materials as provided in G.S. 115C-522. Notwithstanding the provisions of subsections (a) and (b) of this section, any waiver of competition for the purchase, rental, or lease of equipment, materials, supplies, or services is subject to prior review by the Secretary, if the expenditure exceeds ten thousand dollars ($10,000). The Division may levy a fee, not to exceed one dollar ($1.00), for review of each waiver application.

(6) Prescribing conditions under which partial, progressive and multiple awards may be made.

(7) Prescribing conditions and procedures governing the purchase of used equipment, materials and supplies.

(8) Providing conditions under which bids may be rejected in whole or in part.

(9) Prescribing conditions under which information submitted by bidders or suppliers may be considered proprietary or confidential.

(10) Prescribing procedures for making purchases under programs involving participation by two or more levels or agencies of government, or otherwise with funds other than State-appropriated.

(11) Prescribing procedures to encourage the purchase of North Carolina farm products, and products of North Carolina manufacturing enterprises.

(12) Repealed by Session Laws 1987, c. 827, s. 216.

(b) In adopting the rules authorized by subsection (a) of this section, the Secretary shall include special provisions for the purchase of goods and services, which provisions are necessary to meet the documented training, work, or independent living needs of persons with disabilities according to the requirements of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act, as amended. The Secretary may consult with other agencies having expertise in meeting the needs of individuals with disabilities in developing these provisions. These special provisions shall establish purchasing procedures that:

(1) Provide for the involvement of the individual in the choice of particular goods, service providers, and in the methods used to provide the goods and services;

(2) Provide the flexibility necessary to meet those varying needs of individuals that are related to their disabilities;

(3) Allow for purchase outside of certified sources of supply and competitive bidding when a single source can provide multiple pieces of equipment, including adaptive equipment, that are more compatible with each other than they would be if they were purchased from multiple vendors;

(4) Permit priority consideration for vendors who have the expertise to provide appropriate and necessary training for the users of the equipment and who will guarantee prompt service, ongoing support, and maintenance of this equipment;

(5) Permit agencies to give priority consideration to suppliers offering the earliest possible delivery date of goods or services especially when a time factor is crucial to the individual's ability to secure a job, meet the probationary training periods of employment, continue to meet job requirements, or avoid residential placement in an institutional setting; and

(6) Allow consideration of the convenience of the provider's location for the individual with the disability.

In developing these purchasing provisions, the Secretary shall also consider the following criteria: (i) cost-effectiveness, (ii) quality, (iii) the provider's general reputation and performance capabilities, (iv) substantial conformity with specifications and other conditions set forth for these purchases, (v) the suitability of the goods or services for the intended use, (vi) the personal or other related services needed, (vii) transportation charges, and (viii) any other factors the Secretary considers pertinent to the purchases in question.

(c) The purpose of rules promulgated hereunder shall be to promote sound purchasing management.

(d) Notwithstanding the provisions of this section or any rule adopted pursuant to this Article, The University of North Carolina may solicit bids for service contracts with a term of 10 years or less, including extensions and renewals, without the prior approval of the State Purchasing Officer.

(e) **(Expires June 30, 2012)** The Secretary of Administration, in coordination with the Office of Economic Recovery and Investment (OERI), shall adopt rules, policies, and regulations regarding the requisition, issuance, advertising, opening, evaluation, award, protests, contract performance, contract administration, default, termination, and debarment for all contracts for goods, equipment, or services to be awarded by the Department of Administration, State departments, institutions, agencies, universities, and community colleges using funds from and to meet the goals of the American Recovery and Reinvestment Act of 2009 (ARRA) (Public Law 111-5). The rules adopted under this subsection shall be adopted in accordance with G.S. 150B-21.1B. (1931, c. 261, s. 5; 1933, c. 441, s. 1; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1981, c. 602, s. 4; 1983, c. 717, ss. 63-64.1; 1985 (Reg. Sess., 1986), c. 955, ss. 87, 88; 1987, c. 827, s. 216; 1989 (Reg. Sess., 1990), c. 936, s. 3(b); 1995, c. 256, s. 1; 1997-412, s. 3; 1998-217, s. 15; 1999-400, ss. 1, 2; 2002-107, s. 2; 2003-147, s. 9; 2004-203, s. 72(b); 2005-125, s. 1; 2006-203, s. 84; 2009-475, s. 2.)

**Certification as E-Procurement Compliant.** — Session Laws 2003-147, s. 10(a) through (e) contains provisions encouraging local school administrative units to use the NC E-procurement Service for their purchasing requirements. See same catchline in note to G.S. 115C-522.

**Editor's Note.** — As to exemption of the Department of Transportation from the provisions of this section for the purpose of entering into contracts with respect to the development of a "Congestion Avoidance and Reduction for Autos and Truck (CARAT)" system of traffic management for the greater Charlotte-Mecklenburg urban areas, see Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 94, Session Laws 1993, c. 321, s. 162, Session Laws 1995, c. 324, s. 18.14, and Session Laws 1997-443, s. 32.11.

Session Laws 1999-400, which amended subdivisions (a)(1) and (a)(5), provided that the act would not apply to an agency, board, department, institution, or commission that is exempt from Article 3 of Chapter 143 of the General Statutes or from the provisions of that Article that require certain contracts to be awarded by the Department of Administration.

Session Laws 1999-405, s. 7.1, provided that if Senate Bill 968 became law, the amendments made by Senate Bill 968, which added the last two sentences to subdivision (a)(1) and the last two sentences to subdivision (a)(5), do not apply to Special Responsibility Constituent Institutions as designated by the Board of Governors of The University of North Carolina pursuant to G.S. 116-30.1. Senate Bill 968 was enacted as Session Laws 1999-400, effective September 1, 1999.

Session Laws 2002-107, s. 3, provides: "Notwithstanding any other provision of law to the contrary, the Secretary may conduct a pilot program for reverse auctions. The reverse auctions shall be utilized only for the purchase or exchange of those supplies, equipment, and materials as provided in G.S. 115C-522, for use by the public school systems. The Secretary shall report the results of the pilot program to the Joint Select Committee on Information Technology, upon the convening of the 2003 General Assembly."

Session Laws 2003-147, s. 11, provides: "Nothing in this act [giving local boards of education additional purchasing flexibility and encouraging them to use the NC E-Procurement Service] shall be construed to limit the authority of the Department of Administration to develop, implement, and monitor a pilot program for reverse auctions for public school systems as provided in Section 3 of Chapter 107 of the 2002 Session Laws."

Session Laws 2003-147, s. 12, as amended by Session Laws 2004-203, s. 72(b), provides: "Sections 1 through 9 of this act become effective for a local school administrative unit when the unit is certified by the Department of Public Instruction as being E-Procurement compliant, as provided in Section 10 of this act, or April 1, 2004, whichever occurs first."

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2009-475, s. 15, provides: "The General Assembly finds that it is in the public interest of the State of North Carolina to ensure expeditious awards of ARRA funds to maximize the economic recovery impact of the ARRA. It is the policy of the State to provide fair regulation, oversight, and transparency for the use of ARRA funds and to quickly and efficiently complete the awards of grants and contracts under the ARRA. It is also the policy of this State that, due to the historic level of federal and State oversight of ARRA grant and contract awards, restraint should be exercised in the granting of legal and injunctive relief that might forestall awards to programs and contractors."

**Effect of Amendments.** — Session Laws 2006-203, s. 84, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, deleted the former second paragraph of subsection (c), which read: "Prior to adopting rules under this section, the Secretary of Administration may consult with the Advisory Budget Commission."

Session Laws 2009-475, s. 2, effective February 17, 2009, and expiring June 30, 2012, added subsection (e).

**Legal Periodicals.** — For 1997 legislative survey, see 20 Campbell L. Rev. 437.

## CASE NOTES

**Applied** in Sperry Corp. v. Patterson, 73 N.C. App. 123, 325 S.E.2d 642 (1985).

## § 143-53.1. Setting of benchmarks; increase by Secretary.

(a) **(Effective until June 30, 2012)** On and after July 1, 1997, the procedures prescribed by G.S. 143-52 with respect to competitive bids and the bid value benchmark authorized by G.S. 143-53(a)(2) with respect to rule making by the Secretary of Administration for competitive bidding shall be no more than twenty-five thousand dollars ($25,000); provided, the Secretary of Administration may, in his or her discretion, increase the benchmarks effective as of the beginning of any fiscal biennium of the State commencing after June 30, 1999, in an amount whose increase, expressed as a percentage, does not exceed the rise in the Consumer Price Index during the fiscal biennium next preceding the effective date of the benchmark increase. For a special responsibility constituent institution of The University of North Carolina, the

**G.S. 143-53.1(a) is set out twice. See note.**

benchmark prescribed in this section shall be as provided in G.S. 116-31.10. For community colleges, the benchmark prescribed in this section shall be as provided in G.S. 115D-58.14.

(a) **(Effective June 30, 2012)** On and after July 1, 1997, the procedures prescribed by G.S. 143-52 with respect to competitive bids and the bid value benchmark authorized by G.S. 143-53(a)(2) with respect to rule making by the Secretary of Administration for competitive bidding shall be no more than twenty-five thousand dollars ($25,000); provided, the Secretary of Administration may, in his or her discretion, increase the benchmarks effective as of the beginning of any fiscal biennium of the State commencing after June 30, 1999, in an amount whose increase, expressed as a percentage, does not exceed the rise in the Consumer Price Index during the fiscal biennium next preceding the effective date of the benchmark increase. For a special responsibility constituent institution of The University of North Carolina, the benchmark prescribed in this section shall be as provided in G.S. 116-31.10.

(b) **(Expires June 30, 2012)** The benchmarks set by the Secretary of Administration, The University of North Carolina, and the State Board of Community Colleges in subsection (a) of this section shall be applicable to all contracts for goods, equipment, or services awarded by the Department of Administration, State departments, institutions, agencies, universities, and community colleges using funds from the American Recovery and Reinvestment Act of 2009 (Public Law 111-5). (1989 (Reg. Sess., 1990), c. 936, s. 3(c); 1991, c. 689, s. 206.2(b); 1993 (Reg. Sess., 1994), c. 591, s. 10(a); c. 769, s. 17.6(b); 1997-412, s. 4; 2009-475, s. 5.)

**Subsection (a) Set Out Twice.** — The first version of subsection (a) set out above is effective until June 30, 2012. The second version of subsection (a) set out above is effective June 30, 2012.

**Cross References.** — As to purchasing flexibility for community colleges, see G.S. 115D-58.14.

**Editor's Note.** — Session Laws 2009-475, s. 15, provides: "The General Assembly finds that it is in the public interest of the State of North Carolina to ensure expeditious awards of ARRA funds to maximize the economic recovery impact of the ARRA. It is the policy of the State to provide fair regulation, oversight, and transparency for the use of ARRA funds and to quickly and efficiently complete the awards of grants and contracts under the ARRA. It is also the policy of this State that, due to the historic level of federal and State oversight of ARRA grant and contract awards, restraint should be exercised in the granting of legal and injunctive relief that might forestall awards to programs and contractors."

**Effect of Amendments.** — Session Laws 2009-475, s. 5, effective February 17, 2009, and expiring June 30, 2012, designated the previously existing provisions as subsection (a); added the last sentence in subsection (a); and added subsection (b).

## § 143-54. Certification that bids were submitted without collusion.

(a) The Director of Administration shall require bidders to certify that each bid is submitted competitively and without collusion. False certification is a Class I felony.

(b) **(Expires June 30, 2012)** The certification required by subsection (a) of this section shall be applicable to all bids and proposals for contracts for goods, equipment, or services awarded by the Department of Administration, State departments, institutions, agencies, universities, and community colleges using funds from the American Recovery and Reinvestment Act of 2009 (Public Law 111-5). (1961, c. 963; 1971, c. 587, s. 1; 1993, c. 539, s. 1310; 1994, Ex. Sess., c. 24, s. 14(c); 2009-475, s. 6.)

**Editor's Note.** — Session Laws 2009-475, s. 15, provides: "The General Assembly finds that it is in the public interest of the State of North Carolina to ensure expeditious awards of ARRA funds to maximize the economic recovery impact of the ARRA. It is the policy of the State to provide fair regulation, oversight, and transparency for the use of ARRA funds and to quickly and efficiently complete the awards of grants and contracts under the ARRA. It is also the policy of this State that, due to the historic level of federal and State oversight of ARRA grant and contract awards, restraint should be exercised in the granting of legal and injunctive relief that might forestall awards to programs and contractors."

**Effect of Amendments.** — Session Laws 2009-475, s. 6, effective February 17, 2009, and expiring June 30, 2012, designated the existing provisions as subsection (a) and added subsection (b).

## § 143-55. Requisitioning for supplies by agencies; must purchase through sources certified.

(a) Unless otherwise provided by law, after sources of supply have been established by contract and certified by the Secretary of Administration to the said departments, institutions and agencies as herein provided for, it shall be the duty of all departments, institutions and agencies to make requisition or issue orders on forms to be prescribed by the Secretary of Administration, for all supplies, materials and equipment required by them upon the sources of supply so certified, and, except as herein otherwise provided for, it shall be unlawful for them, or any of them, to purchase any supplies, materials or equipment from other sources than those certified by the Secretary of Administration. One copy of such requisition or order shall be furnished to and when requested by the Secretary of Administration.

(b) **(Expires June 30, 2012)** The acquisition of supplies, materials, goods, equipment, or services using funds from the American Recovery and Reinvestment Act of 2009 (ARRA) (Public Law 111-5) shall be exempt from the contracts certified by the Secretary of Administration in subsection (a) of this section. However, the Secretary of Administration, in coordination with the Office of Economic Recovery and Investment, may approve the use of term contracts in limited circumstances where such contracts provide the best means to accomplish the goals of ARRA. In addition, the Secretary of Administration shall provide notice to the vendors on the certified contracts of the opportunity to submit bids or proposals for contracts using ARRA funds. (1931, c. 261, s. 6; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 2006-264, s. 59(c); 2009-475, s. 7.)

**Editor's Note.** — Session Laws 2009-475, s. 15, provides: "The General Assembly finds that it is in the public interest of the State of North Carolina to ensure expeditious awards of ARRA funds to maximize the economic recovery impact of the ARRA. It is the policy of the State to provide fair regulation, oversight, and transparency for the use of ARRA funds and to quickly and efficiently complete the awards of grants and contracts under the ARRA. It is also the policy of this State that, due to the historic level of federal and State oversight of ARRA grant and contract awards, restraint should be exercised in the granting of legal and injunctive relief that might forestall awards to programs and contractors."

**Effect of Amendments.** — Session Laws 2009-475, s. 7, effective February 17, 2009, and expiring June 30, 2012, designated the previously existing provisions as subsection (a) and added subsection (b).

## § 143-56. Certain purchases excepted from provisions of Article.

Unless as may otherwise be ordered by the Secretary of Administration, the purchase of supplies, materials and equipment through the Secretary of Administration shall be mandatory in the following cases:

(1) Published books, manuscripts, maps, pamphlets and periodicals.

(2) Perishable articles such as fresh vegetables, fresh fish, fresh meat, eggs, and others as may be classified by the Secretary of Administration.

Purchase through the Secretary of Administration shall not be mandatory for information technology purchased in accordance with Article 3D of Chapter 147 of the General Statutes, for a purchase of supplies, materials or equipment for the General Assembly if the total expenditures is less than the expenditure benchmark established under the provisions of G.S. 143-53.1, for group purchases made by hospitals, developmental centers, neuromedical treatment centers, and alcohol and drug abuse treatment centers through a competitive bidding purchasing program, as defined in G.S. 143-129, by the University of North Carolina Health Care System pursuant to G.S. 116-37(h), by the University of North Carolina Hospitals at Chapel Hill pursuant to G.S. 116-37(a)(4), by the University of North Carolina at Chapel Hill on behalf of the clinical patient care programs of the School of Medicine of the University of North Carolina at Chapel Hill pursuant to G.S. 116-37(a)(4), or by East Carolina University on behalf of the Medical Faculty Practice Plan pursuant to G.S. 116-40.6(c).

All purchases of the above articles made directly by the departments, institutions and agencies of the State government shall, whenever possible, be based on competitive bids. Whenever an order is placed or contract awarded for such articles by any of the departments, institutions and agencies of the State government, a copy of such order or contract shall be forwarded to the Secretary of Administration and a record of the competitive bids upon which it was based shall be retained for inspection and review. (1931, c. 261, s. 7; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1981, c. 953; 1983, c. 717, ss. 65, 66; 1985, c. 145, s. 3; 1989 (Reg. Sess., 1990), c. 936, s. 3(e); 1998-212, s. 11.8(c); 1999-434, s. 14; 1999-456, s. 7; 2001-487, s. 21(f); 2009-184, s. 1.)

**Effect of Amendments.** — Session Laws 2009-184, s. 1, effective June 26, 2009, and applicable to purchases made on and after that date, inserted "developmental centers, neuromedical treatment centers, and alcohol and drug abuse treatment centers" and made a related punctuation change in the second paragraph.

## § 143-57. Purchases of articles in certain emergencies.

In case of any emergency or pressing need arising from unforeseen causes including but not limited to delay by contractors, delay in transportation, breakdown in machinery, or unanticipated volume of work, the Secretary of Administration shall have power to obtain or authorize obtaining in the open market any necessary supplies, materials, equipment, printing or services for immediate delivery to any department, institution or agency of the State government. A report on the circumstances of such emergency or need and the transactions thereunder shall be made a matter of record promptly thereafter. If the expenditure exceeds ten thousand dollars ($10,000), the report shall also be made promptly thereafter to the Division of Purchase and Contract. (1931, c. 261, s. 8; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1999-400, s. 3.)

**Editor's Note.** — Session Laws 1999-400, s. 3.1, provided that the act would apply to an agency, board, department, institution, or commission that is exempt from Article 3 of Chapter 143 of the General Statutes or from the provisions of that Article that require certain contracts to be awarded by the Department of Administration.

Session Laws 1999-405, s. 7.1, provided that if Senate Bill 968 became law, the amendments made by Senate Bill 968, which added the last sentence, does not apply to Special Responsibility Constituent Institutions as designated by the Board of Governors of The University of North Carolina pursuant to G.S. 116-30.1. Senate Bill 968 was enacted as Session Laws 1999-400, effective September 1, 1999.

## § 143-57.1. Furniture requirements contracts.

(a) To ensure agencies access to sufficient sources of furniture supply and service, to provide agencies the necessary flexibility to obtain furniture that is compatible with interior architectural design and needs, to provide small and disadvantaged businesses additional opportunities to participate on State requirements contracts, and to restore the traditional use of multiple award contracts for purchasing furniture requirements, each State furniture requirements contract shall be awarded on a multiple award basis, subject to the following conditions:

(1) Competitive, sealed bids must be solicited for the contract in accordance with Article 3 of Chapter 143 of the General Statutes unless otherwise provided for by the State Purchasing Officer pursuant to that Article. Bids shall be solicited on a historical weighted average of specific contract items and not on a single item within a class of items. Historical weighted average shall be based on information derived from the State's electronic procurement system, when available, or other available data.

(2) Subject to the provisions of this section, bids shall be evaluated and the contract awarded in accordance with Article 3 of Chapter 143 of the General Statutes.

(3) For each category of goods under each State requirements furniture contract, awards shall be made to at least three qualified vendors unless three qualified vendors are not available. Additionally, if the State Purchasing Officer determines that there are no qualified vendors within the three best qualified vendors who offer furniture manufactured or produced in North Carolina or who are incorporated in the State, the State Purchasing Officer shall expand the number of qualified vendors awarded contracts to as many qualified vendors as is necessary to include a qualified vendor who offers furniture manufactured or produced in North Carolina or who is incorporated in the State, but the State Purchasing Officer shall not be required to expand the number of qualified vendors to more than six qualified vendors. A vendor is qualified under this section if the vendor's products conform to the term contract specifications, the vendor is listed on the State's qualified products list, and the vendor submits a responsive bid.

(4) An agency may purchase from any vendor certified on the contract but shall make the most economical purchase that it determines meets its needs, based upon price, compatibility, service, delivery, freight charges, and other factors that it considers relevant.

(b) For purposes of this section, "furniture requirements contract" means State requirements contracts for casegoods, classroom furniture, bookcases, ergonomic chairs, office swivel and side chairs, computer furniture, mobile and folding furniture, upholstered seating, commercial dining tables, and related items. (1995, c. 136, ss. 1, 3; 1995 (Reg. Sess., 1996), c. 716, s. 30; 2004-115, s. 1.)

**Editor's Note.** — Session Laws 1995, c. 136, ss. 1, 3, were codified as this section at the direction of the Revisor of Statutes.

Session Laws 1995 (Reg. Sess., 1996), c. 716, s. 31, provides: "With repect to a furniture requirements contract that is not currently under G.S. 143-57.1, an agency may purchase from any vendor certified on the contract but shall make the most economical purchase that it determines meets its needs, based upon price, compatibility, service, delivery, and other factors that it considers relevant."

Subdivisions (a)(1) and (a)(3), as amended by Session Laws 2004-115, s. 1, effective July 1, 2004, are applicable to contracts advertised for bid on or after that date.

## § 143-58. Contracts contrary to provisions of Article made void.

If any department, institution or agency of the State government, required by this Article and the rules adopted pursuant thereto applying to the purchase or lease of supplies, materials, equipment, printing or services through the Secretary of Administration, or any nonstate institution, agency or instrumentality duly authorized or required to make purchases through the Department of Administration, shall contract for the purchase or lease of such supplies, materials, equipment, printing or services contrary to the provisions of this Article or the rules made hereunder, such contract shall be void and of no effect. If any such State or nonstate department, institution, agency or instrumentality purchases any supplies, materials, equipment, printing or services contrary to the provisions of this Article or the rules made hereunder, the executive officer of such department, institution, agency or instrumentality shall be personally liable for the costs thereof. (1931, c. 261, s. 9; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1977, c. 148, s. 3; 1987, c. 827, s. 217.)

**Editor's Note.** — As to exemption of the Department of Transportation from the provisions of this section for the purpose of entering into contracts with respect to the development of a "Congestion Avoidance and Reduction for Autos and Trucks (CARAT)" system of traffic management for the greater Charlotte-Mecklenburg urban areas, see Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 94, Session Laws 1993, c. 321, s. 162, Session Laws 1995, c. 324, s. 18.14, and Session Laws 1997-443, s. 32.11.

### CASE NOTES

**Cited** in Carolina Medicorp, Inc. v. Board of Trustees, 118 N.C. App. 485, 456 S.E.2d 116 (1995).

## § 143-58.1. Unauthorized use of public purchase or contract procedures for private benefit.

(a) It shall be unlawful for any person, by the use of the powers, policies or procedures described in this Article or established hereunder, to purchase, attempt to purchase, procure or attempt to procure any property or services for private use or benefit.

(b) This prohibition shall not apply if:

(1) The department, institution or agency through which the property or services are procured had theretofore established policies and procedures permitting such purchases or procurement by a class or classes of persons in order to provide for the mutual benefit of such persons and the department, institution or agency involved, or the public benefit or convenience; and

(2) Such policies and procedures, including any reimbursement policies, are complied with by the person permitted thereunder to use the purchasing or procurement procedures described in this Article or established thereunder.

(c) A violation of this section is a Class 1 misdemeanor. (1983, c. 409; 1993, c. 539, s. 1004; 1994, Ex. Sess., c. 24, s. 14(c).)

## § 143-58.2. State policy; bid procedures and specifications; identification of products.

(a) It is the policy of this State to encourage and promote the purchase of products with recycled content. All State departments, institutions, agencies, community colleges, and local school administrative units shall, to the extent economically practicable, purchase and use, or require the purchase and use of, products with recycled content.

(b) No later than January 1, 1995, the Secretary of Administration and each State department, institution, agency, community college, and local school administrative unit authorized to purchase materials and supplies or to contract for services shall review and revise its bid procedures and specifications for the purchase or use of materials and supplies to eliminate any procedures and specifications that explicitly discriminate against materials and supplies with recycled content, except where procedures and specifications are necessary to protect the health, safety, and welfare of the citizens of this State.

(c) The Secretary of Administration and each State department, institution, agency, community college, and local school administrative unit shall review and revise its bid procedures and specifications on a continuing basis to encourage the purchase or use of materials and supplies with recycled content and to the extent economically practicable, the use of materials and supplies with recycled content.

(d) The Department of Administration, in cooperation with the Division of Pollution Prevention and Environmental Assistance of the Department of Environment and Natural Resources, shall identify materials and supplies with recycled content that meet appropriate standards for use by State departments, institutions, agencies, community colleges, and local school administrative units.

(e) A list of materials and supplies with recycled content that are identified pursuant to subsection (d) of this section and that are available for purchase under a statewide term contract shall be distributed annually to each State agency authorized to purchase materials and supplies for use by its departments, institutions, agencies, community colleges, or local school administrative units.

(f) Repealed by Session Laws 2009-484, s. 15, effective January 1, 2010.

(g) The Department of Administration and the Department of Environment and Natural Resources shall develop guidelines for minimum content standards for materials and supplies with recycled content and may recommend appropriate goals in addition to those goals set forth in G.S. 143-58.3, for types of materials and supplies with recycled content to be purchased by the State.

(h) The Secretary of Administration may adopt rules to implement the provisions of this section and G.S. 143-58.3. (1993, c. 256, s. 2; 1995 (Reg. Sess., 1996), c. 743, ss. 10, 11; 1997-443, s. 11A.119(a); 2001-452, s. 3.7; 2009-484, s. 15.)

**Editor's Note.** — Session Laws 2008-201, s. 1, provides: "The North Carolina Department of Administration, Division of Purchase and Contract, is directed to make the following changes to its Request for Proposal criteria for a statewide tire retread contract:

"(1) Require that the bids remain closed until a designated and advertised bid-opening day in which the bids are opened, announced, and recorded in public. The bids shall then be shown and made available to the public.

"(2) Require that the cost of the tire retread include spot repairs and that there no longer be a separate charge for a spot repair.

"(3) Include in the contract that all casings receive a state-of-the-art inspection with the use of shearography, ultrasound, electrostatic discharge, high pressure testing, or other industry standard testing methodology.

"(4) Include a threshold for the number of times a casing may be retreaded.

"(5) Include a threshold for the age of a casing that may be retreaded.

"(6) Include the number of nail hole repairs that are permissible for a casing to be retreaded.

"(7) Provide assurance that a particular fleet will receive its own casings back after retread completed.

"(8) Set minimum tread depths per category or application of the retread tire.

"(9) Consider a multiaward contract structure that includes several vendors; the Office of Purchase and Contract will take into account geographic location, proximity of vendor to customer, and the needs of the users when creating a multiaward contract.

"(10) Provide for any method of tire retreading to be bid separately."

**Effect of Amendments.** — Session Laws 2009-484, s. 15, effective January 1, 2010, repealed subsection (f), pertaining to annual reports to the Division of Pollution Prevention and Environmental Assistance of the Department of Environment and Natural Resources.

## § 143-58.3. Purchase of recycled paper and paper products; goals.

In furtherance of the State policy, it is the goal of the State that each department, institution, agency, community college, and local school administrative unit purchase paper and paper products with recycled content according to the following schedule:

(1) At least ten percent (10%) by June 30, 1994;
(2) At least twenty percent (20%) by June 30, 1995;
(3) At least thirty-five percent (35%) by June 30, 1996; and
(4) At least fifty percent (50%) by June 30, 1997, and the end of each subsequent fiscal year,

of the total amount spent for the purchase of paper and paper products during that fiscal year. (1993, c. 256, s. 2.)

## § 143-58.4. Energy credit banking and selling program.

(a) The following definitions apply in this section:

(1) AFV. — A hybrid electric vehicle that derives its transportation energy from gasoline and electricity. AFV also means an original equipment manufactured vehicle that operates on compressed natural gas, propane, or electricity.
(2) Alternative fuel. — Biodiesel, biodiesel blend, ethanol, compressed natural gas, propane, and electricity used as a transportation fuel in blends or in a manner as defined by the Energy Policy Act.
(3) B-20. — A blend of twenty percent (20%) by volume biodiesel fuel and eighty percent (80%) by volume petroleum-based diesel fuel.
(3a) Biodiesel. — A fuel comprised of mono-alkyl esters of long fatty acids derived from vegetable oils or animal fats, designated B100 and meeting the requirements of the American Society for Testing and Materials (ASTM) D-6751.
(3b) Biodiesel blend. — A blend of biodiesel fuel with petroleum-based diesel fuel, designated BXX where XX represents the percentage of volume of fuel in the blend meeting the requirements of ASTM D-6751.
(4) Department. — The Department of Commerce.
(5) Energy Policy Act. — The federal Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2782, 42 U.S.C. § 13201, et seq.
(6) EPAct credit. — A credit issued pursuant to the Energy Policy Act.
(7) E-85. — A blend of eighty-five percent (85%) by volume ethanol and fifteen percent (15%) by volume gasoline.
(8) Incremental fuel cost. — The difference in cost between an alternative fuel and conventional petroleum fuel at the time the fuel is purchased.
(9) Incremental vehicle cost. — The difference in cost between an AFV and conventional vehicle of the same make and model. For vehicles with

no comparable conventional model, incremental vehicle cost means the generally accepted difference in cost between an AFV and a similar conventional model.

(b) Establish Program. — The State Energy Office of the Department, in cooperation with State departments, institutions, and agencies, shall establish and administer an energy credit banking and selling program to allow State departments, institutions, and agencies to use moneys generated by the sale of EPAct credits to purchase alternative fuel, develop alternative fuel refueling infrastructure, and purchase AFVs for use by State departments, institutions, and agencies. Each State department, institution, and agency shall provide the State Energy Office with all vehicle fleet information necessary to determine the number of EPAct credits generated annually by the State. The State Energy Office may sell credits in any manner that is in accordance with the provisions of the Energy Policy Act.

(c) Adopt Rules. — The Secretary of Commerce shall adopt rules as necessary to implement this section. (2005-413, s. 1; 2009-237, s. 1; 2009-446, s. 1(g), (h).)

**Editor's Note.** — Session Laws 2005-413, s. 9, made this section effective January 1, 2006.

**Effect of Amendments.** — Session Laws 2009-237, s. 1, effective July 1, 2009, in subsection (a), in the introductory language, substituted "The following definitions apply" for "As used"; in subdivision (a)(2), inserted "biodiesel blend"; added subdivisions (a)(3a) and (a)(3b); and made stylistic and punctuation changes throughout.

Session Laws 2009-446, s. 1(g) and (h), effective August 7, 2009, substituted "Commerce" for "Administration" in subdivision (a)(4) and subsection (c).

## § 143-58.5. Alternative Fuel Revolving Fund.

(a) The definitions set out in G.S. 143-58.4 apply to this section.

(b) The Alternative Fuel Revolving Fund is created and shall be held by the State Treasurer. The Fund shall consist of moneys received from the sale of EPAct credits under G.S. 143-58.4, any moneys appropriated to the Fund by the General Assembly, and any moneys obtained or accepted by the Department for deposit into the Fund. The Fund shall be managed to maximize benefits to the State for the purchase of alternative fuel, related refueling infrastructure, and AFV purchases. To the extent possible, benefits from the sale of EPAct credit shall be distributed to State departments, institutions, and agencies in proportion to the number of EPAct credits generated by each. No portion of the Fund shall be transferred to the General Fund, and any appropriation made to the Fund shall not revert. The State Treasurer shall invest moneys in the Fund in the same manner as other funds are invested. Interest and moneys earned on such investments shall be credited to the Fund.

(c) The Fund shall be used to offset the incremental fuel cost of biodiesel and biodiesel blend fuel with a minimum biodiesel concentration of B-20 for use in State vehicles, for the purchase of ethanol fuel with a minimum ethanol concentration of E-85 for use in State vehicles, the incremental vehicle cost of purchasing AFVs, for the development of related refueling infrastructure, for the costs of administering the Fund, and for projects approved by the Energy Policy Council.

(d) The Secretary of Administration shall adopt rules as necessary to implement this section.

(e) The Department shall submit to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division no later than 1 October of each year a report on the expenditures from the Fund during the preceding fiscal year. (2005-413, s. 1; 2009-237, s. 2.)

**Effect of Amendments.** — Session Laws 2009-237, s. 1, effective July 1, 2009, inserted "and biodiesel blend" in subsection (c).

## § 143-59. Preference given to North Carolina products and citizens, and articles manufactured by State agencies; reciprocal preferences.

(a) Preference. — The Secretary of Administration and any State agency authorized to purchase foodstuff or other products, shall, in the purchase of or in the contracting for foods, supplies, materials, equipment, printing or services give preference as far as may be practicable to such products or services manufactured or produced in North Carolina or furnished by or through citizens of North Carolina: Provided, however, that in giving such preference no sacrifice or loss in price or quality shall be permitted; and provided further, that preference in all cases shall be given to surplus products or articles produced and manufactured by other State departments, institutions, or agencies which are available for distribution.

(b) Reciprocal Preference. — For the purpose only of determining the low bidder on all contracts for equipment, materials, supplies, and services valued over twenty-five thousand dollars ($25,000), a percent of increase shall be added to a bid of a nonresident bidder that is equal to the percent of increase, if any, that the state in which the bidder is a resident adds to bids from bidders who do not reside in that state. Any amount due under a contract awarded to a nonresident bidder shall not be increased by the amount of the increase added by this subsection. On or before January 1 of each year, the Secretary of Administration shall electronically publish a list of states that give preference to in-State bidders and the amount of the percent increase added to out-of-state bids. All departments, institutions, and agencies of the State shall use this list when evaluating bids. If the reciprocal preference causes the nonresident bidder to no longer be the lowest bidder, the Secretary of Administration may, after consultation with the Board of Awards, waive the reciprocal preference. In determining whether to waive the reciprocal preference, the Secretary of Administration and the Board of Awards shall consider factors that include competition, price, product origination, and available resources.

(c) Definitions. — The following definitions apply in this section:

(1) Resident bidder. — A bidder that has paid unemployment taxes or income taxes in this State and whose principal place of business is located in this State.

(2) Nonresident bidder. — A bidder that is not a resident bidder as defined in subdivision (1) of this subsection.

(3) Principal place of business. — The principal place from which the trade or business of the bidder is directed or managed.

(d) Exemptions. — Subsection (b) of this section shall not apply to contracts entered into under G.S. 143-53(a)(5) or G.S. 143-57.

(e) When a contract is awarded by the Secretary using the provisions of subsection (b) of this section, a report of the nature of the contract, the bids received, and the award to the successful bidder shall be posted on the Internet as soon as practicable.

(f) Resident Bidder Notification. — When the Secretary puts a contract up for competitive bidding, the Secretary shall endeavor to provide notice to all resident bidders who have expressed an interest in bidding on contracts of that nature. The Secretary may opt to provide notice under this section by electronic means only. (1931, c. 261, s. 10; 1933, c. 441, s. 2; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 2001-240, s. 1; 2005-213, ss. 1, 3.)

**Editor's Note.** — Session Laws 2001-240, s. 2, provides: "The Secretary of Administration may adopt temporary rules to implement this act."

Session Laws 2001-240, s. 1, as amended by Session Laws 2005-213, s. 1, effective January 1, 2002, added "reciprical preferences" to the section catchline; added the subsection (a) designation; added "Preference. —" at the beginning of subsection (a); and added subsections (b) through (e)."

## § 143-59.1. Contracts with certain foreign vendors.

(a) Ineligible Vendors. — The Secretary of Administration and other entities to which this Article applies shall not contract for goods or services with either of the following:

(1) A vendor if the vendor or an affiliate of the vendor meets one or more of the conditions of G.S. 105-164.8(b) but refuses to collect the use tax levied under Article 5 of Chapter 105 of the General Statutes on its sales delivered to North Carolina. The Secretary of Revenue shall provide the Secretary of Administration periodically with a list of vendors to which this section applies.

(2) A vendor if the vendor or an affiliate of the vendor incorporates or reincorporates in a tax haven country after December 31, 2001, but the United States is the principal market for the public trading of the stock of the corporation incorporated in the tax haven country.

(b) Vendor Certification. — The Secretary of Administration shall require each vendor submitting a bid or contract to certify that the vendor is not an ineligible vendor as set forth in subsection (a) of this section. Any person who submits a certification required by this subsection known to be false shall be guilty of a Class I felony.

(c) Definitions. — The following definitions apply in this section:

(1) Affiliate. — As defined in G.S. 105-163.010.

(2) Tax haven country. — Means each of the following: Barbados, Bermuda, British Virgin Islands, Cayman Islands, Commonwealth of the Bahamas, Gibraltar, Isle of Man, the Principality of Monaco, and the Republic of the Seychelles. (1999-341, s. 7; 2002-189, s. 6; 2003-413, s. 28.)

## § 143-59.1A. Preference given to products made in United States.

If the Secretary of Administration or a State agency cannot give preference to North Carolina products or services as provided in G.S. 143-59, the Secretary or State agency shall give preference, as far as may be practicable and to the extent permitted by State law, federal law, and federal treaty, to products or services manufactured or produced in the United States. Provided, however, that in giving such preference no sacrifice or loss in price or quality shall be permitted; and provided further, that preference in all cases shall be given to surplus products or articles produced and manufactured by other State departments, institutions, or agencies which are available for distribution. (2004-124, s. 6.1.)

## § 143-59.2. Certain vendors prohibited from contracting with State.

(a) Ineligible Vendors. — A vendor is not entitled to enter into a contract for goods or services with any department, institution, or agency of the State government subject to the provisions of this Article if any officer or director of the vendor, or any owner if the vendor is an unincorporated business entity, within 10 years immediately prior to the date of the bid solicitation, has been convicted of any violation of Chapter 78A of the General Statutes or the Securities Act of 1933 or the Securities Exchange Act of 1934.

(b) Vendor Certification. — The Secretary of Administration shall require each vendor submitting a bid or contract to certify that none of its officers, directors, or owners of an unincorporated business entity has been convicted of any violation referenced in subsection (a) of this section within 10 years immediately prior to the date of the bid solicitation. Any person who submits a certification required by this subsection known to be false shall be guilty of a Class I felony.

(c) Void Contracts. — A contract entered into in violation of this section is void. A contract that is void under this section may continue in effect until an alternative can be arranged when: (i) immediate termination would result in harm to the public health or welfare, and (ii) the continuation is approved by the Secretary of Administration. Approval of continuation of contracts under this subsection shall be given for the minimum period necessary to protect the public health or welfare. (2002-189, s. 5.)

## § 143-59.3. Contracts for the purchase of reconstituted or recombined fluid milk products prohibited.

(a) As used in this section, "fluid milk product" has the same meaning as in 7 Code of Federal Regulations § 1000.15 (1 January 2003 Edition).

(b) No department, institution, or agency of the State shall enter into any contract for the purchase of any fluid milk product that is labeled or that is required to be labeled as "reconstituted" or "recombined".

(c) The Secretary of Administration may temporarily suspend the provisions of subsection (b) of this section in case of any emergency or pressing need as provided in G.S. 143-57. (2003-367, s. 1.)

## § 143-59.4. Contracts performed outside the United States.

(a) A vendor submitting a bid shall disclose in a statement, provided contemporaneously with the bid, where services will be performed under the contract sought, including any subcontracts, and whether any services under that contract, including any subcontracts, are anticipated to be performed outside the United States. Nothing in this section is intended to contravene any existing treaty, law, agreement, or regulation of the United States.

(b) The Secretary of Administration shall retain the statements required by subsection (a) of this section regardless of the State entity that awards the contract and shall report annually to the Joint Legislative Commission on Governmental Operations on the number of contracts which are anticipated to be performed outside the United States. (2005-169, s. 1.)

## § 143-60. Rules covering certain purposes.

The Secretary of Administration may adopt, modify, or abrogate rules covering the following purposes, in addition to those authorized elsewhere in this Article:

(1) Requiring reports by State departments, institutions, or agencies of stocks of supplies and materials and equipment on hand and prescribing the form of such reports.

(2) Prescribing the manner in which supplies, materials and equipment shall be delivered, stored and distributed.

(3) Prescribing the manner of inspecting deliveries of supplies, materials and equipment and making chemicals and/or physical tests of samples submitted with bids and samples of deliveries to determine whether deliveries have been made in compliance with specifications.
(4) Prescribing the manner in which purchases shall be made in emergencies.
(5) Providing for such other matters as may be necessary to give effect to foregoing rules and provisions of this Article.
(6) Prescribing the manner in which passenger vehicles shall be purchased.

Further, the Secretary of Administration may prescribe appropriate procedures necessary to enable the State, its institutions and agencies, to obtain materials surplus or otherwise available from federal, State or local governments or their disposal agencies. (1931, c. 261, s. 11; 1945, c. 145; 1957, c. 269, s. 3; 1961, c. 772; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1981, c. 268, s. 2; 1983, c. 717, ss. 67, 68; 1985 (Reg. Sess., 1986), c. 955, ss. 89, 90; 1987, c. 282, s. 27; c. 827, s. 217; 2006-203, s. 85.)

**Editor's Note.** — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 85, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, deleted the former last paragraph, which read: "Prior to taking any action under this section, the Secretary of Administration may consult with the Advisory Budget Commission."

### § 143-61: Repealed by Session Laws 1975, c. 879, s. 45.

### § 143-62. Law applicable to printing Supreme Court Reports not affected.

Nothing in this Article shall be construed as amending or repealing G.S. 7A-6(b), relating to the printing of the Supreme Court Reports, or in any way changing or interfering with the method of printing or contracting for the printing of the Supreme Court Reports as provided for in said section. (1931, c. 261, s. 13; 1969, c. 44, s. 75; 1971, c. 587, s. 1.)

### § 143-63. Financial interest of officers in sources of supply; acceptance of bribes.

Neither the Secretary of Administration, nor any assistant of the Secretary's shall be financially interested, or have any personal beneficial interest, either directly or indirectly, in the purchase of, or contract for, any materials, equipment or supplies, nor in any firm, corporation, partnership or association furnishing any such supplies, materials or equipment to the State government, or any of its departments, institutions or agencies, nor shall such Secretary, assistant, or member of the Commission accept or receive, directly or indirectly, from any person, firm or corporation to whom any contract may be awarded, by rebate, gifts or otherwise, any money or anything of value whatsoever, or any promise, obligation or contract for future reward or compensation. Any violation of this section shall be deemed a Class F felony. Upon conviction thereof, any such Secretary or assistant shall be removed from office. (1931, c. 261, s. 15; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1983, c. 717, s. 81; 1993, c. 539, s. 1311; 1994, Ex. Sess., c. 24, s. 14(c); 2006-203, s. 86.)

**Editor's Note.** — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 86, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "the Secretary's" for "his, nor any member of the Advisory Budget Commission" in the first sentence; and substituted "Secretary or assistant" for "Secretary, assistant or member of the Commission" in the last sentence.

## § 143-63.1. Sale, disposal and destruction of firearms.

(a) Except as hereinafter provided, it shall be unlawful for any employee, officer or official of the State in the exercise of his official duty to sell or otherwise dispose of any pistol, revolver, shotgun or rifle to any person, firm, corporation, county or local governmental unit, law-enforcement agency, or other legal entity.

(b) It shall be lawful for the Department of Administration, in the exercise of its official duty, to sell any weapon described in subsection (a) hereof, to any county or local governmental unit, law-enforcement agency in the State; provided, however, that such law-enforcement agency files a written statement, duly notarized, with the seller of said weapon certifying that such weapon is needed in law enforcement by such law-enforcement agency.

(c) All weapons described in subsection (a) hereof which are not sold as herein provided within one year of being declared surplus property shall be destroyed by the Department of Administration.

(d) Notwithstanding the provisions of this section, but subject to the provisions of G.S. 20-187.2, the North Carolina State Highway Patrol, the North Carolina Department of Correction, and the North Carolina State Bureau of Investigation may sell, trade, or otherwise dispose of any or all surplus weapons they possess to any federally licensed firearm dealers. The sale, trade, or disposal of these weapons shall be in a manner prescribed by the Department of Administration. Any moneys or property obtained from the sale, trade, or disposal shall go to the general fund. (1973, c. 666, ss. 1-3; 1975, c. 879, s. 46; 1981, c. 604; 1981 (Reg. Sess., 1982), c. 1282, s. 52.)

### OPINIONS OF ATTORNEY GENERAL

**Section 20-187.2(a) Not Affected.** — See opinion of Attorney General to Mr. R.D. McMillan, Jr., State Purchasing Officer, 43 N.C.A.G. 58 (1973), issued prior to enactment of subsection (d) of this section.

## § 143-64. Beverages contracts.

Notwithstanding any other provision of law, local school administrative units, community colleges, and constituent institutions of The University of North Carolina shall competitively bid contracts that involve the sale of juice or bottled water. Contracts for the sale of juice and contracts for the sale of bottled water shall each be bid separately from each other and separately from any other contract, including contracts for other beverages or vending machine services. The local school administrative units, community colleges, and constituent institutions may set quality standards for these beverages, and these standards may be used to accept or reject a bid. (2003-284, s. 6.15(a); 2004-199, s. 38.)

# ARTICLE 3A.

## *Surplus Property.*

## Part 1. State Surplus Property Agency.

### § 143-64.01. Department of Administration designated State Surplus Property Agency.

The Department of Administration is designated as the State agency for State surplus property, and with respect to the acquisition of State surplus property the agency shall be subject to the supervision and direction of the Secretary of Administration. (1991, c. 358, s. 2.)

**Cross References.** — As to surplus real property, see note under G.S. 146-22 regarding the provisions of Session Laws 2003-284, s. 6.8.

**Editor's Note.** — Session Laws 1991, c. 358, s. 2 enacted this part as new Article 31A1, G.S. 143-64.9A et seq. It has been redesignated as Part I of Article 3A, G.S. 143-64.01 et seq. Former Article 3A, G.S. 143-64.1 through 143-64.5, has been redesignated as Part II of this Article.

### § 143-64.02. Definitions.

As used in Part 1 of this Article, except where the context clearly requires otherwise:

(1) "Agency" means an existing department, institution, commission, committee, board, division, or bureau of the State.

(2) "Nonprofit tax exempt organizations" means those nonprofit tax exempt medical institutions, hospitals, clinics, health centers, school systems, schools, colleges, universities, schools for the mentally retarded, schools for the physically handicapped, radio and television stations licensed by the Federal Communications Commission as educational radio or educational television stations, public libraries, and civil defense organizations, that have been certified by the Internal Revenue Service as tax-exempt nonprofit organizations under section 501(c)(3) of the United States Internal Revenue Code of 1954.

(3) "Recyclable material" means a recyclable material, as defined in G.S. 130A-290, that the Secretary of Administration determines, consistent with G.S. 130A-309.14, to be a recyclable material. (1991, c. 358, s. 2; 1998-223, s. 1.)

**Editor's Note.** — Session Laws 2004-124, s. 12.5, provides: "Notwithstanding G.S. 143-64.02(1), the Wildlife Resources Commission is not subject to the payment of fees under G.S. 143-64.05 for the acquisition, receipt, warehousing, distribution, or transfer prior to July 20, 2004, of surplus property or for the transfer or sale prior to July 20, 2004, of recyclable material."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

## § 143-64.03. Powers and duties of the State agency for surplus property.

(a) The State Surplus Property Agency is authorized and directed to:

(1) Sell all supplies, materials, and equipment that are surplus, obsolete, or unused;

(2) Warehouse such property; and

(3) Distribute such property to tax-supported or nonprofit tax-exempt organizations.

(b) The State Surplus Property Agency is authorized and empowered to act as a clearinghouse of information for agencies and private nonprofit tax-exempt organizations, to locate property available for acquisition from State agencies, to ascertain the terms and conditions under which the property may be obtained, to receive requests from agencies and private nonprofit tax-exempt organizations, and transmit all available information about the property, and to aid and assist the agencies and private nonprofit tax-exempt organizations in transactions for the acquisition of State surplus property.

(c) The State agency for surplus property, in the administration of Part 1 of this Article, shall cooperate to the fullest extent consistent with the provisions of Part 1 of this Article, with the departments or agencies of the State.

(d) The State agency for surplus property may sell or otherwise dispose of surplus property, including motor vehicles, through an electronic auction service. (1991, c. 358, s. 2; 2003-284, s. 18.6(a).)

## § 143-64.04. Powers of the Secretary to delegate authority.

(a) The Secretary of Administration may delegate to any employees of the State agency for surplus property such power and authority as he or they deem reasonable and proper for the effective administration of Part 1 of this Article. The Secretary of Administration may, in his discretion, bond any person in the employ of the State agency for surplus property, handling moneys, signing checks, or receiving or distributing property from the United States under authority of Part 1 of this Article.

(b) The Secretary of Administration may adopt rules necessary to carry out Part 1 of this Article. (1991, c. 358, s. 2.)

## § 143-64.05. Service charge; receipts.

(a) The State agency for surplus property may assess and collect a service charge for the acquisition, receipt, warehousing, distribution, or transfer of any State surplus property and for the transfer or sale of recyclable material. The service charge authorized by this subsection does not apply to the transfer or sale of timber on land owned by the Wildlife Resources Commission or the Department of Agriculture and Consumer Services.

(b) All receipts from the transfer or sale of surplus, obsolete, or unused equipment of State departments, institutions, and agencies that are supported by appropriations from the General Fund, except where the receipts have been anticipated for or budgeted against the cost of replacements, shall be credited by the Secretary to the Office of State Treasurer as nontax revenue.

(c) A department, institution, or agency may retain receipts derived from the transfer or sale of recyclable material, less any charge collected pursuant to subsection (a) of this section, and may use the receipts to defray the costs of its recycling activities. A contract for the transfer or sale of recyclable material to which a department, institution, or agency is a party shall not become effective until the contract is approved by the Secretary of Administration. The Secretary of Administration shall adopt rules governing the transfer or sale of recyclable material by a department, institution, or agency and specifying the conditions and procedures under which a department, institution, or agency may retain the receipts derived from the transfer or sale, including the appropriate allocation of receipts when more than one department, institution, or agency is involved in a recycling activity. (1991, c. 358, s. 2; 1991 (Reg. Sess., 1992), c. 900, s. 24; 1998-223, s. 2; 2006-231, s. 3; 2007-323, s. 11.1.)

**Editor's Note.** — Session Laws 2004-124, s. 12.5, provides: "Notwithstanding G.S. 143-64.02(1), the Wildlife Resources Commission is not subject to the payment of fees under G.S. 143-64.05 for the acquisition, receipt, warehousing, distribution, or transfer prior to July 20, 2004, of surplus property or for the transfer or sale prior to July 20, 2004, of recyclable material."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

## Part 2. State Agency for Federal Surplus Property.

### § 143-64.1. Department of Administration designated State agency for federal surplus property.

The Department of Administration is hereby designated as the State agency for federal surplus property, and with respect to the acquisition of federal surplus property said agency shall be subject to the supervision and direction of the Secretary of Administration. (1953, c. 1262, s. 1; 1957, c. 269, s. 3; 1975, c. 879, s. 46; 1991, c. 358, s. 3.)

**Editor's Note.** — Session Laws 1991, c. 358, s. 2 enacted a new Article 31A1, G.S. 143-64.9A et seq. It was redesignated as Part I of this Article, G.S. 143-64.01 et seq. Former Article 3A, G.S. 143-64.1 through 143-64.5, has been redesignated as Part II of this Article. References to "this Article" throughout former Article 3A have been changed to "Part 2 of this Article."

**State Government Reorganization.** — The State agency for surplus property remains in the Department of Administration under G.S. 143B-368, enacted by Session Laws 1975, c. 879, which repealed former G.S. 143A-82.

### § 143-64.2. Authority and duties of the State agency for federal surplus property.

(a) The State agency for federal surplus property is hereby authorized and empowered

(1) To acquire from the United States of America such property, including equipment, materials, books, or other supplies under the control of any department or agency of the United States of America as may be usable and necessary for educational purposes, public health purposes, or civil defense purposes, including research;

(2) To warehouse such property; and

(3) To distribute such property to tax-supported or nonprofit and tax-exempt (under section 501(c)(3) of the United States Internal Revenue Code of 1954) medical institutions, hospitals, clinics, health centers, school systems, schools, colleges, universities, schools for the mentally retarded, schools for the physically handicapped, radio and television stations licensed by the Federal Communications Commission as educational radio or educational television stations, public libraries, civil defense organizations, and such other eligible donees within the

State as are permitted to receive surplus property of the United States of America under the Federal Property and Administrative Services Act of 1949, as amended.

(b) The State agency for federal surplus property may adopt rules necessary to carry out Part 2 of this Article.

(c) The State agency for federal surplus property may appoint advisory boards or committees as needed to ensure that Part 2 of this Article and the rules adopted under Part 2 of this Article are consistent with federal law concerning surplus property.

(d) The State agency for surplus property is authorized and empowered to take such action, make such expenditures and enter into such contracts, agreements and undertakings for and in the name of the State, require such reports and make such investigations as may be required by law or regulation of the United States of America in connection with the receipt, warehousing, and distribution of property received by the State agency for federal surplus property from the United States of America.

(e) The State agency for federal surplus property is authorized and empowered to act as clearinghouse of information for the public and private nonprofit institutions and agencies referred to in subsection (a) of this section, to locate property available for acquisition from the United States of America, to ascertain the terms and conditions under which such property may be obtained, to receive requests from the above-mentioned institutions and agencies and to transmit to them all available information in reference to such property, and to aid and assist such institutions and agencies in every way possible in the consummation or acquisition or transactions hereunder.

(f) The State agency for federal surplus property, in the administration of Part 2 of this Article, shall cooperate to the fullest extent consistent with the provisions of Part 2 of this Article, with the departments or agencies of the United States of America and shall make such reports in such form and containing such information as the United States of America or any of its departments or agencies may from time to time require, and it shall comply with the laws of the United States of America and the rules and regulations of any of the departments or agencies of the United States of America governing the allocation, transfer, use, or accounting for, property donable or donated to the State. (1953, c. 1262, s. 2; 1965, c. 1105, ss. 1, 2; 1987, c. 827, s. 218; 1991, c. 358, s. 3.)

## § 143-64.3. Power of Department of Administration and Secretary to delegate authority.

The Department of Administration and/or the Secretary of Administration may delegate to any employees of the State agency for federal surplus property such power and authority as he or they deem reasonable and proper for the effective administration of Part 2 of this Article. The Department of Administration and/or the Secretary of Administration may, in his or their discretion, bond any person in the employ of the State agency for surplus property, handling moneys, signing checks, or receiving or distributing property from the United States under authority of Part 2 of this Article. (1953, c. 1262, s. 3; 1957, c. 269, s. 3; 1975, c. 879, s. 46; 1991, c. 358, s. 3.)

## § 143-64.4. Warehousing, transfer, etc., charges.

The State agency for federal surplus property is hereby authorized and empowered to assess and collect service charges or fees for the acquisition, receipts, warehousing, distribution or transfer of any property acquired by donation from the United States of America for educational purposes, public health purposes, public libraries or civil defense purposes, including research, and any such charges made or fees assessed shall be limited to those reasonably related to the costs of care and handling in respect to the acquisition, receipts, warehousing, distribution or transfer of the property by the State agency for surplus property. (1953, c. 1262, s. 4; 1965, c. 1105, s. 3; 1991, c. 358, s. 3.)

### § 143-64.5. Department of Agriculture and Consumer Services exempted from application of Article.

Notwithstanding any provisions or limitations of Part 2 of this Article, the North Carolina Department of Agriculture and Consumer Services is authorized and empowered to distribute food, surplus commodities and agricultural products under contracts and agreements with the federal government or any of its departments or agencies, and is authorized and empowered to adopt rules in order to conform with federal requirements and standards for such distribution and also for the proper distribution of such food, commodities and agricultural products. To the extent set forth above and in this section, the provisions of Part 2 of this Article shall not apply to the North Carolina Department of Agriculture and Consumer Services. (1953, c. 1262, s. 5; 1987, c. 827, s. 217; 1997-261, s. 89.)

## Part 3. Public Agencies.

**§ 143-64.6:** Repealed by Session Laws 2004-199, s. 36(a), effective August 17, 2004.

**§§ 143-64.7 through 143-64.9:** Reserved for future codification purposes.

## ARTICLE 3B.

## *Conservation of Energy, Water, and Other Utilities in Government Facilities.*

**Editor's Note.** — Session Laws 2006-190, s. 1, effective August 3, 2006, rewrote the Article 3B heading, which formerly read "Energy Conservation in Government Facilities."

## Part 1. Energy Policy and Life-Cycle Cost Analysis.

### § 143-64.10. Findings; policy.

(a) The General Assembly finds all of the following:

(1) That the State shall take a leadership role in aggressively undertaking the conservation of energy, water, and other utilities in North Carolina.

(2) That State facilities and facilities of State institutions of higher learning have a significant impact on the State's consumption of energy, water, and other utilities.

(3) That practices to conserve energy, water, and other utilities that are adopted for the design, construction, operation, maintenance, and

renovation of these facilities and for the purchase, operation, and maintenance of equipment for these facilities will have a beneficial effect on the State's overall supply of energy, water, and other utilities.

(4) That the cost of the energy, water, and other utilities consumed by these facilities and the equipment for these facilities over the life of the facilities shall be considered, in addition to the initial cost.

(5) That the cost of energy, water, and other utilities is significant and facility designs shall take into consideration the total life-cycle cost, including the initial construction cost, and the cost, over the economic life of the facility, of the energy, water, and other utilities consumed, and of operation and maintenance of the facility as it affects the consumption of energy, water, or other utilities.

(6) That State government shall undertake a program to reduce the use of energy, water, and other utilities in State facilities and facilities of the State institutions of higher learning and equipment in those facilities in order to provide its citizens with an example of energy-use, water-use, and utility-use efficiency.

(b) It is the policy of the State of North Carolina to ensure that practices to conserve energy, water, and other utilities are employed in the design, construction, operation, maintenance, and renovation of State facilities and facilities of the State institutions of higher learning and in the purchase, operation, and maintenance of equipment for these facilities. (1975, c. 434, s. 1; 1993, c. 334, s. 2; 2001-415, s. 1; 2006-190, s. 8; 2007-546, s. 3.1(b).)

**Triangle J Guidelines Pilot Program.** — Session Laws 2001-415, ss. 7(a) to (e), provide: "(a) Triangle J Guidelines Pilot Program. — The General Assembly recognizes the State's need to understand how energy conservation measures are utilized in the construction or renovation of State facilities and how these measures benefit the State through cost savings and the protection of our natural resources. The General Assembly promotes the use of the Triangle J Council of Governments' High Performance Guidelines to achieve these goals and encourages any State entity to rate itself in accordance with these guidelines for the design, construction, operation, maintenance, or renovation of any State-assisted or State-owned facility.

"(b) To accomplish the goals described in Section 7(a) of this act, the Department of Administration shall implement a pilot program to review the use of the Triangle J Council of Governments' High Performance Guidelines in projects for the renovation or construction of State facilities.

"The Board of Governors of The University of North Carolina shall select at least four projects to participate in the pilot program, and the State Board of Community Colleges and the Office of State Budget, Planning, and Management [now the Office of State Budget and Management] shall select at least three projects each to participate in the program. One-third of the projects participating in this program shall be projects for the repair or renovation of a State facility, and the remaining projects shall be projects for the construction of State facilities.

"(c) The Department of Administration shall oversee the pilot program, and each entity involved shall submit all applicable information to the Department as it deems necessary, including compiling and submitting energy usage and cost data. The program shall include a one-year postoccupancy evaluation that shall be included as part of the evaluation of the Triangle J Council of Governments' High Performance Guidelines for each facility. The entities participating in this program shall explore the concept of a 'high performing facility' in assessing the use of the Triangle J Guidelines for these projects. For purposes of this section, 'high performing facility' means a building and surrounding environs designed using features that are energy efficient, incorporate reusable and renewable resources, provide natural lighting, are nontoxic, require low maintenance, are congruent with the natural characteristics of the site, incorporate water conservation measures, and cause minimum adverse impact to the environment as enacted in Section 2(11) of S.L. 2000-143.

"(d) The Department of Administration shall submit an interim report on the implementation of this program to the Senate and House of Representatives' Chairs of the Appropriations Committees, Chairs of General Government Appropriations Subcommittee, and the Joint Legislative Commission on Governmental Operations not later than December 15, 2002. The report shall discuss the benefits of using the Triangle J Council of Governments' High Performance Guidelines and make recommendations regarding the use of the Triangle J Guidelines in the projects participating in the program and other projects. The Department of Administration shall submit a final report to the Senate and House of Representatives' Chairs of the Appropriations Committees, Chairs of General Government Appropriations Subcommittee, and the Joint Legislative Commission on Governmental Operations not later than 18 months after completion of the last project participating in this program, if practicable.

"(e) This act shall not be construed to obligate the General Assembly to appropriate funds to implement the Triangle J Guidelines pilot program."

**Editor's Note.** — As to the design for construction of dormitories and the exemption of the Office of State Budget and Management from the requirements of G.S. 143-135.26(1), 143-128, 143-129, 143-132, 143-134, 143-131, 143-135.26, 143-64.10 through 143-64.13, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(b), and 133-1.1(g) and rules implementing those statutes for contracting and supervising the design, construction, or demolition of prison facilities, see Session laws 1987 (Reg. Sess., 1988), c. 1086, s. 123(b).

As to the exemption of the Office of State Budget and Management from the requirements of G.S. 143-135.26(1), 143-128, 143-129, 143-131, 143-132, 143-134, 143-135.26, 143-64.10 through 143-64.13, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(b), and 133-1.1(g) and rules implementing those statutes for the purpose of construction of prison facilities, see Session Laws 1989, c. 754, s. 28(a).

As to the exemption of the Office of State Budget and Management from the requirements of this Article in administration and implementation of the Prison Facilities Legislative Bond Act of 1990, see Session Laws 1989 (Reg. Sess., 1990), c. 933, s. 6(4).

As to the exemption of the Office of State Budget and Management from the requirements of this Article in the implementation of the providing of prison facilities under the provisions of the State Prison and Youth Services Facilities Bond Act, see Session Laws 1989 (Reg. Sess., 1990), c. 935, s. 6(a)(4).

As to the exemption of the Office of State Budget and Management from the requirements of G.S. 143-135.26(1), 143-128, 143-129, 143-131, 143-132, 143-134, 143-135.26, 143-64.10 through 143-64.13, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(b), and 133-1.1(g) and rules implementing those statutes for the purpose of contracting and supervising the construction of prison facilities upon meeting a verifiable ten percent (10%) goal for participating by minority and women-owned businesses, see Session Laws 1991, c. 689, s. 239(f), as amended by Session Laws 1991 (Reg. Sess., 1992), c. 1044, s. 41(b).

## § 143-64.11. Definitions.

For purposes of this Article:

(1) "Economic life" means the projected or anticipated useful life of a facility.

(2) "Energy-consumption analysis" means the evaluation of all energy-consuming systems, including systems that consume water or other utilities, and components of these systems by demand and type of energy or other utility use, including the internal energy load imposed on a facility by its occupants, equipment and components, and the external energy load imposed on the facility by climatic conditions.

(2a) "Energy Office" means the State Energy Office of the Department of Commerce.

(2b) "Energy-consuming system" includes but is not limited to any of the following equipment or measures:

a. Equipment used to heat, cool, or ventilate the facility;
b. Equipment used to heat water in the facility;
c. Lighting systems;
d. On-site equipment used to generate electricity for the facility;
e. On-site equipment that uses the sun, wind, oil, natural gas, liquid propane gas, coal, or electricity as a power source; and
f. Energy conservation measures, as defined in G.S. 143-64.17, in the facility design and construction that decrease the energy, water, or other utility requirements of the facility.

(3) "Facility" means a building or a group of buildings served by a central distribution system for energy, water, or other utility or components of a central distribution system.

(4) "Initial cost" means the required cost necessary to construct or renovate a facility.

(5) "Life-cycle cost analysis" means an analytical technique that considers certain costs of owning, using, and operating a facility over its economic life, including but not limited to:
  a. Initial costs;
  b. System repair and replacement costs;
  c. Maintenance costs;
  d. Operating costs, including energy costs; and
  e. Salvage value.

(6) Repealed by Session Laws 1993, c. 334, s. 3, effective July 13, 1993.

(7) "State agency" means the State of North Carolina or any board, bureau, commission, department, institution, or agency of the State.

(8) "State-assisted facility" means a facility constructed or renovated in whole or in part with State funds or with funds guaranteed or insured by a State agency.

(9) "State facility" means a facility constructed or renovated, by a State agency.

(10) "State institution of higher learning" means any constituent institution of The University of North Carolina. (1975, c. 434, s. 2; 1989, c. 23, s. 1; 1993, c. 334, s. 3; 2001-415, s. 2; 2006-190, ss. 9, 10, 11; 2007-546, s. 3.1(c); 2009-446, s. 1(f).)

**Editor's Note.** — See the Editor's Notes under G.S. 143-64.10.

Session Laws 2007-546, s. 5, provides: "This act shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act. Every public agency, as defined in subsection (c) of Section 1 of this act, to which this act applies may implement the provisions of this act from funds otherwise appropriated or available to that public agency."

Session Laws 2009-446, s. 1(a), provides: "The State Energy Office is transferred from the Department of Administration to the Department of Commerce. This transfer shall have all of the elements of a Type I transfer, as defined in G.S. 143A-6."

**Effect of Amendments.** — Session Laws 2009-446, s. 1(f), effective August 7, 2009, substituted "Commerce" for "Administration" in subdivision (2a).

## § 143-64.12. Authority and duties of the Department; State agencies and State institutions of higher learning.

(a) The Department of Commerce through the State Energy Office shall develop a comprehensive program to manage energy, water, and other utility use for State agencies and State institutions of higher learning and shall update this program annually. Each State agency and State institution of higher learning shall develop and implement a management plan that is consistent with the State's comprehensive program under this subsection to manage energy, water, and other utility use. The energy consumption per gross square foot for all State buildings in total shall be reduced by twenty percent (20%) by 2010 and thirty percent (30%) by 2015 based on energy consumption for the 2002-2003 fiscal year. Each State agency and State institution of higher learning shall update its management plan annually and include strategies for supporting the energy consumption reduction requirements under this subsection. Each community college shall submit to the State Energy Office an annual written report of utility consumption and costs.

(a1) State agencies and State institutions of higher learning shall carry out the construction and renovation of facilities in such a manner as to further the policy set forth under this section and to ensure the use of life-cycle cost analyses and practices to conserve energy, water, and other utilities.

(b) The Department of Administration shall develop and implement policies, procedures, and standards to ensure that State purchasing practices improve efficiency regarding energy, water, and other utility use and take the cost of the product over the economic life of the product into consideration. The Department of Administration shall adopt and implement Building Energy Design Guidelines. These guidelines shall include energy-use goals and standards, economic assumptions for life-cycle cost analysis, and other criteria on building systems and technologies. The Department of Administration shall modify the design criteria for construction and renovation of facilities of State buildings and State institutions of higher learning buildings to require that a life-cycle cost analysis be conducted pursuant to G.S. 143-64.15.

(b1) The Department of Administration, as part of the Facilities Condition and Assessment Program, shall identify and recommend energy conservation maintenance and operating procedures that are designed to reduce energy consumption within the facility of a State agency or a State institution of higher learning and that require no significant expenditure of funds. Every State agency or State institution of higher learning shall implement these recommendations. Where energy management equipment is proposed for any facility of a State agency or of a State institution of higher learning, the maximum interchangeability and compatibility of equipment components shall be required. As part of the Facilities Condition and Assessment Program under this section, the Department of Administration shall develop an energy audit and a procedure for conducting energy audits. Every five years the Department shall conduct an energy audit for each State agency or State institution of higher learning.

(c) through (g) Repealed by Session Laws 1993, c. 334, s. 4.

(h) When conducting an energy audit under this section, the Department of Administration shall identify and recommend any facility of a State agency or State institution of higher learning as suitable for building commissioning to reduce energy consumption within the facility or as suitable for installing an energy savings measure pursuant to a guaranteed energy savings contract under Part 2 of this Article.

(i) Consistent with G.S. 150B-2(8a)h., the Department of Administration may adopt architectural and engineering standards to implement this section. (1975, c. 434, s. 3; 1993, c. 334, s. 4; 2000-140, s. 76(f); 2001-415, s. 3; 2006-190, s. 12; 2007-546, s. 3.1(a); 2008-198, s. 11.1; 2009-446, s. 1(e).)

**Editor's Note.** — See the Editor's Notes under G.S. 143-64.10.

Session Laws 2007-323, s. 19.3(a) and (b), provides: "(a) The State Energy Office shall develop a Strategic Plan for Energy Grants to establish criteria and guidelines to award and administer future grants. The plan shall include the proposed distribution of grant funds for energy purposes, which may include energy efficiency, renewable energy, alternative fuels, and energy conservation. The Department shall submit the plan to the Energy Policy Council and to the Chairs of the House Appropriations Committee and the Chairs of the Senate Appropriations Committee no later than November 1, 2007. After consultation with the House and Senate Appropriations Chairs, the Energy Policy Council shall approve the plan no later than March 1, 2008. With the exception of grants to be administered from funds specified in subsections (b), (c), and (d) of this section, the plan shall be approved prior to any new grants being awarded.

"(b) Of the funds appropriated in this act for the 2007-2008 fiscal year, the sum of five million dollars ($5,000,000) shall be used to establish the Energy Efficiency Reserve. The Reserve shall be administered by the State Energy Office. The State Energy Office, in consultation with the State Construction Office, shall use the funds in the Energy Efficiency Reserve to provide funding for projects designed to make State, university, or community college facilities more energy efficient. Projects eligible to make State, university, or community college facilities more energy efficient from remaining funds in the Energy Efficiency Reserve include:

"(1) Replacement of incandescent light bulbs with compact fluorescent light bulbs, installation of exit signs that employ light-emitting diode (LED) technology, the installation of occupancy sensors or optical sensors, and other lighting efficiency improvements.

"(2) For windows that need replacement, installation of more energy efficient windows.

"(3) Insulation improvements when practicable.

"(4) Replacement of inefficient or oversized heating, ventilation, and air conditioning (HVAC) systems when those systems are subject to replacement, and installation of programmable automation systems.

"(5) Installation of aerators in sink faucets that reduce the flow rate, and other water system projects that reduce water consumption.

"(6) Any other retrofit or replacement projects that make State, university, or community college facilities more energy efficient for which the incremental cost of the project will be equal to or less than the energy or water savings that result over a period of three years after completion.

"Funds appropriated to the Reserve for the 2007-2008 fiscal year shall not revert and shall remain available until expended. The State Energy Office shall report to the House of Representatives and Senate Appropriations Committees on the use of the Reserve funds no later than May 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2007-546, s. 3.2, provides: "The Department of Administration shall establish and train an additional team to examine existing facilities of State agencies and State institutions of higher learning to identify and recommend energy conservation maintenance and operating procedures designed to reduce energy consumption and to conduct energy audits and identify a facility as suitable for building commissioning or for installing an energy savings measure under the Facilities Condition Assessment Program (FCAP) under G.S. 143-64.12, as amended by Section 3.1 of this act."

Session Laws 2007-546, s. 5, provides: "This act shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act. Every public agency, as defined in subsection (c) of Section 1 of this act, to which this act applies may implement the provisions of this act from funds otherwise appropriated or available to that public agency."

Session Laws 2009-446, s. 1(a), provides: "The State Energy Office is transferred from the Department of Administration to the Department of Commerce. This transfer shall have all of the elements of a Type I transfer, as defined in G.S. 143A-6."

**Effect of Amendments.** — Session Laws 2008-198, s. 11.1, effective August 8, 2008, substituted "2002-2003" for "2003-2004" in the third sentence of subsection (a).

Session Laws 2009-446, s. 1(e), effective August 7, 2009, substituted "Commerce" for "Administration" in subsection (a).

## § **143-64.13:** Repealed by Session Laws 1993, c. 334, s. 5.

## § **143-64.14:** Recodified as G.S. 143-64.16 by Session Laws 1993, c. 334, s. 7.

## § 143-64.15. Life-cycle cost analysis.

(a) A life-cycle cost analysis shall be commenced at the schematic design phase of the construction or renovation project, shall be updated or amended as needed at the design development phase, and shall be updated or amended again as needed at the construction document phase. A life-cycle cost analysis shall include, but not be limited to, all of the following elements:

(1) The coordination, orientation, and positioning of the facility on its physical site.

(2) The amount and type of fenestration and the potential for daylighting employed in the facility.

(3) Thermal characteristics of materials and the amount of insulation incorporated into the facility design.

(4) The variable occupancy and operating conditions of the facility, including illumination levels.

(5) Architectural features that affect the consumption of energy, water, and other utilities.

(b) The life-cycle cost analysis performed for any State facility shall, in addition to the requirements set forth in subsection (a) of this section, include, but not be limited to, all of the following:

(1) An energy-consumption analysis of the facility's energy-consuming systems in accordance with the provisions of subsection (g) of this section.
(2) The initial estimated cost of each energy-consuming system being compared and evaluated.
(3) The estimated annual operating cost of all utility requirements.
(4) The estimated annual cost of maintaining each energy-consuming system.
(5) The average estimated replacement cost for each system expressed in annual terms for the economic life of the facility.

(c) Each entity shall conduct a life-cycle cost analysis pursuant to this section for the construction or the renovation of any State facility or State-assisted facility of 20,000 or more gross square feet. For the replacement of heating, ventilation, and air-conditioning equipment in any State facility or State-assisted facility of 20,000 or more gross square feet, the entity shall conduct a life-cycle cost analysis of the replacement equipment pursuant to this section when the replacement is financed under a guaranteed energy savings contract or financed using repair and renovation funds.

(d) The life-cycle cost analysis shall be certified by a registered professional engineer or bear the seal of a North Carolina registered architect, or both. The engineer or architect shall be particularly qualified by training and experience for the type of work involved, but shall not be employed directly or indirectly by a fuel provider, utility company, or group supported by fuel providers or utility funds. Plans and specifications for facilities involving public funds shall be designed in conformance with the provisions of G.S. 133-1.1.

(e) In order to protect the integrity of historic buildings, no provision of this Article shall be interpreted to require the implementation of measures to conserve energy, water, or other utility use that conflict with respect to any property eligible for, nominated to, or entered on the National Register of Historic Places, pursuant to the National Historic Preservation Act of 1966, P.L. 89-665; any historic building located within an historic district as provided in Chapters 160A or 153A of the General Statutes; any historic building listed, owned, or under the jurisdiction of an historic properties commission as provided in Chapter 160A or 153A; nor any historic property owned by the State or assisted by the State.

(f) Each State agency shall use the life-cycle cost analysis over the economic life of the facility in selecting the optimum system or combination of systems to be incorporated into the design of the facility.

(g) The energy-consumption analysis of the operation of energy-consuming systems utilities in a facility shall include, but not be limited to, all of the following:

(1) The comparison of two or more system alternatives.
(2) The simulation or engineering evaluation of each system over the entire range of operation of the facility for a year's operating period.
(3) The engineering evaluation of the consumption of energy, water, and other utilities of component equipment in each system considering the operation of such components at other than full or rated outputs. (1993, c. 334, s. 6; 2001-415, ss. 4, 5; 2006-190, s. 13; 2007-546, s. 4.1.)

**Editor's Note.** — Session Laws 2007-546, s. 5, provides: "This act shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act. Every public agency, as defined in subsection (c) of Section 1 of this act, to which this act applies may implement the provisions of this act from funds otherwise appropriated or available to that public agency."

## § 143-64.15A. Certification of life-cycle cost analysis.

Each State agency and each State institution of higher learning performing a life-cycle cost analysis for the purpose of constructing or renovating any facility shall, prior to selecting a design option or advertising for bids for construction, submit the life-cycle cost analysis to the Department for certification at the schematic design phase and again when it is updated or amended as needed in accordance with G.S. 143-64.15. The Department shall review the material submitted by the State agency or State institution of higher learning, reserve the right to require an agency or institution to complete additional analysis to comply with certification, perform any additional analysis, as necessary, to comply with G.S. 143-341(11), and require that all construction or renovation conducted by the State agency or State institution of higher learning comply with the certification issued by the Department. (2001-415, s. 6; 2007-546, s. 4.2.)

**Editor's Note.** — Session Laws 2007-546, s. 5, provides: "This act shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act. Every public agency, as defined in subsection (c) of Section 1 of this act, to which this act applies may implement the provisions of this act from funds otherwise appropriated or available to that public agency."

## § 143-64.16. Application of Part.

The provisions of this Part shall not apply to municipalities or counties, nor to any agency or department of any municipality or county; provided, however, this Part shall apply to any board of a community college. Community college is defined in G.S. 115D-2(2). (1975, c. 434, s. 5; 1989, c. 23, s. 2; 1993, c. 334, s. 7; 1993 (Reg. Sess., 1994), c. 775, s. 2.)

## Part 2. Guaranteed Energy Savings Contracts for Governmental Units.

## § 143-64.17. Definitions.

As used in this Part:

(1) "Energy conservation measure" means a facility or meter alteration, training, or services related to the operation of the facility or meter, when the alteration, training, or services provide anticipated energy savings or capture lost revenue. Energy conservation measure includes any of the following:

a. Insulation of the building structure and systems within the building.

b. Storm windows or doors, caulking, weatherstripping, multiglazed windows or doors, heat-absorbing or heat-reflective glazed or coated window or door systems, additional glazing, reductions in glass area, or other window or door system modifications that reduce energy consumption.

c. Automatic energy control systems.

d. Heating, ventilating, or air-conditioning system modifications or replacements.

e. Replacement or modification of lighting fixtures to increase the energy efficiency of a lighting system without increasing the overall illumination of a facility, unless an increase in illumination is necessary to conform to the applicable State or local building code or is required by the light system after the proposed modifications are made.

f. Energy recovery systems.

g. Cogeneration systems that produce steam or forms of energy such as heat, as well as electricity, for use primarily within a building or complex of buildings.

h. Repealed by Session Laws 2006-190, s. 2, effective August 3, 2006, and applicable to contracts entered into or renewed on or after that date.

i. Faucets with automatic or metered shut-off valves, leak detection equipment, water meters, water recycling equipment, and wastewater recovery systems.

j. Other energy conservation measures that conserve energy, water, or other utilities.

(2) "Energy savings" means a measured reduction in fuel costs, energy costs, water costs, stormwater fees, other utility costs, or operating costs, including environmental discharge fees, water and sewer maintenance fees, and increased meter accuracy, created from the implementation of one or more energy conservation measures when compared with an established baseline of previous costs, including captured lost revenues, developed by the governmental unit.

(2a) "Governmental unit" means either a local governmental unit or a State governmental unit.

(3) "Guaranteed energy savings contract" means a contract for the evaluation, recommendation, or implementation of energy conservation measures, including the design and installation of equipment or the repair or replacement of existing equipment or meters, in which all payments, except obligations on termination of the contract before its expiration, are to be made over time, and in which energy savings are guaranteed to exceed costs.

(4) "Local governmental unit" means any board or governing body of a political subdivision of the State, including any board of a community college, any school board, or an agency, commission, or authority of a political subdivision of the State.

(5) "Qualified provider" means a person or business experienced in the design, implementation, and installation of energy conservation measures.

(6) "Request for proposals" means a negotiated procurement initiated by a governmental unit by way of a published notice that includes the following:

a. The name and address of the governmental unit.

b. The name, address, title, and telephone number of a contact person in the governmental unit.

c. Notice indicating that the governmental unit is requesting qualified providers to propose energy conservation measures through a guaranteed energy savings contract.

d. The date, time, and place where proposals must be received.

e. The evaluation criteria for assessing the proposals.

f. A statement reserving the right of the governmental unit to reject any or all the proposals.

g. Any other stipulations and clarifications the governmental unit may require.

(7) "State governmental unit" means the State or a department, an agency, a board, or a commission of the State, including the Board of

Governors of The University of North Carolina and its constituent institutions. (1993 (Reg. Sess., 1994), c. 775, s. 3; 1995, c. 295, s. 1; 1999-235, ss. 1, 2; 2002-161, s. 2; 2006-190, s. 2.)

**Editor's Note.** — Session Laws 2007-546, s. 2.1(a) to (d), as amended by Session Laws 2008-203, s. 6, provides: "(a) The Department of Administration shall administer and oversee the implementation of a program whereby all of the following energy conservation measures, as defined in G.S. 143-64.17, shall be fully implemented no later than December 31, 2009, in each building owned by the State, The University of North Carolina, or the North Carolina Community College System:

"(1) Lighting Systems. — The installation of exit signs that employ light-emitting diode (LED) technology or photo luminescent technology; the replacement of incandescent light bulbs with compact fluorescent light bulbs; and where appropriate, as determined by the Department of Administration, the installation of occupancy sensors or optical sensors.

"(2) Water Systems. — The installation of aerators in sink faucets that reduce the flow of water to a rate of no more than five-tenths gallons per minute (0.5 g.p.m.); the installation of shower heads that reduce the flow of water to a rate of no more than one and five-tenths gallons per minute (1.5 g.p.m.); where appropriate, as determined by the Department of Administration, the resetting of hot water heaters to a water temperature of 120 degrees; the training of staff to monitor the use of irrigation systems and to base the use of the system on the moisture content of the soil, and either the elimination of potable water for irrigation or the reduction of water consumption in the building by twenty percent (20%) based on water consumption for the 2002-2003 fiscal year.

"(3) Heating, Ventilation, and Air-Conditioning (HVAC) Systems. — For HVAC equipment that is subject to replacement, the review of the specifications for the replacement HVAC equipment to ensure that it is not oversized; and, for building automation systems that are programmable, the training to ensure that these systems are properly programmed.

"(4) Minor Equipment. — For minor motorized equipment that is subject to replacement, the replacement of minor equipment with equipment that has premium efficiency motors. For purposes of this subdivision, 'premium efficiency motor' means a motor that meets or exceeds a set of minimum full-load efficiency standards developed by the National Electrical Manufacturers Association (NEMA).

"(5) Other Energy Conservation Measures. — Disconnect lamps in drink vending machines; use power save feature on computers, monitors, copiers, fax machines, and other office equipment; and when purchasing office equipment or appliances, purchase only Energy Star office equipment and appliances.

"(b) Consistent with G.S. 150B-2(8a)h., the Department of Administration shall develop or revise its architectural and engineering standards to provide assistance in determining which energy conservation measures are best suited to the unique characteristics of each building and in determining the specifications for the energy conservation measures under this section. The development or revision of the architectural and engineering standards shall be completed by February 1, 2008.

"(c) Prior to implementing this section and no later than February 1, 2008, the Department of Administration shall report to the Joint Legislative Commission on Governmental Operations and the Environmental Review Commission on its plan to implement this section.

"(d) In order to protect the integrity of historic buildings, this section does not apply to the extent it would require the implementation of measures to conserve energy, water, or other utility use that conflict with respect to any property eligible for, nominated to, or entered on the National Register of Historic Places, pursuant to the National Historic Preservation Act of 1966, P.L. 89-665; any historic building located within an historic district as provided in Chapter 160A or 153A of the General Statutes; any historic building listed, owned, or under the jurisdiction of an historic properties commission as provided in Chapter 160A or 153A; or any historic property owned by the State or assisted by the State."

## § 143-64.17A. Solicitation of guaranteed energy savings contracts.

(a) Before entering into a guaranteed energy savings contract, a governmental unit shall issue a request for proposals. Notice of the request shall be published at least 15 days in advance of the time specified for opening of the proposals in at least one newspaper of general circulation in the geographic area for which the local governmental unit is responsible or, in the case of a State governmental unit, in which the facility or facilities are located. No guaranteed energy savings contract shall be awarded by any governmental unit unless at least two proposals have been received from qualified providers. Provided that if after the publication of the notice of the request for proposals, fewer than two proposals have been received from qualified providers, the governmental unit shall again publish notice of the request and if as a result of the second notice, one or more proposals by qualified providers are received, the governmental unit may then open the proposals and select a qualified provider even if only one proposal is received.

(b) The governmental unit shall evaluate a sealed proposal from any qualified provider. Proposals shall contain estimates of all costs of installation, modification, or remodeling, including costs of design, engineering, installation, maintenance, repairs, debt service, and estimates of energy savings.

(c) In the case of a local governmental unit, proposals received pursuant to this section shall be opened by a member or an employee of the governing body of the local governmental unit at a public opening at which the contents of the proposals shall be announced and recorded in the minutes of the governing body. Proposals shall be evaluated for the local governmental unit by a licensed architect or engineer on the basis of:

(1) The information required in subsection (b) of this section; and
(2) The criteria stated in the request for proposals.

The local governmental unit may require a qualified provider to include in calculating the cost of a proposal for a guaranteed energy savings contract any reasonable fee payable by the local governmental unit for evaluation of the proposal by a licensed architect or professional engineer not employed as a member of the staff of the local governmental unit or the qualified provider.

(c1) In the case of a State governmental unit, proposals received pursuant to this section shall be opened by a member or an employee of the State governmental unit at a public opening and the contents of the proposals shall be announced at this opening. Proposals shall be evaluated for the State governmental unit by a licensed architect or engineer who is either privately retained, employed with the Department of Administration, or employed as a member of the staff of the State governmental unit. The proposal shall be evaluated on the basis of the information required in subsection (b) of this section and the criteria stated in the request for proposals.

The State governmental unit shall require a qualified provider to include in calculating the cost of a proposal for a guaranteed energy savings contract any reasonable fee payable by the State governmental unit for evaluation of the proposal by a licensed architect or professional engineer not employed as a member of the staff of the State governmental unit or the qualified provider. The Department of Administration may charge the State governmental unit a reasonable fee for the evaluation of the proposal if the Department's services are used for the evaluation and the cost paid by the State governmental unit to the Department of Administration shall be calculated in the cost of the proposal under this subsection.

(d) The governmental unit shall select the qualified provider that it determines to best meet the needs of the governmental unit by evaluating all of the following:

(1) Prices offered.
(2) Proposed costs of construction, financing, maintenance, and training.
(3) Quality of the products proposed.
(4) Amount of energy savings.
(5) General reputation and performance capabilities of the qualified providers.
(6) Substantial conformity with the specifications and other conditions set forth in the request for proposals.
(7) Time specified in the proposals for the performance of the contract.

(8) Any other factors the governmental unit deems necessary, which factors shall be made a matter of record.

(e) Nothing in this section shall limit the authority of governmental units as set forth in Article 3D of this Chapter. (1993 (Reg. Sess., 1994), c. 775, s. 3; 2002-161, s. 3.)

## § 143-64.17B. Guaranteed energy savings contracts.

(a) A governmental unit may enter into a guaranteed energy savings contract with a qualified provider if all of the following apply:

(1) The term of the contract does not exceed 20 years from the date of the installation and acceptance by the governmental unit of the energy conservation measures provided for under the contract.

(2) The governmental unit finds that the energy savings resulting from the performance of the contract will equal or exceed the total cost of the contract.

(3) The energy conservation measures to be installed under the contract are for an existing building or utility system.

(b) Before entering into a guaranteed energy savings contract, the governmental unit shall provide published notice of the time and place or of the meeting at which it proposes to award the contract, the names of the parties to the proposed contract, and the contract's purpose. The notice must be published at least 15 days before the date of the proposed award or meeting.

(c) A qualified provider entering into a guaranteed energy savings contract under this Part shall provide security to the governmental unit in the form acceptable to the Office of the State Treasurer and in an amount equal to one hundred percent (100%) of the total cost of the guaranteed energy savings contract to assure the provider's faithful performance. Any bonds required by this subsection shall be subject to the provisions of Article 3 of Chapter 44A of the General Statutes. If the savings resulting from a guaranteed energy savings contract are not as great as projected under the contract and all required shortfall payments to the governmental unit have not been made, the governmental unit may terminate the contract without incurring any additional obligation to the qualified provider.

(d) As used in this section, "total cost" shall include, but not be limited to, costs of construction, costs of financing, and costs of maintenance and training during the term of the contract. "Total cost" does not include any obligations on termination of the contract before its expiration, provided that those obligations are disclosed when the contract is executed.

(e) A guaranteed energy savings contract may not require the governmental unit to purchase a maintenance contract or other maintenance agreement from the qualified provider who installs energy conservation measures under the contract if the unit of government takes appropriate action to budget for its own forces or another provider to maintain new systems installed and existing systems affected by the guaranteed energy savings contract.

(f) In the case of a State governmental unit, a qualified provider shall, when feasible, after the acceptance of the proposal of the qualified provider by the State governmental unit, conduct an investment grade audit. During this investment grade audit, the qualified provider shall perform in accordance with Part 1 of this Article a life cycle cost analysis of each energy conservation measure in the final proposal. If the results of the audit are not within ten percent (10%) of both the guaranteed savings contained in the proposal and the total proposal amount, either the State governmental unit or the qualified provider may terminate the project without incurring any additional obligation to the other party. However, if the State governmental unit terminates the project after the audit is conducted and the results of the audit are within ten percent (10%) of both the guaranteed savings contained in the proposal and the total proposal amount, the State governmental unit shall reimburse the qualified provider the reasonable cost incurred in conducting the audit, and the results of the audit shall become the property of the State governmental unit.

(g) In the case of a State governmental unit, a qualified provider shall provide an annual reconciliation statement based upon the results of the measurement and verification review. The statement shall disclose any shortfalls or surplus between guaranteed energy and operational savings specified in the guaranteed energy savings contract and actual, not stipulated, energy and operational savings incurred during a given guarantee year. The guarantee year shall consist of a 12-month term commencing from the time that the energy conservation measures become fully operational. A qualified provider shall pay the State governmental unit any shortfall in the guaranteed energy and operational savings after the total year savings have been determined. A surplus in any one year shall not be carried forward or applied to a shortfall in any other year. (1993 (Reg. Sess., 1994), c. 775, s. 3; 1995, c. 295, s. 2; 1999-235, s. 3; 2002-161, s. 4; 2003-138, s. 1; 2006-190, s. 3; 2009-375, s. 2.)

**Effect of Amendments.** — Session Laws 2009-375, s. 2, effective July 31, 2009, added the second sentence in subsection (f).

**§ 143-64.17C:** Repealed by Session Laws 2002, ch. 161, s. 5, effective January 1, 2003, and applicable to contracts entered into on or after that date.

**Editor's Note.** — Session Laws 2002-161, s. 12, provides that nothing in the act limits the use of any method of contracting authorized by local law or other applicable laws.

## § 143-64.17D. Contract continuance.

A guaranteed energy savings contract may extend beyond the fiscal year in which it becomes effective. Such a contract shall stipulate that it does not constitute a direct or indirect pledge of the taxing power or full faith and credit of any governmental unit. (1993 (Reg. Sess., 1994), c. 775, s. 3; 2002-161, s. 6.)

## § 143-64.17E. Payments under contract.

A local governmental unit may use any funds, whether operating or capital, that are not otherwise restricted by law for the payment of a guaranteed energy savings contract. State appropriations to any local governmental unit shall not be reduced as a result of energy savings occurring as a result of a guaranteed energy savings contract. (1993 (Reg. Sess., 1994), c. 775, s. 3.)

## § 143-64.17F. State agencies to use contracts when feasible; rules; recommendations.

(a) State governmental units shall evaluate the use of guaranteed energy savings contracts in reducing energy costs and may use those contracts when feasible and practical.

(b) The Department of Administration, in consultation with the Department of Commerce through the State Energy Office, shall adopt rules for: (i) agency evaluation of guaranteed energy savings contracts; (ii) establishing time periods for consideration of guaranteed energy savings contracts by the Office of State Budget and Management, the Office of the State Treasurer, and the

Council of State, and (iii) setting measurements and verification criteria, including review, audit, and precertification. Prior to adopting any rules pursuant to this section, the Department shall consult with and obtain approval of those rules from the State Treasurer.

(c) The Department of Administration, and the Department of Commerce through the State Energy Office, may provide to the Council of State its recommendations concerning any energy savings contracts being considered. (2002-161, s. 7; 2003-138, s. 2; 2009-446, s. 1(d).)

**Editor's Note.** — Session Laws 2002-161, s. 12, provides that nothing in the act limits the use of any method of contracting authorized by local law or other applicable laws.

**Effect of Amendments.** — Session Laws 2009-446, s. 1(d), effective August 7, 2009, in subsection (b), inserted "in consultation with the Department of Commerce"; and in subsection (c), inserted "and the Department of Commerce."

## § 143-64.17G. Report on guaranteed energy savings contracts entered into by local governmental units.

A local governmental unit that enters into a guaranteed energy savings contract must report the contract and the terms of the contract to the Local Government Commission and the State Energy Office of the Department of Administration. The Commission shall compile the information and report it biennially to the Joint Commission on Governmental Operations. In compiling the information, the Local Government Commission shall include information on the energy savings expected to be realized from a contract and, with the assistance of the Office of State Construction and the State Energy Office, shall evaluate whether expected savings have in fact been realized. (1993 (Reg. Sess., 1994), c. 775, s. 9; 2006-190, s. 4; 2009-375, s. 3.)

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 775, s. 9, has been codified at this section at the direction of the Revisor of Statutes.

Session Laws 1993 (Reg. Sess., 1994), c. 775, s. 10, as amended by Session Laws 1995, c. 295, s. 3, provided: "A local governmental unit may not enter into a guaranteed energy savings contract under Part 2 of Article 3B of Chapter 143 of the General Statutes, as enacted by this act, on or after July 1, 1999." Session Laws 1999-235, s. 4, repealed this provision.

**Effect of Amendments.** — Session Laws 2009-375, s. 3, effective July 31, 2009, in the first sentence, added "and the State Energy Office of the Department of Administration" at the end, and in the last sentence, inserted "and the State Energy Office" near the middle.

## § 143-64.17H. Report on guaranteed energy savings contracts entered into by State governmental units.

A State governmental unit that enters into a guaranteed energy savings contract must report the contract and the terms of the contract to the State Energy Office of the Department of Commerce within 30 days of the date the contract is entered into. In addition, within 60 days after each annual anniversary date of a guaranteed energy savings contract, the State governmental unit must report the status of the contract to the State Energy Office, including any details required by the State Energy Office. The State Energy Office shall compile the information for each fiscal year and report it to the Joint Legislative Commission on Governmental Operations and to the Local Government Commission annually by December 1. In compiling the information, the State Energy Office shall include information on the energy savings expected to be realized from a contract and shall evaluate whether expected savings have in fact been realized. (2002-161, s. 8; 2006-190, s. 5; 2009-446, s. 1(c).)

**Editor's Note.** — Session Laws 2002-161, s. 12, provides that nothing in the act limits the use of any method of contracting authorized by local law or other applicable laws.

**Effect of Amendments.** — Session Laws 2006-190, s. 5, effective August 3, 2006, and applicable to contracts entered into or renewed on or after that date, rewrote the section heading, which formerly read: "Guaranteed energy savings contract reporting requirements."

Session Laws 2009-446, s. 1(c), effective August 7, 2009, substituted "Commerce" for "Administration" in the first sentence.

## § 143-64.17I. Installment and lease purchase contracts.

A local governmental unit may provide for the acquisition, installation, or maintenance of energy conservation measures acquired pursuant to this Part by installment or lease purchase contracts in accordance with and subject to the provisions of G.S. 160A-20 and G.S. 160A-19, as applicable. (2002-161, s. 8.)

**Editor's Note.** — Session Laws 2002-161, s. 12, provides that nothing in the act limits the use of any method of contracting authorized by local law or other applicable laws.

## § 143-64.17J. Financing by State governmental units.

State governmental units may finance the acquisition, installation, or maintenance of energy conservation measures acquired pursuant to this Part in the manner and to the extent set forth in Article 8 of Chapter 142 of the General Statutes or as otherwise authorized by law. (2002-161, s. 8.)

**Editor's Note.** — Session Laws 2002-161, s. 12, provides that nothing in the act limits the use of any method of contracting authorized by local law or other applicable laws.

## § 143-64.17K. Inspection and compliance certification for State governmental units.

The provisions of G.S. 143-341(3) shall not apply to any energy conservation measure for State governmental units provided pursuant to this Part, except as specifically set forth in this section. Except as otherwise exempt under G.S. 116-31.11, the following shall apply to all energy conservation measures provided to State governmental units pursuant to this Part:

(1) The provisions of G.S. 133-1.1.
(2) Inspection and certification by:
  a. The applicable local building inspector under Part 4 of Article 18 of Chapter 153A of the General Statutes or Part 5 of Article 19 of Chapter 160A of the General Statutes; or
  b. At the election of the State governmental unit, the Department of Administration under G.S. 143-341(3)d.

The cost of compliance with this section may be included in the cost of the project in accordance with G.S. 143-64.17A(c1) and may be included in the cost financed under Article 8 of Chapter 142 of the General Statutes. (2002-161, s. 8.)

**Editor's Note.** — Session Laws 2002-161, s. 12, provides that nothing in the act limits the use of any method of contracting authorized by local law or other applicable laws.

**§§ 143-64.17L through 143-64.19:** Reserved for future codification purposes.

## ARTICLE 3C.

## *Contracts to Obtain Consultant Services.*

### § 143-64.20. "Agency" defined; Governor's approval required.

(a) For purposes of this Article the term "agency" shall mean every State agency, institution, board, commission, bureau, department, division, council, member of the Council of State, or officer of the State government.

(b) No State agency shall contract to obtain services of a consultant or advisory nature unless the proposed contract has been justified to and approved in writing by the Governor of North Carolina. All written approvals shall be maintained on file as part of the agency's records for not less than five years. (1975, c. 887, s. 1.)

**Cross References.** — As to the establishment of community penalty programs, see note under G.S. 143-48.

#### OPINIONS OF ATTORNEY GENERAL

**Applicability of Article to Contracts for Planning, Design and Construction of Highways.** — The provisions of Session Laws 1975, Chapter 887 applicable to "contracts for services of a consultant or advisory nature" do not include contracts for the planning, design and construction of highways which the Board of Transportation is authorized to enter into by the provisions of Chapter 136 of the General Statutes. See opinion of Attorney General to Mr. Billy Rose, 45 N.C.A.G. 71 (1975).

**Contracts with Experts, Consultants, or Other Professional Advisors to Review Conversion Plans Are Exempt from Articles 3 and 3C of Chapter 143.** — The Commissioner of Insurance has statutory authority to contract with experts, consultants, or other professional advisors to review conversion plans without adhering to the requirements set forth in Articles 3 and 3C of Chapter 143, G.S. 143-48 et seq. and G.S. 143-64.20 et seq., the only statutory requirement that must be met by the Commissioner is that the costs for the personal professional service contracts must not exceed an amount that is reasonable and appropriate for the review of the plan. See opinion of Attorney General to Peter A. Kolbe, General Counsel, North Carolina Department of Insurance, 2001 N.C. AG LEXIS 28 (8/24/01).

**Contracts negotiated pursuant to G.S. 58-19-15(f) are not exempt from the requirements of Article 3C of Chapter 143,** G.S. 143-64.20 et seq. See opinion of Attorney General to Peter A. Kolbe, General Counsel, North Carolina Department of Insurance, 2001 N.C. AG LEXIS 29 (10/3/01).

**The State Employees' Comprehensive Major Medical Plan is exempt from the requirements of Article 3C of Chapter 143,** G.S. 143-64.20 et seq., with respect to contracts to assist the plan in negotiating preferred provider networks. See opinion of Attorney General to Jack W. Walker, Executive Administrator, Teachers' & State Employees' Comprehensive Major Medical Plan, 2001 N.C. AG LEXIS 38 (8/23/01).

### § 143-64.21. Findings to be made by Governor.

The Governor, before granting written approval of any such contract, must find:

(1) That the contract is reasonably necessary to the proper function of such State agency; and

(2) That such services or advice cannot be performed within the resources of such State agency;

(3) That the estimated cost is reasonable as compared with the likely benefits or results; and
(4) That the General Assembly has appropriated funds for such contract or that such funds are otherwise available; and
(5) That all rules and regulations of the Department of Administration have been or will be complied with. (1975, c. 879, s. 46; c. 887, s. 2.)

### OPINIONS OF ATTORNEY GENERAL

**Compensation of Expert Retained to Assist in Reviewing Proposed Acquisition of Control.** — Prior to granting written approval for a contract for the Commissioner of Insurance to retain an expert to assist in reviewing a proposed acquisition of control, the Governor must find that the estimated cost is reasonable as compared with the likely benefits or results. See opinion of Attorney General to Peter A. Kolbe, General Counsel, North Carolina Department of Insurance, 2001 N.C. AG LEXIS 29 (10/3/01).

## § 143-64.22. Contracts with other State agencies; competitive proposals.

The rules of the Department of Administration shall include provisions to assure that all consultant contracts let by State agencies shall be made with other agencies of the State of North Carolina, if such contract can reasonably be performed by them; or otherwise, that wherever practicable a sufficient number of sources for the performance of such contract are solicited for competitive proposals and that such proposals are properly evaluated for award to the State's best advantage. (1975, c. 879, s. 46; c. 887, s. 3; 1987, c. 827, s. 217.)

## § 143-64.23. Compliance required; penalty for violation of Article.

No disbursement of State funds shall be made and no such contract shall be binding until the provisions of G.S. 143-64.21 and 143-64.22 have been complied with. Any employee or official of the State of North Carolina who violates this Article shall be liable to repay any amount expended in violation of this Article, plus court costs. (1975, c. 887, s. 4.)

## § 143-64.24. Applicability of Article.

This Article shall not apply to the following agencies:
(1) The General Assembly.
(2) Special study commissions.
(3) The Research Triangle Institute.
(4) The School of Government at the University of North Carolina at Chapel Hill.
(5) Attorneys employed by the North Carolina Department of Justice.
(6) Physicians or doctors performing contractual services for any State agency.
(7) Independent Review Organizations selected by the Commissioner of Insurance pursuant to G.S. 58-50-85.
(8) The University of North Carolina. The Board of Governors of the University of North Carolina must adopt policies and procedures governing contracts to obtain the services of a consultant by the constituent institutions of the University of North Carolina. (1975, c. 887, s. 5; 1977, c. 802, s. 50.57; 2001-446, s. 4.6A; 2006-95, s. 2.1; 2006-264, s. 29(*l*).)

**OPINIONS OF ATTORNEY GENERAL**

**Inapplicability to Certain Contracts.** — This section is inapplicable to contracts entered into by the Department of Administration with engineering or architectural firms for planning, design, construction and renovation services. See opinion of Attorney General to Mr. Ray DeBruhl, Construction Division, Department of Administration, 51 N.C.A.G. 35 (1981).

**§§ 143-64.25 through 143-64.30:** Reserved for future codification purposes.

## Article 3D.

## *Procurement of Architectural, Engineering, and Surveying Services.*

### § 143-64.31. Declaration of public policy.

(a) It is the public policy of this State and all public subdivisions and Local Governmental Units thereof, except in cases of special emergency involving the health and safety of the people or their property, to announce all requirements for architectural, engineering, surveying and construction management at risk services, to select firms qualified to provide such services on the basis of demonstrated competence and qualification for the type of professional services required without regard to fee other than unit price information at this stage, and thereafter to negotiate a contract for those services at a fair and reasonable fee with the best qualified firm. If a contract cannot be negotiated with the best qualified firm, negotiations with that firm shall be terminated and initiated with the next best qualified firm. Selection of a firm under this Article shall include the use of good faith efforts by the public entity to notify minority firms of the opportunity to submit qualifications for consideration by the public entity.

(a1) A resident firm providing architectural, engineering, surveying, or construction management at risk services shall be granted a preference over a nonresident firm, in the same manner, on the same basis, and to the extent that a preference is granted in awarding contracts for these services by the other state to its resident firms over firms resident in the State of North Carolina. For purposes of this section, a resident firm is a firm that has paid unemployment taxes or income taxes in North Carolina and whose principal place of business is located in this State.

(b) Public entities that contract with a construction manager at risk under this section shall report to the Secretary of Administration the following information on all projects where a construction manager at risk is utilized:

(1) A detailed explanation of the reason why the particular construction manager at risk was selected.

(2) The terms of the contract with the construction manager at risk.

(3) A list of all other firms considered but not selected as the construction manager at risk and the amount of their proposed fees for services.

(4) A report on the form of bidding utilized by the construction manager at risk on the project.

The Secretary of Administration shall adopt rules to implement the provisions of this subsection including the format and frequency of reporting. (1987, c. 102, s. 1; 1989, c. 230, s. 2; 2001-496, s. 1; 2006-210, s. 1.)

**Local Modification.** — (As to school building contracts) Cabarrus: 2009-430, s. 2 (expires June 30, 2014); Cherokee: 2007-48, s. 1; Currituck: 1993 (Reg. Sess., 1994), c. 668, s. 1

(expires on completion of project or January 1, 2004); (As to water treatment and wastewater treatment plant expansion projects) Harnett: 2007-214, s. 1 (expires December 31, 2010); Johnston: 1995 (Reg. Sess., 1996), c. 611, s. 1; 2002-93, s. 2 (expires June 30, 2005); 2008-40 (as to contracts for renovations to the county courthouse); city of Charlotte (as to water and wastewater treatment plants): 2007-312, s. 1.

**Cross References.** — As to public contracts, see G.S. 143-128 et seq.

**Editor's Note.** — Session Laws 2008-107, s. 27.7A, provides: "The Department of Administration shall contract with North Carolina Freedom Monument Project, Inc., a nonprofit corporation, for the design and construction of the North Carolina Freedom Project. Notwithstanding G.S. 143-64.31 through 143-64.34 and G.S. 143-135.26, North Carolina Freedom Monument Project, Inc., shall select the designer and consultant for the project."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

### OPINIONS OF ATTORNEY GENERAL

**This Section Does Not Apply to Subcontract Services Procured by Private Firms.** — This section applies only to the procurement of architectural, engineering, or surveying services by state or local government entities and does not extend to subcontract services procured by private firms. See opinion of Attorney General to Jerry T. Carter, Executive Director, N.C. Board of Examiners for Engineers and Surveyors, 2001 N.C. AG LEXIS 23 (6/19/2001).

**Legislative exemptions authorizing public "design-build" contracts are not intended to require strict compliance with this section;** such should be presumed to supersede strict qualifications-based selection methods unless specifically stated otherwise in the authorizing legislation. See opinion of Attorney General to Jerry T. Carter, Executive Director, N.C. Board of Examiners for Engineers and Surveyors, 2001 N.C. AG LEXIS 23 (6/19/2001).

**Award of Professional Services Contracts on Competitive Basis.** — With respect to state-funded projects, professional services contracts may be awarded on a competitive basis in limited circumstances; however, before these contracts are awarded as a routine matter, the Department of Transportation should adopt rules and regulations governing their award. See opinion of Attorney General to Mr. Len Hill, P.E., Deputy Highway Administrator - Preconstruction, North Carolina Department of Transportation, 2000 N.C. AG LEXIS 3 (5/31/2000).

## § 143-64.32. Written exemption of particular contracts.

Units of local government or the North Carolina Department of Transportation may in writing exempt particular projects from the provisions of this Article in the case of:

(a) Proposed projects where an estimated professional fee is in an amount less than thirty thousand dollars ($30,000), or

(b) Other particular projects exempted in the sole discretion of the Department of Transportation or the unit of local government, stating the reasons therefor and the circumstances attendant thereto. (1987, c. 102, s. 2.)

**Local Modification.** — (As to school building contracts) Cabarrus: 2009-430, s. 2 (expires June 30, 2014); Cherokee: 2007-48, s. 1; Currituck: 1993 (Reg. Sess., 1994), c. 668, s. 1 (expires on completion of project or January 1, 2004); (As to water treatment and wastewater treatment plant expansion projects) Harnett: 2007-214, s. 1 (expires December 31, 2010); Johnston: 1995 (Reg. Sess., 1996), c. 611, s. 1; 2002-93, s. 2 (expires June 30, 2005); 2008-40 (as to contracts for renovations to the county courthouse); city of Charlotte (as to water and wastewater treatment plants): 2007-312, s. 1.

## § 143-64.33. Advice in selecting consultants or negotiating consultant contracts.

On architectural, engineering, or surveying contracts, the Department of Transportation or the Department of Administration may provide, upon request by a county, city, town or other subdivision of the State, advice in the process of selecting consultants or in negotiating consultant contracts with architects, engineers, or surveyors or any or all. (1987, c. 102, s. 3; 1989, c. 230, s. 3; c. 770, s. 44.)

## § 143-64.34. Exemption of certain projects.

State capital improvement projects under the jurisdiction of the State Building Commission, capital improvement projects of The University of North Carolina, and community college capital improvement projects, where the estimated expenditure of public money is less than five hundred thousand dollars ($500,000), are exempt from the provisions of this Article. (1987, c. 102, s. 3.1; c. 830, s. 78(a); 1997-314, s. 1; 1997-412, s. 5; 2001-496, ss. 8(b), 8(c); 2005-300, s. 1; 2005-370, s. 1; 2007-322, s. 2; 2007-446, s. 7.)

**Editor's Note.** — Session Laws 2001-496, s. 8(b), as amended by Session Laws 2005-300, s. 1, repealed Session Laws 1997-412, s. 5.1, which effective July 1, 2001, would have deleted subsection (b), concerning exemption of capital improvement projects of the University of North Carolina where the expenditure is less than $300,000.

Session Laws 2007-322, s. 13, provides: "This act is effective when it becomes law [July 30, 2007]. Sections 1 through 4 of this act apply to construction projects for which bids or proposals are solicited on or after that date. Section 5 of this act applies to construction or repair work commenced on or after that date."

**Legal Periodicals.** — For 1997 legislative survey, see 20 Campbell L. Rev. 437.

## §§ 143-64.35 through 143-64.49: Reserved for future codification purposes.

## Article 3E.

## *State/Public School Child Care Contracts.*

## § 143-64.50. State/public school-contracted on-, near-site child care facilities; location authorization; contract for program services authorization.

State agencies and local boards of education may contract with any city, county, or other political subdivision of the State, governmental or private agency, person, association, or corporation to establish child care services in State buildings and public schools. If the child care program is located in a State building that is not used for legislative activity, the procedure for approving the location of the program shall be pursuant to G.S. 143-341(4). If the child care program is located in a State building used for legislative activity, the procedure for approving the location of the program shall be pursuant to G.S. 120-32.1. If the child care program is located in any other State building, the procedure for contracting for child care services shall be pursuant to G.S. 143-49(3). If the child care program is located in a State building used for legislative activity, the procedure for contracting for child care services shall be pursuant to G.S. 120-32(4).

Contracts for services awarded pursuant to this section are exempt from the provisions of G.S. 66-58(a) and the contract may provide for payment of rent by the lessee or the operator of the facility. (1991, c. 345, s. 1; 1997-506, s. 49.)

**Editor's Note.** — Section 2 of Session Laws 1991, c. 345 provides: "Nothing in this act shall be construed to allow the State of North Carolina to expend funds to implement the provisions of this act."

### § 143-64.51. State/public school-contracted child care facilities; licensing requirements.

All child care facilities established pursuant to this Article shall be licensed and regulated under the provisions of Article 7 of Chapter 110 of the General Statutes, entitled "Child Care Facilities." (1991, c. 345, s. 1; 1997-506, s. 50.)

### § 143-64.52. State/public school-contracted child care facilities; limitation of State/local board liability.

The operators of the child care facilities established pursuant to this Article shall assume all financial and legal responsibility for the operation of the programs and shall maintain adequate insurance coverage for the operations taking place in the facilities. Neither the operator or any of the staff of the facilities are considered State employees or local board of education employees by virtue of this Article alone. The State or the local boards of education are financially and legally responsible only for the maintenance of the building. (1991, c. 345, s. 1; 1997-506, s. 51.)

## ARTICLE 3F.

## *State Privacy Act.*

### § 143-64.60. State Privacy Act.

(a) It is unlawful for any State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

The provisions of this subsection shall not apply with respect to:

(1) Any disclosure which is required or permitted by federal statute, or

(2) The disclosure of a social security number to any State or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any State or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it. (2001-256, s. 1; 2001-487, s. 87.)

**§§ 143-64.61 through 143-64.69:** Reserved for future codification purposes.

## ARTICLE 3G.

## *Personal Service Contracts.*

### § 143-64.70. Personal service contracts — reporting requirements.

(a) By January 1 of each year, each State department, agency, and institution shall make a detailed written report to the Office of State Budget and

Management and the Office of State Personnel on its utilization of personal services contracts that have an annual expenditure greater than twenty-five thousand dollars ($25,000). The report by each State department, agency, and institution shall include the following:

(1) Identification of the department and employee responsible for oversight of the performance of the contract.

(2) Vendor or contractor name, object of expenditure description, contract award amount, purchase order or contract number, purchase order start and end date, source of funds, and amount disbursed during the fiscal year.

(3) through (7) Repealed by Session Laws 2007-322, s. 7, effective July 30, 2007.

(b) By March 15 of each year, the Office of State Budget and Management and the Office of State Personnel shall compile and analyze the information required under subsection (a) of this section and shall submit to the Joint Legislative Commission on Governmental Operations a detailed report on the type, number, duration, cost and effectiveness of State personal services contracts throughout State government. (2001-424, ss. 6.19(a), (b); 2005-276, s. 6.38; 2007-322, s. 7.)

**§§ 143-64.71 through 143-64.79:** Reserved for future codification purposes.

## ARTICLE 3H.

## *Overpayments of State Funds.*

### § 143-64.80. Overpayments of State funds to persons in State-supported positions; recoupment required.

(a) An overpayment of State funds to any person in a State-funded position, whether in the form of salary or otherwise, shall be recouped by the entity that made the overpayment and, to the extent allowed by law, the amount of the overpayment may be offset against the net wages of the person receiving the overpayment.

(b) No State department, agency, or institution, or other State-funded entity may forgive repayment of an overpayment of State funds, but shall have a duty to pursue the repayment of State funds by all lawful means available, including the filing of a civil action in the General Court of Justice. (2003-263, s. 1.)

**§§ 143-64.81 through 143-64.85:** Reserved for future codification purposes.

## ARTICLE 4.

## *World War Veterans Loan Administration.*

**§§ 143-65 through 143-105:** Deleted by Session Laws 1951, c. 349.

## ARTICLE 5.

## *Check on License Forms, Tags and Certificates Used or Issued.*

**§ 143-106:** Repealed by Session Laws 1983, c. 913, s. 33.

**§ 143-107:** Transferred to G.S. 143-106 by Session Laws 1951, c. 1010, s. 2.

## ARTICLE 6.

## *Officers of State Institutions.*

### § 143-108. Secretary to be elected from directors.

The board of directors of the various State institutions shall elect one of their number as secretary, who shall act as such at all regular or special meetings of such boards. (1907, c. 883, s. 1; C.S., s. 7517.)

### § 143-109. Directors to elect officers and employees.

All officers and employees of the various State institutions who hold elective positions shall be nominated and elected by the board of directors of the respective institutions. (1907, c. 883, s. 3; C.S., s. 7518.)

### § 143-110. Places vacated for failure to attend meetings.

Unless otherwise specially provided by law, whenever a trustee or director of any institution supported in whole or in part by State appropriation shall fail to be present for two successive years at the regular meetings of the board, his place as trustee or director shall be deemed vacant and shall be filled as provided by law for other vacancies on such boards.

This section shall not apply to any trustee or director who holds office as such by virtue of another public office held by him and shall not apply to any trustee or director chosen by any agency or authority other than the State of North Carolina. (1927, c. 225.)

### § 143-111. Director not to be elected to position under board.

It shall be unlawful for any board of directors, board of trustees or other governing body of any of the various State institutions (penal, charitable, or otherwise) to appoint or elect any person who may be or has been at any time within six months a member of such board of directors, board of trustees, or other governing body, to any position in the institution, which position may be under the control of such board of directors, board of trustees, or other governing body. (1909, c. 831; C.S., s. 7519.)

### § 143-112. Superintendents to be within call of board meetings.

The superintendent of each of the various State institutions shall be present on the premises of his institution and within the call of the board of directors during all regular or special meetings of the board, and shall respond to all calls of the board for any information which it may wish at his hands. (1907, c. 883, s. 1; C.S., s. 7520.)

### § 143-113. Trading by interested officials forbidden.

The directors, stewards, and superintendents of the State institutions shall not trade directly or indirectly with or among themselves, or with any concern in which they are interested, for any supplies needed by any such institutions. (1907, c. 883, s. 2; C.S., s. 7521.)

### § 143-114. Diversion of appropriations to State institutions.

It shall be unlawful for the board of trustees, board of directors, or other body controlling any State institution, to divert, use, or expend any moneys appropriated for the use of said institutions for its permanent improvement and enlargement to the payment of any of the current expenses of said institution or for the payment of the cost of the maintenance thereof; it shall likewise be unlawful for any board of trustees, board of directors, or other controlling body of any State institution to which money is appropriated for its maintenance by the State to divert, use or expend any money so appropriated for maintenance, for the permanent enlargement or permanent equipment, or the purchase of land for said institution. (1921, c. 232, s. 1; C.S., s. 7521 (a).)

### § 143-115. Trustee, director, officer or employee violating law guilty of misdemeanor.

Any member or members of any board of trustees, board of directors, or other controlling body governing any of the institutions of the State, or any officer, employee of, or person holding any position with any of the institutions of the State, violating any of the provisions of G.S. 143-114, shall be guilty of a Class 1 misdemeanor, and upon conviction in any court of competent jurisdiction judgment shall be rendered by such court removing such member, officer, employee, or person holding any position from his place, office or position. (1921, c. 232, s. 2; C.S., s. 7521 (b); 1993, c. 539, s. 1005; 1994, Ex. Sess., c. 24, s. 14(c).)

### § 143-116. Venue for trial of offenses.

All offenses against G.S. 143-114 and 143-115 shall be held to have been committed in the County of Wake and shall be tried and disposed of by the courts of said county having jurisdiction thereof. (1921, c. 232, s. 3; C.S., s. 7521 (c).)

**§§ 143-116.1 through 143-116.5:** Reserved for future codification purposes.

## ARTICLE 6A.

## *Rules of Conduct; Traffic Laws for Institutions.*

### § 143-116.6. Rules concerning conduct; violation.

(a) The Secretary of Health and Human Services may adopt rules for State-owned institutions under the jurisdiction of the Department of Health and Human Services for the regulation and deportment of persons in the buildings and grounds of the institutions, and for the suppression of nuisances and disorder. Rules adopted under this section shall be consistent with G.S. 14-132. Copies of the rules shall be posted at the entrance to the grounds and at different places on the grounds.

(b) Any person violating such rules shall, upon conviction, be guilty of a Class 2 misdemeanor. (1981, c. 614, s. 5; 1987, c. 827, s. 255; 1993, c. 539, s. 1006; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.118(a).)

## § 143-116.7. Motor vehicle laws applicable to streets, alleys and driveways on the grounds of Department of Health and Human Services institutions; traffic regulations; registration and regulation of motor vehicles.

(a) Except as otherwise provided in this section, all the provisions of Chapter 20 of the General Statutes relating to the use of the highways of the State and the operation of motor vehicles thereon are made applicable to the streets, alleys, roads and driveways on the grounds of all State institutions under the jurisdiction of the Department of Health and Human Services. Any person violating any of the provisions of the Chapter in or on such streets, alleys, roads or driveways shall, upon conviction be punished as prescribed in this section. Nothing herein contained shall be construed as in any way interfering with the ownership and control of the streets, alleys, roads and driveways on the grounds of the State institutions operated by the Department of Health and Human Services.

(b) The Secretary of Health and Human Services may adopt rules consistent with the provisions of Chapter 20 of the General Statutes, with respect to the use of the streets, alleys, and driveways of institutions of the Department of Health and Human Services. Based upon a traffic and engineering investigation, the Secretary of Health and Human Services may also determine and establish speed limits on streets lower than those provided in G.S. 20-141.

(c) The Secretary may, by rule, regulate parking and establish parking areas on the grounds of institutions of the Department of Health and Human Services.

(d) The Secretary may, by rule, provide for the registration and parking of motor vehicles maintained and operated by employees of the institution, and may fix fees, not to exceed ten dollars ($10.00) per year, for such registration.

(e) Rules adopted under this section may provide that violation subjects the offender to a civil penalty, not to exceed fifty dollars ($50.00). Penalties may be graduated according to the seriousness of the offense or the number of prior offenses by the person charged but shall not exceed fifty dollars ($50.00). The Secretary may establish procedures for the collection of penalties, and they may be enforced by civil action in the nature of debt.

(f) A rule adopted under this section may provide for the removal of illegally parked motor vehicles. Any such removal must be in compliance with Article 7A of Chapter 20 of the General Statutes.

(g) Any violation under this section or of a provision of Chapter 20 of the General Statutes made applicable to the grounds of State institutions solely by operation of this section shall be considered an infraction and shall be subject to an infraction penalty not to exceed fifty dollars ($50.00). A rule adopted under this section may provide that a violation shall not be an infraction, but shall be enforced by other methods available, including the methods authorized by subsection (e).

(h) Any fees or civil penalties collected pursuant to this section shall be deposited in the General Fund Budget Code of the institution where the fees or civil penalties are collected and shall only be used to support the cost of administration of this section. Infraction penalties shall be disbursed as provided in G.S. 14-3.1(a). (1981, c. 614, s. 5; 1985, c. 672; c. 764, s. 39; 1985 (Reg. Sess., 1986), c. 852, ss. 13, 14; 1987, c. 827, s. 256; 1997-443, s. 11A.118(a).)

## § 143-116.8. Motor vehicle laws applicable to State parks and forests road system.

(a) Except as otherwise provided in this section, all the provisions of Chapter 20 of the General Statutes relating to the use of highways and public vehicular areas of the State and the operation of vehicles thereon are made applicable to the State parks and forests road system. For the purposes of this section, the term "State parks and forests road system" shall mean the streets, alleys, roads, public vehicular areas and driveways of the State parks, State forests, State recreation areas, State lakes, and all other lands administered by the Department of Environment and Natural Resources. This term shall not be construed, however, to include streets that are a part of the State highway system. Any person violating any of the provisions of Chapter 20 hereby made applicable in the State parks and forests road system shall, upon conviction, be punished in accordance with Chapter 20. Nothing herein contained shall be construed as in any way interfering with the ownership and control of the State parks and forests road system by the Department of Environment and Natural Resources.

(b)(1) It shall be unlawful for a person to operate a vehicle in the State parks and forests road system at a speed in excess of twenty-five miles per hour (25 mph). When the Secretary of Environment and Natural Resources determines that this speed is greater than reasonable and safe under the conditions found to exist in the State parks and forests road system, the Secretary may establish a lower reasonable and safe speed limit. No speed limit established by the Secretary pursuant to this provision shall be effective until posted in the part of the system sought to be affected.

(2) Any person convicted of violating this subsection by operating a vehicle on the State parks and forests road system while fleeing or attempting to elude arrest or apprehension by a law enforcement officer with authority to enforce the motor vehicle laws, shall be punished as provided in G.S. 20-141.5.

(3) For the purposes of enforcement and administration of Chapter 20, the speed limits stated and authorized to be adopted by this section are speed limits under Chapter 20.

(4) The Secretary may designate any part of the State parks and forests road system for one-way traffic and shall erect appropriate signs giving notice thereof. It shall be a violation of G.S. 20-165.1 for any person to willfully drive or operate any vehicle on any part of the State parks and forests road system so designated except in the direction indicated.

(5) The Secretary shall have power, equal to the power of local authorities under G.S. 20-158 and G.S. 20-158.1, to place vehicle control signs and signals and yield-right-of-way signs in the State parks and forests road system; the Secretary also shall have power to post such other signs and markers and mark the roads in accordance with Chapter 20 as the Secretary may determine appropriate for highway safety and traffic control. The failure of any vehicle driver to obey any vehicle control sign or signal, or any yield-right-of-way sign placed under the authority of this section in the State parks and forests road system

shall be an infraction and shall be punished as provided in G.S. 20-176.

(c) The Secretary of Environment and Natural Resources may, by rule, regulate parking and establish parking areas, and provide for the removal of illegally parked motor vehicles on the State parks and forests road system. Any rule of the Secretary shall be consistent with the provisions of G.S. 20-161, 20-161.1, and 20-162. Any removal of illegally parked motor vehicles shall be in compliance with Article 7A of Chapter 20.

(d) A violation of the rules issued by the Secretary of Environment and Natural Resources under subsection (c) of this section is an infraction pursuant to G.S. 20-162.1, and shall be punished as therein provided. These rules may be enforced by the Commissioner of Motor Vehicles, the Highway Patrol, or other law enforcement officers of the State, counties, cities or other municipalities having authority under Chapter 20 to enforce laws or rules on travel or use or operation of vehicles or the use or protection of the highways of the State.

(e) The provisions of Chapter 20 are applicable at all times to the State parks and forests road system, including closing hours, regardless of the fact that during closing hours the State parks and forests road system is not open to the public as a matter of right. (1987, c. 474, s. 1; 1989, c. 727, s. 218(96); 1997-443, ss. 11A.119(a), 19.26(e).)

## Article 7.

## *Persons Admitted to Department of Health and Human Services Institutions to Pay Costs.*

### § 143-117. Institutions included.

All persons admitted to the following institutions operated by the Department of Health and Human Services are required to pay the actual cost of their care, treatment, training and maintenance at these institutions: regional psychiatric hospitals, special care centers, regional mental retardation centers, schools for emotionally disturbed children, and alcohol and drug abuse treatment centers. (1925, c. 120, s. 1; 1949, c. 1070; 1957, c. 1232, s. 29; 1959, c. 1028, ss. 1-7; 1967, c. 188, s. 1; c. 834, s. 1; 1969, c. 20; c. 837, s. 4; 1971, c. 469; 1981, c. 562, s. 6; 1985, c. 508, s. 2; 1987, c. 856, s. 14; 1989, c. 145, s. 2; 1997-443, ss. 11A.92, 11A.118(a).)

**Editor's Note.** — Session Laws 1987, c. 856, s. 20 provided that ss. 1 through 19 would be effective only upon agreement by Duke University to the terms of ss. 21 through 26 of the act and certification of that fact by the Secretary of the Department of Human Resources to the Governor, and ss. 12 to 17 would be effective on the date of the transfer. Section 20 further provided that any disputes arising out of the transfer would be resolved by the Director of Budget.

Sections 21 through 26 of the act provided terms for the transfer of the Lenox Baker Hospital to Duke University.

The letter of certification from the Secretary of the Department of Human Resources was dated October 5, 1988, but it appears that this was a typographical error and that October 5, 1987, was the correct date.

**Legal Periodicals.** — For survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

### CASE NOTES

**This Article is constitutional.** State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

**And Is Not an Impermissible Delegation of Power.** — This Article sets forth adequate standards from which the various boards of trustees or directors of institutions can ascertain the charges against a patient and is not an impermissible delegation of power to the hospital board. State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

**Legislative Policy.** — The policy stated by the General Assembly is that all persons admitted to State hospitals must pay the actual cost of their care, treatment and maintenance. State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

**Applicability.** — This section applies to any person confined to a State institution, as defined in this section, regardless of the origin of the commitment. State ex rel. Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977).

This Article is applicable to the criminally insane as well as to the civilly committed. State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

**Cost Charged as Compensation for Services Rendered.** — The cost charged by this Article is not characteristic of a tax. It is compensation for services rendered the respective inmates or patients by the hospital. State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

**As to collection from defendant of costs for period from declaration of incompetency to stand trial and trial,** see State ex rel. Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977).

**As to collection from defendant of costs arising during period following acquittal by reason of insanity,** see State ex rel. Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977).

**As to collection from defendant of costs during period from acquittal by reason of insanity and release from institution,** see State ex rel. Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977).

**Cited** in Graham v. Reserve Life Ins. Co., 274 N.C. 115, 161 S.E.2d 485 (1968); State ex rel. Broughton Hosp. v. Hollifield, 4 N.C. App. 453, 167 S.E.2d 45 (1969).

## § 143-117.1. Definitions.

As used in this Article, the following terms have the meaning specified unless the content clearly implies otherwise:

(1) "Care" means care, treatment, training, maintenance, habilitation and rehabilitation of a person admitted to institutions covered by this Article.

(2) "Department" means the Department of Health and Human Services.

(3) "Persons admitted" means clients of regional psychiatric hospitals, State special care centers, regional mental retardation centers, schools for emotionally disturbed children, and alcohol and drug abuse treatment centers, including clients who may be treated on an outpatient basis.

(4) "Secretary" means the Secretary of Health and Human Services. (1985, c. 508, s. 3; 1987, c. 856, s. 15; 1989, c. 145, s. 3; c. 770, s. 41; 1997-443, s. 11A.118(a).)

**Editor's Note.** — Session Laws 1987, c. 856, s. 20 provided that ss. 1 through 19 would be effective only upon agreement by Duke University to the terms of ss. 21 through 26 of the act and certification of that fact by the Secretary of the Department of Human Resources to the Governor, and ss. 12 to 17 would be effective on the date of the transfer. Section 20 further provided that any disputes arising out of the transfer would be resolved by the Director of Budget.

Sections 21 through 26 of the act provided terms for the transfer of the Lenox Baker Hospital to Duke University.

The letter of certification from the Secretary of the Department of Human Resources was dated October 5, 1988, but it appears that this was a typographical error and that October 5, 1987, was the correct date.

## § 143-118. Secretary of Health and Human Services to fix cost and charges.

(a) The Secretary shall determine and fix the actual cost of care to be paid by and for each person admitted to an institution. The Secretary is given full and final authority to fix a general rate of charge based on said actual cost of providing care, to be paid by persons admitted able to pay the rate or charge, or, in cases where indigent persons admitted are later found to be nonindigent, then cost for their care shall be paid in one or more payments based on the rate of charge in effect for the period or periods of time during which the persons admitted were receiving care in the institutions.

(b), (c) Repealed by Session Laws 1985, c. 508, s. 5, effective October 1, 1985.

(d) The Secretary shall ascertain which of the persons admitted or persons legally responsible for them are financially able to pay the cost fixed.

(e) The Secretary is empowered to enter into contracts of compromise of accounts owing to the institution for past, present or future care at the institutions, including but not limited to the authority to enter into a contract to charge nothing, which contract shall be binding on the respective institution under the terms and for the period specified in the contract. The rates set by the compromise shall be determined in the discretion of the Secretary by the ability to pay of the person admitted or the person legally responsible for his support. This subsection shall not be construed as mandatory and if a contract is not entered into or terminates or if the obligor defaults in the payment of a compromise account or any installment, then the full actual cost of care shall be assessed against the person admitted.

(f) For any client admitted under Part 2 of Article 5 of G.S. 122C to a State facility for the mentally ill designated for research purposes in accordance with G.S. 122C-210.2, the Secretary may reduce the rates set by compromise in G.S. 143-118(e) by not more than one-half the amount of that rate. (1925, c. 120, s. 2; 1935, c. 186, s. 1; 1981, c. 562, s. 6; 1985, c. 508, ss. 4-6; 1987, c. 358, s. 2; 1997-443, s. 11A.118(a).)

### CASE NOTES

**Legislative Policy.** — The policy stated by the General Assembly is that all persons admitted to State hospitals must pay the actual cost of their care, treatment and maintenance. State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

**This section sets forth the guidelines to be followed by the board** and empowers it to fix the actual cost of maintaining an individual in a State institution. State ex rel. Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977).

**Cited** in State ex rel. Broughton Hosp. v. Hollifield, 4 N.C. App. 453, 167 S.E.2d 45 (1969).

## § 143-118.1: Repealed by Session Laws 1987, c. 699, s. 1.

## § 143-119. Payments.

(a) The cost of care when fixed by the Secretary shall be paid by the person admitted or by the person legally responsible for payment. The payment of the cost of care constitutes a valid expenditure of funds held by a fiduciary of a person admitted, including Clerks of Court, and a receipt for payment of such costs shall be a valid voucher in the fiduciary's settlement of his accounts of his trust.

(b) Immediately upon the determination of the cost, the person admitted or the person legally responsible for paying the cost shall be notified of the amount due and a statement shall be rendered on a monthly basis.

(c) If the person admitted or the person legally responsible for paying the cost is not able to pay the total cost due on a monthly basis, the Secretary may arrange for the payment of a portion of the cost monthly and extend the payments until the costs are paid or may arrange for any other method of payment.

(d) The institutions shall maintain a list of all unpaid accounts for audit by the State auditors.

(e) The Secretary may discharge from the institution persons admitted who have been found able to pay but who refuse to pay costs fixed against them, unless the person was committed by an order of a court of competent jurisdiction. (1925, c. 120, s. 3; 1935, c. 186, s. 2; 1983, c. 23, s. 2; c. 806; 1985, c. 508, s. 7.)

### CASE NOTES

**Equitable Enforcement Options.** — It is clear from a complete reading of this section that dismissal from an institution for failure to pay is only one of the options created by the statute to enforce payment as equitably as possible. State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

**§ 143-120:** Repealed by Session Laws 1985, c. 508, s. 8.

## § 143-121. Action to recover costs.

(a) Immediately upon the fixing of the amount of actual cost, a cause of action shall accrue for the costs in favor of the State for the use of the institution in which the person admitted received care against the person admitted or person legally responsible for paying the costs.

(b) The State for the use of the institution may sue upon the cause of action in the courts of Wake County, in the courts of the county in which the institution is located, or in the courts of the county where the defendant resides.

(c) In any action to recover the cost of care, a verified and itemized statement of the account signed by the reimbursement director of the institution showing the period of time during which the person admitted was receiving care in the institution, the daily or monthly rate of charge fixed by the Secretary, the total amount due on the account, and the proper credits for any payments which may have been made on the account, shall be filed with the complaint and shall constitute a prima facie case. The State shall be entitled to a judgment in the case in the absence of allegation and proof on the part of the person admitted or person legally responsible for paying the costs that the verified and itemized statement is not correct because of:

(1) An error in the calculation of the amount due predicated upon the rate of charge fixed by the Secretary;
(2) An error as to the period of time during which the person admitted received care in the institution; or
(3) An error in not properly crediting the account with any payment which may have been made.

(d) The provisions of this Article directing the Secretary to determine which of the persons admitted are nonindigent and able to pay for their care, notify the person admitted or person legally responsible for the cost of his care of the amount due, to render a statement of the amount due monthly, to discharge persons admitted found able to pay but who refuse to pay and all of the other provisions relating to the manner in which the Secretary shall assess and collect costs are directory and not mandatory. The failure of the Secretary to perform any of these provisions shall not affect the right of the State to recover in any action brought for the cost of care against the person admitted, a person legally responsible for the cost of his care, or his estate if he has died. (1925, c. 120, s. 5; 1985, c. 508, s. 9.)

CASE NOTES

**No Constitutional Provision for Maintenance of Nonindigent Insane Person at State Expense.** — There is no provision in the Constitution requiring or authorizing the General Assembly to provide for the care, treatment, or maintenance of nonindigent insane persons at the expense of the State. The General Assembly has at all times by appropriate statutes required such persons to pay at least the actual cost of their care, treatment, and maintenance while they are patients in State institutions. State ex rel. Broughton Hosp. v. Hollifield, 4 N.C. App. 453, 167 S.E.2d 45 (1969).

**When Action May Be Instituted.** — An action under this section to recover for treatment and maintenance of an incompetent at a State hospital need not be instituted while the patient is receiving such treatment and maintenance, but may be brought after the patient has left the State hospital, the State not being relegated after the patient leaves the hospital to an action under G.S. 143-126 against the patient's estate. State ex rel. Broughton Hosp. v. Hollifield, 4 N.C. App. 453, 167 S.E.2d 45 (1969).

**Funds for Future Support of Incompetent and Family Need Not Be Set Aside Prior to Recovery.** — In an action under this section to recover for treatment and maintenance of an incompetent at a State hospital, it is not required that sufficient funds be set aside and retained by the incompetent for his future support and maintenance and for that of members of his family who are dependent upon him before the State is entitled to recovery. State ex rel. Broughton Hosp. v. Hollifield, 4 N.C. App. 453, 167 S.E.2d 45 (1969).

**Applied** in State ex rel. State Hosp. v. Security Nat'l Bank, 207 N.C. 697, 178 S.E. 487 (1935); State ex rel. Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977).

## § 143-121.1. Ratification of past acts.

The past acts of the Secretary, boards of directors of the institutions and the North Carolina Hospital Board of Control in fixing the rate to be paid by persons admitted are hereby in every respect ratified and validated, and on all claims and causes of action now pending or which hereafter may be made or begun for the payment of the past indebtedness for care, the rates fixed by the party authorized the fix rates at the time the care was provided shall prevail and collections shall be made in accordance with those rates unless the Secretary enters into a contract compromising the account. (1985, c. 508, s. 10.)

## § 143-122. No limitation of action.

No statute of limitation shall apply to or constitute a defense to any cause of action asserted by the State under this Article and all statutes containing limitations which might apply to these actions are hereby repealed as to all such causes of action for costs previously incurred and now remaining unpaid. (1925, c. 120, s. 6; 1985, c. 508, s. 11.)

CASE NOTES

**Applied** in State ex rel. State Hosp. v. Security Nat'l Bank, 207 N.C. 697, 178 S.E. 487 (1935).

## § 143-123. Power to admit indigent persons.

(a) This Article shall not be construed to limit the authority of the institutions to provide care to all indigent persons who are otherwise entitled to admission in any of the institutions.

(b) If at any time any person admitted and determined to be indigent shall succeed to or inherit, or acquire, in any manner, property or otherwise be reputed to be solvent, then the State shall have the full right and authority to collect and sue for the entire cost of care without hinderance of any statute of limitations. (1925, c. 120, s. 7; 1985, c. 508, s. 11.)

**Editor's Note.** — Session Laws 2006-66, s. 6.16, provides: "Notwithstanding G.S. 143-23 or any other provision of law, the State Board of Education may use any funds appropriated for State Aid to Local School Administrative units to cover increases in fuel costs.

"Notwithstanding G.S. 143-23 or any other provision of law, all other State agencies may transfer funds within their budgets, including funds appropriated for salaries and wages, to cover the increases in fuel costs."

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

### CASE NOTES

**Applied** in State ex rel. State Hosp. v. Security Nat'l Bank, 207 N.C. 697, 178 S.E. 487 (1935).

## § 143-124. Suit by Attorney General; venue.

At the request of the institution, all actions and suits shall be prosecuted by the Attorney General. The institution shall have the right to select the venue of the action. (1925, c. 120, s. 8; 1985, c. 508, s. 11.)

## § 143-125. Judgment; never barred.

Any judgment obtained by the State under this Article shall never be barred by any statute of limitation but shall to the extent unpaid continue in force; and, at the request of the Attorney General or the director of the institution, the clerk shall issue an execution. (1925, c. 120, s. 9; 1985, c. 508, s. 11.)

## § 143-126. Death of a person admitted; lien on estate.

(a) In the event of the death of person admitted, leaving any cost of care unpaid, then the unpaid cost shall constitute a lien on all property, both real and personal of the decedent and shall be payable from the decedent's estate as a fourth class claim after the payment of taxes to the State or its subdivisions.

(b) Upon the death of person admitted, the Department shall file a verified statement of account containing the following:

(1) The name of the person admitted;
(2) The date of death of the person admitted;
(3) The inclusive dates of the provision of care;
(4) The name of the institution providing care; and
(5) The amount of the unpaid balance.

The statement shall be filed in the office of the clerk of superior court in the county of residence of the deceased person admitted and in the county or counties in which real property is located in which the decedent owns an interest. The statement shall be docketed and indexed by the clerk.

(c) From the time of docketing, the statement shall be and constitute due notice of a lien against all real property then owned in whole or in part by the decedent and lying in such county to the extent of the total amount of the unpaid balance for the decedent's care as evidenced by the verified statement of account. Payments made by a fiduciary including those made by a clerk of superior court, in full or partial satisfaction of such lien, shall constitute a valid expenditure as provided in G.S. 143-119.

(d) No action to enforce such lien may be brought more than three years from the date of death of the person admitted. The failure to bring such action or the failure of the Department to file such statement shall not be a complete bar against recovery but shall only extinguish the lien and priority established by it.

(e) Upon receipt of the unpaid balance by the institution or Department or upon agreement of compromise of such unpaid balance, the Department shall notify the clerks of superior court in the counties where the lien has been recorded that the unpaid balance has been paid, and the clerks shall cancel the lien of record. (1925, c. 120, s. 10; 1967, c. 960; 1973, c. 476, s. 133; 1985, c. 508, s. 11.)

### OPINIONS OF ATTORNEY GENERAL

**The lien created by this section does not have priority over costs of administration,** but falls within the fourth class of former G.S. 28-105. See opinion of Attorney General to Mr. Frankie Williams, Clerk of the Superior Court, Rockingham County, 43 N.C.A.G. 304 (1974).

**As to priority of widow's and child's allowances,** see opinion of Attorney General to Elmanda S. Yates, Assistant Clerk, Superior Court, Davidson County, 42 N.C.A.G. 263 (1973).

**As to limits on priority of funeral expenses,** see opinion of Attorney General to Elmanda S. Yates, Assistant Clerk, Superior Court, Davidson County, 42 N.C.A.G. 262 (1973).

## § 143-126.1. Lien on property for unpaid balance due institution.

(a) There is hereby created a general lien on both the real and personal property of any person admitted who is receiving or who has received care in any of the institutions operated by the Department of Health and Human Services to the extent of the total amount of the unpaid balance shown on the verified statement of account for charges from and after July 1, 1967.

(b) Such general lien for the unpaid balance for care at the institutions shall apply to the property, both real and personal, of the person admitted whether held by him or his trustee or guardian.

(c) At the time deemed suitable in the discretion of the Department, there may be filed a verified statement of account containing the following:

(1) The name of the person admitted;
(2) The inclusive dates of the provision of care and a statement that care is continuing if applicable;
(3) The name of the institution providing care; and
(4) The amount of the unpaid balance.

The statement may be filed in the office of the clerk of superior court in the county of residence of the person admitted and in each county or counties where real property in which the patient owns an interest is found. The statement shall be docketed and indexed by the clerk.

(d) From the time of docketing, the statement shall be and constitute due notice of a lien against the real property then owned or thereafter acquired by the patient and lying in such county to the extent of the total amount of the unpaid balance for the person admitted's care as evidenced by the verified statement of account for charges from and after July 1, 1967. Payments made by a fiduciary, including those made by a clerk of superior court, in full or partial satisfaction of such lien, shall constitute a valid expenditure as provided in G.S. 143-119.

(e) The lien thus established shall take priority over all other liens subsequently acquired and shall continue from the date of filing until satisfied. No action to enforce such lien may be brought more than three years from the last date of filing of such lien nor more than three years after the death of any person admitted. The failure to bring such action or the failure of the Department to file said statement shall not be a complete bar against recovery but shall only extinguish the lien and priority established by it.

(f) Upon receipt of the full unpaid balance by the institution or Department or upon agreement of compromise of such unpaid balance, the Department shall notify the clerks of superior court in the counties where the lien has been docketed that the unpaid balance has been paid, and the clerks shall cancel the lien of record.

(g) Notwithstanding the foregoing provisions, no such lien shall be enforceable against any funds paid by the State to a person admitted after judgment or settlement of a claim for damages arising out of the negligent injury of such person at any of the institutions during the life of person admitted. Upon the death of the person admitted, any remaining proceeds of a judgment or settlement under this subsection in the hands of the deceased shall become a general asset of the estate and subject to any lien of the State. (1967, c. 959; 1973, c. 476, s. 133; 1979, c. 978, s. 1; 1985, c. 508, s. 11; 1997-443, s. 11A.118(a).)

### OPINIONS OF ATTORNEY GENERAL

**Eligibility for Assistance Payments.** — As to determination of whether a patient in a State hospital who has real or personal property on which there is a lien in favor of the State by virtue of this section has a reserve of assets too great for him to receive assistance to the aged welfare payments, see opinion of Attorney General to Mr. Emmett L. Sellers, Director, Division of Medical Services, State Department of Social Services, 40 N.C.A.G. 689 (1969).

As to the eligibility of a State hospital patient to receive medical assistance to the aged payments where he voluntarily disposes of his real property and applies the proceeds in payment of the debt which is the subject of a lien in favor of the State under this section, see opinion of Attorney General to Mr. Emmett L. Sellers, Director, Division of Medical Services, State Department of Social Services, 40 N.C.A.G. 689 (1969).

## § 143-127. Money paid into State treasury.

All money collected by any institution pursuant to this Article shall be by such institution paid into the State treasury, and shall be by the State Treasurer credited to the account of the institution collecting and turning the same into the treasury, and shall be paid out by warrants drawn as in cases of appropriations made for the maintenance of such institutions and shall be used by such institution as it uses and is authorized by law to use appropriations made for maintenance. (1925, c. 120, s. 11; 1983, c. 913, s. 34.)

### CASE NOTES

**Cited** in State ex rel. Broughton Hosp. v. Hollifield, 4 N.C. App. 453, 167 S.E.2d 45 (1969).

## § 143-127.1. Parental liability for payment of cost of care for long-term patients in Department of Health and Human Services facilities.

(a) Notwithstanding the foregoing provisions of G.S. 143-117 through 143-127 inclusive, the natural or adoptive parents of persons who are non-Medicaid, long-term patients at facilities owned or operated by the Department of Health and Human Services shall only be liable on the charges made by such facility for treatment, care and maintenance for an amount not to exceed the cost of caring for a normal child at home as determined from standard sources by the Department of Health and Human Services.

(b) Parents or adoptive parents of a patient in a facility owned or operated by the Department of Health and Human Services shall not be liable for any charges made by such facility for treatment, care and maintenance of such a patient incurred or accrued subsequent to such patient attaining age 18.

(c) For purposes of this section, the term "long-term patient" is defined as a person who has been a patient in a facility owned or operated by the Department of Health and Human Services for a continuous period in excess of 120 days. No absence of a patient from the facility due to a temporary or trial visit shall be counted as interrupting the accrual of the 120 days herein required to attain the status of a long-term patient.

(d) Repealed by Session Laws 1993, c. 386, s. 2, effective October 1, 1993. (1971, c. 218, s. 1; 1973, c. 476, s. 133; c. 775; 1975, c. 19, s. 48; 1979, c. 838, ss. 25-27; 1983, c. 12; 1983 (Reg. Sess., 1984), c. 1116, s. 82; 1987, c. 738, s. 68; 1993, c. 386, s. 2; 1997-443, s. 11A.118(a).)

### OPINIONS OF ATTORNEY GENERAL

**Authority to Establish Cost of Keeping Normal Child Prior to 1971.** — The Board of Mental Health has authority to establish an amount as the cost of keeping a normal child at home in years prior to 1971. See opinion of Attorney General to Mr. Ben W. Aiken, General Business Manager, N.C. Department of Mental Health, 41 N.C.A.G. 507 (1971).

**Refunds Not Required.** — Session Laws 1971, Chapter 218 does not require that institutions refund to the parent all payments made after the patient has attained age 21. See opinion of Attorney General to Mr. Ben W. Aiken, General Business Manager, N.C. Department of Mental Health, 41 N.C.A.G. 507 (1971).

**The limitation on parental liability does not apply to patients themselves,** who are still liable for the full cost of care, training, treatment and maintenance. See opinion of Attorney General to Mr. Ben W. Aiken, General Business Manager, N.C. Department of Mental Health, 41 N.C.A.G. 507 (1971).

## ARTICLE 7A.

### *Damage of Personal Property in State Institutions.*

## § 143-127.2. Repair or replacement of personal property.

The Secretary of Health and Human Services may adopt rules governing repair or replacement of personal property items excluding private passenger vehicles that belong to employees, volunteers, or clients of State facilities within the Department of Health and Human Services and that are damaged or stolen by clients of the State facilities provided that the item is determined by the Secretary to be:

(1) Damaged or stolen on or off facility grounds during the performance of employment or volunteer duty and necessary for the employee or volunteer to have in his possession to perform his assigned duty; or

(2) Damaged or stolen on or off the facility grounds while the client is under the supervision of the facility and necessary for the client to have in his possession as part of his treatment environment. (1985, c. 393, s. 1; 1987, c. 264, s. 4; 1989, c. 189, s. 1; 1997-443, s. 11A.118(a).)

### § 143-127.3. Negligence.

Reimbursement for items damaged or stolen shall not be granted in instances in which the employee, volunteer, or client, if competent, is determined to be negligent or otherwise at fault for the damage or loss of the property. Negligence shall be determined by the director of the facility. (1985, c. 393, s. 1; 1987, c. 264, s. 4; 1989, c. 189, s. 1.)

### § 143-127.4. Other remedies.

The director of the facility shall determine if the person seeking reimbursement has made a good faith effort to recover the loss from all other non-State sources and has failed before reimbursement is granted. (1985, c. 393, s. 1; 1987, c. 264, s. 4; 1989, c. 189, s. 1.)

### § 143-127.5. Limitations.

Reimbursement shall be limited to the amount specified in the rules and shall not exceed a maximum of two hundred dollars ($200.00) per incident. No employee, volunteer, or client shall receive more than five hundred dollars ($500.00) per year in reimbursement. Reimbursement is subject to the availability of funds. (1985, c. 393, s. 1; 1987, c. 264, ss. 1, 4; 1989, c. 189, s. 1.)

### § 143-127.6. Administrative and judicial review.

Chapter 150B of the General Statutes governs administrative and judicial review of a decision under this Article by the director of a facility. (1985, c. 393, s. 1; 1987, c. 264, ss. 2, 4; c. 827, s. 257; 1989, c. 189, s. 1.)

## Article 8.

## *Public Contracts.*

### § 143-128. Requirements for certain building contracts.

(a) Preparation of specifications. — Every officer, board, department, commission or commissions charged with responsibility of preparation of specifications or awarding or entering into contracts for the erection, construction, alteration or repair of any buildings for the State, or for any county, municipality, or other public body, shall have prepared separate specifications for each of the following subdivisions or branches of work to be performed:

(1) Heating, ventilating, air conditioning and accessories (separately or combined into one conductive system), refrigeration for cold storage (where the cold storage cooling load is 15 tons or more of refrigeration), and all related work.

(2) Plumbing and gas fittings and accessories, and all related work.

(3) Electrical wiring and installations, and all related work.

(4) General work not included in subdivisions (1), (2), and (3) of this subsection relating to the erection, construction, alteration, or repair of any building.

Specifications for contracts that will be bid under the separate-prime system or dual bidding system shall be drawn as to permit separate and independent bidding upon each of the subdivisions of work enumerated in this subsection. The above enumeration of subdivisions or branches of work shall not be construed to prevent any officer, board, department, commission or commissions from preparing additional separate specifications for any other category of work.

(a1) Construction methods. — The State, a county, municipality, or other public body shall award contracts to erect, construct, alter, or repair buildings pursuant to any of the following methods:

(1) Separate-prime bidding.
(2) Single-prime bidding.
(3) Dual bidding pursuant to subsection (d1) of this section.
(4) Construction management at risk contracts pursuant to G.S. 143-128.1.
(5) Alternative contracting methods authorized pursuant to G.S. 143-135.26(9).

(a2) Annually, on or before April 1st, beginning April 1, 2003, The University of North Carolina and all other public entities shall report to the Secretary of the Department of Administration on the effectiveness and cost-benefit of utilization of each of the construction methods authorized in G.S. 143-128(a1) that are used by the public entity. The reports, which shall be initially filed in the year in which the project is completed, shall be in the format and contain the data prescribed by the Secretary of Administration and shall include at least the following:

(1) The type of construction method used on the project.
(2) The total dollar value of building projects by specific project with costs.
(3) The bid costs and relevant post-bid costs.
(4) A detailed listing of all contractors and subcontractors used on the project indicating whether the contractor or subcontractor was an out-of-state contractor or subcontractor.
(5) If any contractor or subcontractor was an out-of-state contractor or subcontractor, the reasons why the contractor or subcontractor was selected.

The Secretary of the Department of Administration shall report to the General Assembly on or before May 1st each year on the information collected pursuant to this subsection.

(b) Separate-prime contracts. — When the State, county, municipality, or other public body uses the separate-prime contract system, it shall accept bids for each subdivision of work for which specifications are required to be prepared under subsection (a) of this section and shall award the respective work specified separately to responsible and reliable persons, firms or corporations regularly engaged in their respective lines of work. When the estimated cost of work to be performed in any single subdivision or branch for which separate bids are required by this subsection is less than twenty-five thousand dollars ($25,000), the same may be included in the contract for one of the other subdivisions or branches of the work, irrespective of total project cost. The contracts shall be awarded to the lowest responsible, responsive bidders, taking into consideration quality, performance, the time specified in the bids for performance of the contract, and compliance with G.S. 143-128.2. Bids may also be accepted from and awards made to separate contractors for other categories of work.

Each separate contractor shall be directly liable to the State of North Carolina, or to the county, municipality, or other public body and to the other separate contractors for the full performance of all duties and obligations due respectively under the terms of the separate contracts and in accordance with the plans and specifications, which shall specifically set forth the duties and obligations of each separate contractor. For the purpose of this section, "separate contractor" means any person, firm or corporation who shall enter into a contract with the State, or with any county, municipality, or other public entity to erect, construct, alter or repair any building or buildings, or parts of any building or buildings.

(c) Repealed by Session Laws 2001-496, s. 3, effective January 1, 2001.

(d) Single-prime contracts. — All bidders in a single-prime project shall identify on their bid the contractors they have selected for the subdivisions or branches of work for:

(1) Heating, ventilating, and air conditioning;
(2) Plumbing;
(3) Electrical; and
(4) General.

The contract shall be awarded to the lowest responsible, responsive bidder, taking into consideration quality, performance, the time specified in the bids for performance of the contract, and compliance with G.S. 143-128.2. A contractor whose bid is accepted shall not substitute any person as subcontractor in the place of the subcontractor listed in the original bid, except (i) if the listed subcontractor's bid is later determined by the contractor to be nonresponsible or nonresponsive or the listed subcontractor refuses to enter into a contract for the complete performance of the bid work, or (ii) with the approval of the awarding authority for good cause shown by the contractor. The terms, conditions, and requirements of each contract between the contractor and a subcontractor performing work under a subdivision or branch of work listed in this subsection shall incorporate by reference the terms, conditions, and requirements of the contract between the contractor and the State, county, municipality, or other public body.

When contracts are awarded pursuant to this section, the public body shall make available to subcontractors the dispute resolution process as provided for in subsection (f1) of this section.

(d1) Dual bidding. — The State, a county, municipality, or other public entity may accept bids to erect, construct, alter, or repair a building under both the single-prime and separate-prime contracting systems and shall award the contract to the lowest responsible, responsive bidder under the single-prime system or to the lowest responsible, responsive bidder under the separate-prime system, taking into consideration quality, performance, compliance with G.S. 143-128.2, and time specified in the bids to perform the contract. In determining the system under which the contract will be awarded to the lowest responsible, responsive bidder, the public entity may consider cost of construction oversight, time for completion, and other factors it considers appropriate. The bids received as separate-prime bids shall be received, but not opened, one hour prior to the deadline for the submission of single-prime bids. The amount of a bid submitted by a subcontractor to the general contractor under the single-prime system shall not exceed the amount bid, if any, for the same work by that subcontractor to the public entity under the separate-prime system. The provisions of subsection (b) of this section shall apply to separate-prime contracts awarded pursuant to this section and the provisions of subsection (d) of this section shall apply to single-prime contracts awarded pursuant to this section.

(e) Project expediter; scheduling; public body to resolve project disputes. — The State, county, municipality, or other public body may, if specified in the bid documents, provide for assignment of responsibility for expediting the work on a project to a single responsible and reliable person, firm or corporation, which may be a prime contractor. In executing this responsibility, the designated project expediter may recommend to the State, county, municipality, or other public body whether payment to a contractor should be approved. The project expediter, if required by the contract documents, shall be responsible for preparing the project schedule and shall allow all contractors and subcontractors performing any of the branches of work listed in subsection (d) of this section equal input into the preparation of the initial schedule. Whenever separate contracts are awarded and separate contractors engaged for a project pursuant to this section, the public body may provide in the contract documents for resolution of project disputes through alternative dispute resolution processes as provided for in subsection (f1) of this section.

(f) Repealed by Session Laws 2001-496, s. 3, effective January 1, 2001.

(f1) Dispute resolution. — A public entity shall use the dispute resolution process adopted by the State Building Commission pursuant to G.S. 143-135.26(11), or shall adopt another dispute resolution process, which shall include mediation, to be used as an alterative to the dispute resolution process adopted by the State Building Commission. This dispute resolution process will be available to all the parties involved in the public entity's construction project including the public entity, the architect, the construction manager, the contractors, and the first-tier and lower-tier subcontractors and shall be available for any issues arising out of the contract or construction process. The public entity may set a reasonable threshold, not to exceed fifteen thousand dollars ($15,000), concerning the amount in controversy that must be at issue before a party may require other parties to participate in the dispute resolution process. The public entity may require that the costs of the process be divided between the parties to the dispute with at least one-third of the cost to be paid by the public entity, if the public entity is a party to the dispute. The public entity may require in its contracts that a party participate in mediation concerning a dispute as a precondition to initiating litigation concerning the dispute.

(g) Exceptions. — This section shall not apply to:

(1) The purchase and erection of prefabricated or relocatable buildings or portions thereof, except that portion of the work which must be performed at the construction site.

(2) The erection, construction, alteration, or repair of a building when the cost thereof is three hundred thousand dollars ($300,000) or less.

(3) The erection, construction, alteration, or repair of a building by The University of North Carolina or its constituent institutions when the cost thereof is five hundred thousand dollars ($500,000) or less.

Notwithstanding the other provisions of this subsection, subsection (f1) of this section shall apply to any erection, construction, alteration, or repair of a building by a public entity. (1925, c. 141, s. 2; 1929, c. 339, s. 2; 1931, c. 46; 1943, c. 387; 1945, c. 851; 1949, c. 1137, s. 1; 1963, c. 406, ss. 2-7; 1967, c. 860; 1973, c. 1419; 1977, c. 620; 1987 (Reg. Sess., 1988), c. 1108, ss. 4, 5; 1989, c. 480, s. 1; 1995, c. 358, s. 4; c. 367, ss. 1, 4, 5; c. 509, s. 79; 1998-137, s. 1; 1998-193, s. 1; 2001-496, ss. 3, 13; 2002-159, s. 42; 2007-322, s. 3.)

**Local Modification.** — (As to Article 8) Alleghany: 1989, c. 211, s. 1; (As to Article 8, except G.S. 143-128.2 and G.S. 143-128.3) Burke: 2007-35, s. 1 (expires December 31, 2011); (As to school building contracts) Cabarrus: 2009-430, s. 2 (expires June 30, 2014); Cherokee: 2007-48, s. 1; Chowan: 1989, c. 397, s. 1; Clay: 2006-94, s. 1; Currituck: 1993 (Reg. Sess., 1994), c. 668, s. 1; (as to Article 8) 2009-370, s. 2; Dare: 1989, c. 177, s. 1; 1999-40, s. 1; 2003-47, s. 1 (as to design and construction of administration building and renovation of Old Dare Court House, and expires July 1, 2008); Davidson: 1989, c. 398, s. 1; Durham: 1985 (Reg. Sess., 1986), c. 908; (as to Article 8) Forsyth: 2001-54; Franklin: 1993 (Reg. Sess., 1994), c. 757, s. 1; (as to G.S. 143-128) Greene: 1953, c. 718; (As to water treatment and wastewater treatment plant expansion projects) Harnett: 2007-214, s. 1 (expires December 31, 2010); Iredell: (as to animal shelter project) 2008-67, s. 1 (expires July 1, 2010); Johnston: 1995 (Reg. Sess., 1996), c. 611, s. 1; (as to Art. 8) 1997-37; 2008-40 (as to contracts for renovations to the county courthouse); Mecklenburg: 1993 (Reg. Sess., 1994), c. 573, s. 1; (as to

Article 8) 2009-162, s. 1(c); New Hanover: 1983, c. 365; (As to contracts with Water and Sewer Authority) 2007-135, s. 1 (expires December 31, 2009); Pasquotank: 1989, c. 268, s. 3; 1989, c. 468, s. 1; Stokes: 2006-50, s.1; Surry: 1993 (Reg. Sess., 1994), c. 705, s. 1; Tyrrell: 1983, c. 208; 1985, c. 120; 1987, c. 58, s. 1; 1987, c. 58, s. 2; Union: 1991, c. 393, s. 1; Wilson: 1991, c. 200; (as to Article 8) city of Charlotte: 2000-26, s. 1; (as to Article 8) 2001-248, ss. 1, 2; (as to Article 8) 2001-329, s. 4, as amended by 2007-255, s. 1; and as amended by 2009-162, s. 2(b); (as to G.S. 143-128, and as to water and wastewater treatment plants) 2007-312, s. 1; (as to G.S. 143-128, and as to speedway area infrastructure projects) city of Concord: 2008-7, s. 1 (expires December 31, 2013); (as to Article 8) city of Durham: 1985, c. 714; 1985, c. 727; 1987, c. 789; 2001-350, s. 3; (As to Article 8) 1991, c. 107; city of Greensboro: 1995, c. 54, s. 1; (as to Article 8) city of Greenville: 1998-144; 2004-10 (expires January 1, 2010); city of Lumberton: 1983 (Reg. Sess., 1984), c. 996; (As to Article 8) city of Mount Airy: 2003-281, s. 1; city of Roanoke Rapids: 2001-425, s. 3; 2005-174, s. 2; (as to Article 8, except for G.S. 143-128.2 and 143-128.3) 2005-174, s. 3 (expires January 1, 2009); (As to contracts with Water and Sewer Authority) city of Wilmington: 2007-135, s. 1 (expires December 31, 2009); (as to Article 8) city of Winston-Salem: 2001-54; town of Ahoskie: 1987 (Reg. Sess., 1988), c. 884; town of Blowing Rock: 2006-171, s. 10 (public parking facility); town of Clayton: 1995, c. 125, s. 1; (as to Article 8) town of Garner: 1993, c. 281, s. 4; town of Louisburg: 2007-216, s. 3, as amended by 2009-370, s. 1 (expires January 1, 2011); town of Manteo: 1985 (Reg. Sess., 1986), c. 808; Mooresville: (as to sewer pumping station) 2008-67, s. 2; town of Yadkinville: 1997-3, s. 1; (as to Article 8) village of Bald Head Island: 1989 (Reg. Sess., 1990), c. 925, s. 1; Alamance-Caswell Area Mental Health, Developmental Disabilities and Substance Abuse Authority: 1987, c. 120; Albemarle Hospital Board of Trustees: 1989, c. 468, s. 2; (As to Article 8) Board of Trustees of Beaufort County Community College: 2009-168, s. 1.1; Charlotte/Mecklenburg Board of Education: 1999-207, ss. 3, 4; 2001-496, s. 10(c); Currituck County Board of Education and City of Albemarle: 1989, c. 409, s. 1; 1999-102, s. 1; 2001-496, s. 10(b); (As to Article 8, except G.S. 143-128.2 and G.S. 143-128.3) Piedmont Community College: 2007-35, s. 1 (expires December 31, 2011); (as to Chapter 143, Articles 3 and 8) Piedmont Triad International Authority: 1998-55, s. 11; 2002-146, s. 8 (expires January 1, 2010); Tyrrell County Board of Education: 1983, c. 580; 1985, c. 120; Union County Public Schools Board of Education: 2007-90, ss. 2 and 3 (expires July 1, 2011); (as to Article 8) University of North Carolina at Chapel Hill and East Carolina University: 1987, c. 803, s. 3; University of North Carolina at Chapel Hill: 1985 (Reg. Sess., 1986), c. 865, s. 3; Winston-Salem/Forsyth County Board of Education: 1993, c. 128, s. 1; 2003-269, s. 1.

**Cross References.** — As to legislation regarding construction of juvenile facilities, see the editor's note under G.S. 7B-1500. As to procurement of architectural and engineering services, see G.S. 143-64.31 et seq. As to application of this Article to lease of personal property with an option to purchase by a county, see G.S. 153A-165. As to application of this Article to lease of personal property with an option to purchase by a city, see G.S. 160A-19.

**Editor's Note.** — As to the exemption of the Office of State Budget and Management from the requirements of G.S. 143-135.26(1), 143-128, 143-129, 143-131, 143-132, 143-134, 143-135.26, 143-64.10 through 143-64.13, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(b), and 133-1.1(g) and rules implementing those statutes for the purpose of construction of prison facilities, see Session Laws 1989, c. 754, s. 28(a).

As to exemption of the Office of State Budget and Management from the requirements of this section in the administration and implementation of the Prison Facilities Legislative Bond Act of 1990, see Session Laws 1989 (Reg. Sess., 1990), c. 933, s. 6(4).

As to the exemption of the Office of State Budget and Management from the requirements of this section in providing prison facilities under the provisions of the State Prison and Youth Services Facilities Bond Act, see Session Laws 1989 (Reg. Sess., 1990), c. 935, s. 6(a)(4).

As to exemption of the Office of Management and Budget from the requirements of this section with respect to facilities authorized for the Department of Correction, see Session Laws 1991, c. 689, s. 239(f), as amended by Session Laws 1991 (Reg. Sess., 1992), c. 1044, s.41(b), quoted under G.S. 143-64.10.

Session Laws 1993, c. 550, s. 6, effective July 1, 1993, provides that if the Secretary of Administration, after consultation with the Secretary of Correction, finds that the delivery of state prison and youth services facilities authorized to be constructed under that act must be expedited for good cause, the Office of State Construction of the Department of Administration may use alternative delivery systems and shall be exempt from several statutes, including this section, and rules implementing those statutes to the extent necessary to expedite delivery. Section 6 also sets out the provisions governing the exercise of the exemptions allowable and other relevant provisions.

As to the exemption of the Office of State Construction of the Department of Administration from the requirements of this section to the extent necessary to expedite delivery of certain prison facilities, see Session Laws 1994, Extra Session, c. 24, s. 67.

Session Laws 1995, c. 507, s. 27.10, provides that if the construction of prison facilities in Avery and Mitchell Counties must be expedited for good cause, as determined by the Secretary of Administration and Secretary of Correction, the Office of State Construction of the Department of Administration shall be exempt from the following statutes and rules to the extent necessary to expedite delivery: G.S. 143-135.26, 143-128, 143-129, 143-131, 143-132, 143-134, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(g), and 143-408.1 through 143-408.7.

Session Laws 1997-443, s. 32.11, provides that the Department of Transportation may enter into a design-build-warrant contract to develop, with Federal Highway Administration participation, a Congestion Avoidance and Reduction for Autos and Trucks (CARAT) system of traffic management in the Charlotte-Mecklenburg urban areas. Notwithstanding any other provision of law, contractors, their employees, and Department of Transportation employees involved in this project only do not have to be licensed by occupational licensing boards, and for the purpose of entering into contracts, the Department of Transportation is exempted from the provisions of G.S. 136-28.1, 143-52, 143-53, 143-58, 143-128, and 143-129; these exemptions are limited and available only to the extent necessary to comply with federal rules, regulations, and policies for completion of this project. The Department shall report quarterly to the Joint Legislative Transportation Oversight Committee on the project. Session Laws from 1993 and 1995 contained similar provisions.

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997.'"

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 1998-202, s. 35, provides: "(a) The Office of State Construction of the Department of Administration may contract for and supervise all aspects of administration, technical assistance, design, construction, or demolition of any juvenile facilities authorized for the 1998-99 fiscal year, including renovation of existing adult facilities to juvenile facilities.

"The facilities authorized for the 1998-99 fiscal year shall be constructed in accordance with the provisions of general law applicable to the construction of State facilities. If the Secretary of Administration, after consultation with the Office of Juvenile Justice (now the Department of Juvenile Justice and Delinquency Prevention), finds that the delivery of juvenile facilities must be expedited for good cause, the Office of State Construction of the Department of Administration shall be exempt from the following statutes and rules implementing those statutes, to the extent necessary to expedite delivery: G.S. 143-135.26, 143-128, 143-129, 143-131, 143-132, 143-134, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(g), and 143-408.1 through 143-408.7.

"Prior to exercising the exemptions allowable under this section, the Secretary of Administration shall give reasonable notice in writing of the Department's intent to exercise the exemptions to the Speaker of the House, the President Pro Tempore of the Senate, the Chairs of the House and Senate Appropriations Committees, the Joint Legislative Commission on Governmental Operations, and the Fiscal Research Division. The written notice shall contain at least the following information: (i) the specific statutory requirement or requirements from which the Department intends to exempt itself; (ii) the reason the exemption is necessary to expedite delivery of juvenile facilities; (iii) the way in which the Department anticipates the exemption will expedite the delivery of facilities; and (iv) a brief summary of the proposed contract for the project which is to be exempted.

"The Office of State Construction of the Department of Administration shall have a verifiable ten percent (10%) goal for participation by minority and women-owned businesses. All contracts for the design, construction, or demolition of juvenile facilities shall include a penalty for failure to complete the work by a specified date.

"The Office of State Construction of the Department of Administration shall consult the Department of Health and Human Services on these projects to the extent that such involvement relates to the Department's program needs and to its responsibility for the care of the population of the facility.

Session Laws 1998-202, s. 36, contains a severability clause.

Session Laws 2003-435, 1st Ex. Sess., s. 1.2(c), effective December 16, 2003, provides: "Site development funded by money appropriated under this section is not subject to Article 8 of Chapter 143 of the General Statutes (public contracts) or Article 3 of Chapter 143 of the General Statutes (purchases and contracts), except where public funds are expended the provisions of G.S. 143-48 and G.S. 143-128.2 shall apply. Actions involving expenditures of public moneys or use of public lands for projects and programs involved in site development funded by money appropriated under this section are exempt from the requirements of Article 1 of Chapter 113A of the General Statutes.

This exemption does not apply to an ordinance adopted under G.S. 113A-8."

This section, as amended by Session Laws 2007-322, s. 3, effective July 30, 2007, which added subdivision (g)(3), is applicable to construction projects for which bids or proposals are solicited on or after July 30, 2007.

Session Laws 2007-322, s. 13, provides: "This act is effective when it becomes law [July 30, 2007]. Sections 1 through 4 of this act apply to construction projects for which bids or proposals are solicited on or after that date. Section 5 of this act applies to construction or repair work commenced on or after that date."

Session Laws 2009-451, s. 9.14(b), provides: "With respect to the demonstration wind turbines and necessary support facilities authorized by subsection (a) of this section, the facilities authorized under this act shall be constructed in accordance with the provisions of general law applicable to the construction of State facilities, except that the State Property Office shall expedite and grant all easements and use agreements required for construction of the facilities without payment of any fee, royalty, or other cost. Notwithstanding any other provision of law, construction of the facilities authorized by this section shall be exempt from the following statutes and rules implementing those statutes: G.S. 143-48 through 143-64, 143-128, 143-129, 143-132, 113A-1 through 113A-10, 113A-50 through 113A-66, and 113A-116 through 113A-128. If Senate Bill 1068, 2009 Regular Session, becomes law, the provisions of Part 12 of Article 21 of Chapter 143 of the General Statutes as enacted by that act shall not apply to the facilities authorized by this section. With respect to any other environmental permits required for construction of the facilities, the Department of Environment and Natural Resources is directed to expedite permitting of the project to the extent allowed by law and shall waive any application fees that would be otherwise applicable to applications for permits required for the facilities and, where possible under applicable law, issue all permits within 40 days of receipt of a complete application." Senate Bill 1068, 2009 Regular Session, did not become law.

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

**Legal Periodicals.** — See legislative survey, 21 Campbell L. Rev. 323 (1999).

## CASE NOTES

**Section Held Inapplicable to Municipal Housing Authority.** — Although housing authority was a municipal corporation organized for a special purpose, it was not a "municipality" subject to the provisions of this section requiring separate bids on different branches of work to be performed on contracts it let for construction of housing. Carolinas Chapter NECA, Inc. v. Housing Auth., 29 N.C. App. 755, 225 S.E.2d 653 (1976).

**The cause of action under this section exists** for any contractor that enters into a contract with the state for construction or erection of a building and not just those contractors listed in subsection (a). RPR & Assocs. v. O'Brien/Atkins Assocs., 24 F. Supp. 2d 515 (M.D.N.C. 1998).

**Factors Other Than Cost Allowed.** — This section's award standard allows factors other than cost to be taken into consideration when awarding bid contracts. Kinsey Contracting Co. v. City of Fayetteville, 106 N.C. App. 383, 416 S.E.2d 607, cert. denied, 332 N.C. 345, 421 S.E.2d 149 (1992).

**"Lowest Responsible Bidder."** — Language "the lowest responsible bidder or bidders" used in subsection (b) of this section was construed to be an abbreviated reference to the general award standard set out in G.S. 143-129. Kinsey Contracting Co. v. City of Fayetteville, 106 N.C. App. 383, 416 S.E.2d 607, cert. denied, 332 N.C. 345, 421 S.E.2d 149 (1992).

**Liability of Contractor for Breach of Duties.** — This section, by reference to the contract, contemplates that a contractor who breaches his statutory duty to fulfill his contractual duties and obligations shall be liable for contract damages. Bolton Corp. v. T.A. Loving Co., 94 N.C. App. 392, 380 S.E.2d 796, cert. denied, 325 N.C. 545, 385 S.E.2d 496 (1989).

**Contractor Not Liable When Specifications by Owner or Owner's Architect Followed.** — In an action to recover for damages allegedly resulting from defendant contractor's failure to properly install a roof on a school, the trial court properly instructed the jury that where a contractor is required to, and does, comply with the plans and specifications prepared by the owner or the owner's architect, the contractor will not be liable for the consequences of defects in the plans and specifications. Burke County Pub. Sch. Bd. of Educ. v. Juno Constr. Corp., 50 N.C. App. 238, 273 S.E.2d 504 (1981).

**Suit Against General Contractor by Prime Contractor for Breach of Duties.** — Where general contractor was responsible for "General work relating to the erection [and] construction" of building not included in three other prime contracts, and as project expediter general contractor's work was to facilitate and assist in the smooth and efficient production of the building, by statute another prime contractor could sue the general contractor for breach of these contract duties. Bolton Corp. v. T.A. Loving Co., 94 N.C. App. 392, 380 S.E.2d 796, cert. denied, 325 N.C. 545, 385 S.E.2d 496 (1989).

**Suit Against One Prime Contractor by Another.** — Under this section, a prime contractor may be sued by another prime contractor working on a construction project for economic loss foreseeably resulting from the first prime contractor's failure to fully perform all duties and obligations due respectively under the terms of the separate contracts. Bolton Corp. v. T.A. Loving Co., 94 N.C. App. 392, 380 S.E.2d 796, cert. denied, 325 N.C. 545, 385 S.E.2d 496 (1989).

Trial court did not err in entering judgment for the prime electrical contractor on the prime general contractor's third-party claim under G.S. 143-128(b) to recover the cost of a subcontractor's services for repainting walls allegedly damaged by the electrical contractor, where the State contract required timely and effective notice to any prime contractor allegedly responsible for damage and the general contractor did not notify the electrical contractor until several months after the damage occurred and months after the repairs were done. Absent timely and effective notice, no duty arose on the electrical contractor's part to settle the claim or resolve the dispute under the contract. D.W.H. Painting Co. v. D.W. Ward Constr. Co., 174 N.C. App. 327, 620 S.E.2d 887, 2005 N.C. App. LEXIS 2366 (2005).

**Trial Court Did Not Have Jurisdiction to Enter Permanent Injunction.** — Appeals court: (1) vacated the permanent injunctive relief, which purported to effectively determine the controversy between an unsuccessful bidder for a town's water tank and the town and the successful bidder, based upon whether the town was in the process of awarding the contract in violation of to G.S. 143-128, 143-129 after negotiating with the successful bidder, on its merits, for lack of trial court jurisdiction to award that relief, since the trial court issued the permanent injunction at a hearing held only to determine whether a temporary restraining order was to be continued as a preliminary injunction; and (2) dismissed, and remanded for further proceedings the appeal of the remaining part of the order awarding a preliminary injunction, since that order was a non-final interlocutory order that was not yet appealable. CB&I Constructors, Inc. v. Town of Wake Forest, 157 N.C. App. 545, 579 S.E.2d 502, 2003 N.C. App. LEXIS 736 (2003).

**Cited** in Bolton Corp. v. T.A. Loving Co., 317 N.C. 623, 347 S.E.2d 369 (1986); Bolton Corp. v. State, 95 N.C. App. 596, 383 S.E.2d 671 (1989); APAC-Carolina, Inc. v. Greensboro-High Point Airport Auth., 110 N.C. App. 664, 431 S.E.2d 508 (1993).

## OPINIONS OF ATTORNEY GENERAL

**Constitutionality.** — The minority participant provisions in this section, G.S. 136-28.4, 160A-17.1, and Session Laws 1989, c. 8, s. 3(b) (Senate Bill 38) appear to be facially constitutional under the principles established by the United States Supreme Court in City of Richmond v. J.A. Croson Company, — U.S. —, 109 S. Ct. 706 (1989), because none of the provisions in question mandate a racial preference which would result in a deprivation of personal rights guaranteed to all persons by the Equal Protection Clause of the Fourteenth Amendment. See opinion of the Attorney General to Rep. Thomas C. Hardaway, Co-Chairman, Sen. Ralph Hunt, Co-Chairman, Legislative Research Commission Committee on Minority Business Contracts and Small Business Assistance, 60 N.C.A.G. 1 (1990).

**Separate Prime Rate Contractor System.** — Contracts awarded by the State, city, county, or other public body pursuant to the separate prime rate contractor system are not exempt from the "verifiable percentage goal for participation by minority businesses" requirement as set forth in subsection (c) of this section. See opinion of the Attorney General to James K. Polk, Special Asst. to Gov. for Minority Affairs, 60 N.C.A.G. 79 (1991).

**The single prime contractor is required to make the good faith effort to recruit and select minority businesses** for participation in contracts awarded under subdivision (c)(4) of this section, but the awarding authority is required to adopt written guidelines which should specify actions which must be taken by the separate prime contractors to seek minority participation. See opinion of the Attorney General to James K. Polk, Special Asst. to Gov. for Minority Affairs, 60 N.C.A.G. 79 (1991).

**As to separate contracts required of counties in certain circumstances,** see opinion of Attorney General to Mr. William L. Mills, Jr., Cabarrus County Attorney, 40 N.C.A.G. 550 (1970).

**Separate Specifications Required for**

**Electrical, Plumbing and Heating Facilities.** — A county or city may not let a bid for a contract for a public building of the modular unit type which has factory installed electrical, plumbing and heating facilities without having separate specifications drawn for such facilities so as to permit separate and independent bids on each class of work. See opinion of Attorney General to Mr. W.I. Thornton, Jr., Durham City Attorney, 42 N.C.A.G. 129 (1972).

**Definition of "Public Entity".** — The term "public entity" includes all elected or appointed authorities of the state and their individual departments, commissions, committees, councils, including the constituent institutions of the University of North Carolina. See opinion of Attorney General to T. Brooks Skinner, Jr., General Counsel, North Carolina Department of Administration, 2002 N.C. AG LEXIS 13 (3/7/02).

**Project Subject to Minority Business Participation Requirements.** — Under G.S. 160A-17.1, the governing body of a city is specifically authorized to accept a state grant for constructing "any project"; accordingly, it is appropriate to interpret a former provision of this section pertaining to minority business participation requirements as applying to the construction of waste water collection facilities which were subject to a grant from the Department of Environment and Natural Resources. See opinion of Attorney General to Mr. John T. Carter, Jr., Jacksonville City Attorney, 2002 N.C.A.G. 25 (7/18/02).

**Airport Construction Contracts.** — Subsection (f1) of this section does not mandate inclusion of a dispute resolution procedure in all contracts for an airport authority's construction projects. See opinion of Attorney General to William O. Cooke, Cooke & Cooke, L.L.P., 2002 N.C.A.G. 32 (11/18/02).

## § 143-128.1. Construction management at risk contracts.

(a) For purposes of this section and G.S. 143-64.31:

(1) "Construction management services" means services provided by a construction manager, which may include preparation and coordination of bid packages, scheduling, cost control, value engineering, evaluation, preconstruction services, and construction administration.

(2) "Construction management at risk services" means services provided by a person, corporation, or entity that (i) provides construction management services for a project throughout the preconstruction and construction phases, (ii) who is licensed as a general contractor, and (iii) who guarantees the cost of the project.

(3) "Construction manager at risk" means a person, corporation, or entity that provides construction management at risk services.

(4) "First-tier subcontractor" means a subcontractor who contracts directly with the construction manager at risk.

(b) The construction manager at risk shall be selected in accordance with Article 3D of this Chapter. Design services for a project shall be performed by a licensed architect or engineer. The public owner shall contract directly with the architect or engineer.

(c) The construction manager at risk shall contract directly with the public entity for all construction; shall publicly advertise as prescribed in G.S. 143-129; and shall prequalify and accept bids from first-tier subcontractors for all construction work under this section. The prequalification criteria shall be determined by the public entity and the construction manager at risk to address quality, performance, the time specified in the bids for performance of the contract, the cost of construction oversight, time for completion, capacity to perform, and other factors deemed appropriate by the public entity. The public entity shall require the construction manager at risk to submit its plan for compliance with G.S. 143-128.2 for approval by the public entity prior to soliciting bids for the project's first-tier subcontractors. A construction manager at risk and first-tier subcontractors shall make a good faith effort to recruit and select minority businesses for participation in contracts pursuant to G.S. 143-128.2. A construction manager at risk may perform a portion of the work only if (i) bidding produces no responsible, responsive bidder for that portion of the work, the lowest responsible, responsive bidder will not execute a contract for the bid portion of the work, or the subcontractor defaults and a prequalified replacement cannot be obtained in a timely manner, and (ii) the public entity approves of the construction manager at risk's performance of the work. All bids shall be opened publicly, and once they are opened, shall be public records under Chapter 132 of the General Statutes. The construction manager at risk shall act as the fiduciary of the public entity in handling and opening bids. The construction manager at risk shall award the contract to the lowest responsible, responsive bidder, taking into consideration quality, performance, the time specified in the bids for performance of the contract, the cost of construction oversight, time for completion, compliance with G.S. 143-128.2, and other factors deemed appropriate by the public entity and advertised as part of the bid solicitation. The public entity may require the selection of a different first-tier subcontractor for any portion of the work, consistent with this section, provided that the construction manager at risk is compensated for any additional cost incurred.

When contracts are awarded pursuant to this section, the public entity shall provide for a dispute resolution procedure as provided in G.S. 143-128(f1).

(d) The construction manager at risk shall provide a performance and payment bond to the public entity in accordance with the provisions of Article 3 of Chapter 44A of the General Statutes. (2001-496, s. 2.)

## § 143-128.2. Minority business participation goals.

(a) The State shall have a verifiable ten percent (10%) goal for participation by minority businesses in the total value of work for each State building project, including building projects done by a private entity on a facility to be leased or purchased by the State. A local government unit or other public or private entity that receives State appropriations for a building project or other State grant funds for a building project, including a building project done by a private entity on a facility to be leased or purchased by the local government unit, where the project cost is one hundred thousand dollars ($100,000) or more, shall have a verifiable ten percent (10%) goal for participation by minority businesses in the total value of the work; provided, however, a local government unit may apply a different verifiable goal that was adopted prior to December 1, 2001, if the local government unit had and continues to have a sufficiently strong basis in evidence to justify the use of that goal. On State building projects and building projects subject to the State goal requirement, the Secretary shall identify the appropriate percentage goal, based on adequate data, for each category of minority business as defined in G.S. 143-128.2(g)(1) based on the specific contract type.

Except as otherwise provided for in this subsection, each city, county, or other local public entity shall adopt, after a notice and public hearing, an appropriate verifiable percentage goal for participation by minority businesses in the total value of work for building projects.

Each entity required to have verifiable percentage goals under this subsection shall make a good faith effort to recruit minority participation in accordance with this section or G.S. 143-131(b), as applicable.

(b) A public entity shall establish prior to solicitation of bids the good faith efforts that it will take to make it feasible for minority businesses to submit successful bids or proposals for the contracts for building projects. Public entities shall make good faith efforts as set forth in subsection (e) of this section. Public entities shall require contractors to make good faith efforts pursuant to subsection (f) of this section. Each first-tier subcontractor on a construction management at risk project shall comply with the requirements applicable to contractors under this subsection.

(c) Each bidder, which shall mean first-tier subcontractor for construction manager at risk projects for purposes of this subsection, on a project bid under any of the methods authorized under G.S. 143-128(a1) shall identify on its bid the minority businesses that it will use on the project and an affidavit listing the good faith efforts it has made pursuant to subsection (f) of this section and the total dollar value of the bid that will be performed by the minority businesses. A contractor, including a first-tier subcontractor on a construction manager at risk project, that performs all of the work under a contract with its own workforce may submit an affidavit to that effect in lieu of the affidavit otherwise required under this subsection. The apparent lowest responsible, responsive bidder shall also file the following:

(1) Within the time specified in the bid documents, either:

a. An affidavit that includes a description of the portion of work to be executed by minority businesses, expressed as a percentage of the total contract price, which is equal to or more than the applicable goal. An affidavit under this sub-subdivision shall give rise to a presumption that the bidder has made the required good faith or effort; or

b. Documentation of its good faith effort to meet the goal. The documentation must include evidence of all good faith efforts that were implemented, including any advertisements, solicitations, and evidence of other specific actions demonstrating recruitment and selection of minority businesses for participation in the contract.

(2) Within 30 days after award of the contract, a list of all identified subcontractors that the contractor will use on the project.

Failure to file a required affidavit or documentation that demonstrates that the contractor made the required good faith effort is grounds for rejection of the bid.

(d) No subcontractor who is identified and listed pursuant to subsection (c) of this section may be replaced with a different subcontractor except:

(1) If the subcontractor's bid is later determined by the contractor or construction manager at risk to be nonresponsible or nonresponsive, or the listed subcontractor refuses to enter into a contract for the complete performance of the bid work, or

(2) With the approval of the public entity for good cause.

Good faith efforts as set forth in G.S. 143-131(b) shall apply to the selection of a substitute subcontractor. Prior to substituting a subcontractor, the contractor shall identify the substitute subcontractor and inform the public entity of its good faith efforts pursuant to G.S. 143-131(b).

(e) Before awarding a contract, a public entity shall do the following:

(1) Develop and implement a minority business participation outreach plan to identify minority businesses that can perform public building projects and to implement outreach efforts to encourage minority business participation in these projects to include education, recruitment, and interaction between minority businesses and nonminority businesses.

(2) Attend the scheduled prebid conference.

(3) At least 10 days prior to the scheduled day of bid opening, notify minority businesses that have requested notices from the public entity for public construction or repair work and minority businesses that otherwise indicated to the Office of Historically Underutilized Businesses an interest in the type of work being bid or the potential contracting opportunities listed in the proposal. The notification shall include the following:

a. A description of the work for which the bid is being solicited.

b. The date, time, and location where bids are to be submitted.

c. The name of the individual within the public entity who will be available to answer questions about the project.

   - d. Where bid documents may be reviewed.
   - e. Any special requirements that may exist.

(4) Utilize other media, as appropriate, likely to inform potential minority businesses of the bid being sought.

(f) A public entity shall require bidders to undertake the following good faith efforts to the extent required by the Secretary on projects subject to this section. The Secretary shall adopt rules establishing points to be awarded for taking each effort and the minimum number of points required, depending on project size, cost, type, and other factors considered relevant by the Secretary. In establishing the point system, the Secretary may not require a contractor to earn more than fifty (50) points, and the Secretary must assign each of the efforts listed in subdivisions (1) through (10) of this subsection at least 10 points. The public entity may require that additional good faith efforts be taken, as indicated in its bid specifications. Good faith efforts include:

(1) Contacting minority businesses that reasonably could have been expected to submit a quote and that were known to the contractor or available on State or local government maintained lists at least 10 days before the bid or proposal date and notifying them of the nature and scope of the work to be performed.

(2) Making the construction plans, specifications and requirements available for review by prospective minority businesses, or providing these documents to them at least 10 days before the bid or proposals are due.

(3) Breaking down or combining elements of work into economically feasible units to facilitate minority participation.

(4) Working with minority trade, community, or contractor organizations identified by the Office of Historically Underutilized Businesses and included in the bid documents that provide assistance in recruitment of minority businesses.

(5) Attending any prebid meetings scheduled by the public owner.

(6) Providing assistance in getting required bonding or insurance or providing alternatives to bonding or insurance for subcontractors.

(7) Negotiating in good faith with interested minority businesses and not rejecting them as unqualified without sound reasons based on their capabilities. Any rejection of a minority business based on lack of qualification should have the reasons documented in writing.

(8) Providing assistance to an otherwise qualified minority business in need of equipment, loan capital, lines of credit, or joint pay agreements to secure loans, supplies, or letters of credit, including waiving credit that is ordinarily required. Assisting minority businesses in obtaining the same unit pricing with the bidder's suppliers in order to help minority businesses in establishing credit.

(9) Negotiating joint venture and partnership arrangements with minority businesses in order to increase opportunities for minority business participation on a public construction or repair project when possible.

(10) Providing quick pay agreements and policies to enable minority contractors and suppliers to meet cash-flow demands.

(g) As used in this section:

(1) The term "minority business" means a business:

   - a. In which at least fifty-one percent (51%) is owned by one or more minority persons or socially and economically disadvantaged individuals, or in the case of a corporation, in which at least fifty-one percent (51%) of the stock is owned by one or more minority persons or socially and economically disadvantaged individuals; and
   - b. Of which the management and daily business operations are controlled by one or more of the minority persons or socially and economically disadvantaged individuals who own it.

(2) The term "minority person" means a person who is a citizen or lawful permanent resident of the United States and who is:

a. Black, that is, a person having origins in any of the black racial groups in Africa;

b. Hispanic, that is, a person of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race;

c. Asian American, that is, a person having origins in any of the original peoples of the Far East, Southeast Asia and Asia, the Indian subcontinent, or the Pacific Islands;

d. American Indian, that is, a person having origins in any of the original Indian peoples of North America; or

e. Female.

(3) The term "socially and economically disadvantaged individual" means the same as defined in 15 U.S.C. 637.

(h) The State, counties, municipalities, and all other public bodies shall award public building contracts, including those awarded under G.S. 143-128.1, 143-129, and 143-131, without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition, as defined in G.S. 168A-3. Nothing in this section shall be construed to require contractors or awarding authorities to award contracts or subcontracts to or to make purchases of materials or equipment from minority-business contractors or minority-business subcontractors who do not submit the lowest responsible, responsive bid or bids.

(i) Notwithstanding G.S. 132-3 and G.S. 121-5, all public records created pursuant to this section shall be maintained by the public entity for a period of not less than three years from the date of the completion of the building project.

(j) Except as provided in subsections (a), (g), (h) and (i) of this section, this section shall only apply to building projects costing three hundred thousand dollars ($300,000) or more. This section shall not apply to the purchase and erection of prefabricated or relocatable buildings or portions thereof, except that portion of the work which must be performed at the construction site. (2001-496, s. 3.1.)

**Editor's Note.** — Session Laws 2001-496, s. 14(b), provides: "The State Building Commission shall adopt temporary rules to implement G.S. 143-135.26(10) and G.S. 143-135.26(11) as enacted by Section 11 of this act [s. 11 of Session Laws 2001-496] no later than 60 days following the effective date of Section 11 of this act [s. 11 of Session Laws 2001-496]. The Secretary of Administration shall adopt rules to implement G.S. 143-128.2(f) as enacted by Section 3.1 of this act [s. 3.1 of Session Laws 2001-496] no later than June 30, 2002. A bidder must show compliance with at least five of the 10 efforts, as set forth in G.S. 143-128.2(f) as enacted by Section 3.1 of this act [s. 3.1 of Session Laws 2001-496], until 60 days following the adoption of rules to implement G.S. 143-128.2(f) by the Secretary of Administration as required in this section [s. 14 of Session Laws 2001-491]."

Session Laws 2001-496, s. 14(c), provides: "A city, county, or other public entity, other than the State, may apply verifiable percentage goals enacted prior to the effective date [January 1, 2002] of Section 3.1 of this act [s. 3.1 of Session Laws 2001-491] to building projects undertaken on or after the effective date [January 1, 2002] of Section 3.1 of this act [Session Laws 2001-491]."

Session Laws 2003-435, 1st Ex. Sess., s. 1.2(c), effective December 16, 2003, provides: "Site development funded by money appropriated under this section is not subject to Article 8 of Chapter 143 of the General Statutes (public contracts) or Article 3 of Chapter 143 of the General Statutes (purchases and contracts), except where public funds are expended the provisions of G.S. 143-48 and G.S. 143-128.2 shall apply. Actions involving expenditures of public moneys or use of public lands for projects and programs involved in site development funded by money appropriated under this section are exempt from the requirements of Article 1 of Chapter 113A of the General Statutes. This exemption does not apply to an ordinance adopted under G.S. 113A-8."

OPINIONS OF ATTORNEY GENERAL

**Contracts Under Federal Law.** — Where an airport authority chooses to let contracts under federal law relying upon G.S. 63-54(c), pertaining to federal aid for airports and related facilities, then the requirements of this section would not apply. See opinion of Attorney General to William O. Cooke, Cooke & Cooke, L.L.P., 2002 N.C.A.G. 32 (11/18/02).

## § 143-128.3. Minority business participation administration.

(a) All public entities subject to G.S. 143-128.2 shall report to the Department of Administration, Office of Historically Underutilized Business, the following with respect to each building project:

(1) The verifiable percentage goal.

(2) The type and total dollar value of the project, minority business utilization by minority business category, trade, total dollar value of contracts awarded to each minority group for each project, the applicable good faith effort guidelines or rules used to recruit minority business participation, and good faith documentation accepted by the public entity from the successful bidder.

(3) The utilization of minority businesses under the various construction methods under G.S. 143-128(a1).

The reports shall be in the format and contain the data prescribed by the Secretary of Administration. The University of North Carolina and the State Board of Community Colleges shall report quarterly and all other public entities shall report semiannually. The Secretary of the Department of Administration shall make reports every six months to the Joint Legislative Committee on Governmental Operations on information reported pursuant to this subsection.

(b) A public entity that has been notified by the Secretary of its failure to comply with G.S. 143-128.2 on a project shall develop a plan of compliance that addresses the deficiencies identified by the Secretary. The corrective plan shall apply to the current project or to subsequent projects under G.S. 143-128, as appropriate, provided that the plan must be implemented, at a minimum, on the current project to the extent feasible. If the public entity, after notification from the Secretary, fails to file a corrective plan, or if the public entity does not implement the corrective plan in accordance with its terms, the Secretary shall require one or both of the following:

(1) That the public entity consult with the Department of Administration, Office of Historically Underutilized Businesses on the development of a new corrective plan, subject to the approval of the Department and the Attorney General. The public entity may designate a representative to appear on its behalf, provided that the representative has managerial responsibility for the construction project.

(2) That the public entity not bid another contract under G.S. 143-128 without prior review by the Department and the Attorney General of a good faith compliance plan developed pursuant to subdivision (1) of this subsection. The public entity shall be subject to the review and approval of its good faith compliance plan under this subdivision with respect to any projects bid pursuant to G.S. 143-128 during a period of time determined by the Secretary, not to exceed one year.

A public entity aggrieved by the decision of the Secretary may file a contested case proceeding under Chapter 150B of the General Statutes.

(c) The Secretary shall study and recommend to the General Assembly and other State agencies ways to improve the effectiveness and efficiency of the State capital facilities development, minority business participation program and good faith efforts in utilizing minority businesses as set forth in G.S. 143-128.2, and other appropriate good faith efforts that may result in the increased utilization of minority businesses.

(d) The Secretary shall appoint an advisory board to develop recommendations to improve the recruitment and utilization of minority businesses. The Secretary, with the input of its advisory board, shall review the State's programs for promoting the recruitment and utilization of minority businesses involved in State capital projects and shall recommend to the General Assembly, the State Construction Office, The University of North Carolina, and the community colleges system changes in the terms and conditions of State laws, rules, and policies that will enhance opportunities for utilization of minority businesses on these projects. The Secretary shall provide guidance to these agencies on identifying types of projects likely to attract increased participation by minority businesses and breaking down or combining elements of work into economically feasible units to facilitate minority business participation.

(e) The Secretary shall adopt rules for State entities, The University of North Carolina, and community colleges and shall adopt guidelines for local government units to implement the provisions of G.S. 143-128.2.

(e1) Repealed by Session Laws 2007-392, s. 3, effective October 1, 2007.

(f) The Secretary shall provide the following information to the Attorney General:

(1) Failure by a public entity to report data to the Secretary in accordance with this section.

(2) Upon the request of the Attorney General, any data or other information collected under this section.

(3) False statements knowingly provided in any affidavit or documentation under G.S. 143-128.2 to the State or other public entity. Public entities shall provide to the Secretary information concerning any false information knowingly provided to the public entity pursuant to G.S. 143-128.2.

(g) The Secretary shall report findings and recommendations as required under this section to the Joint Legislative Committee on Governmental Operations annually on or before June 1, beginning June 1, 2002. (2001-496, s. 3.6; 2005-270, s. 2; 2007-392, s. 3.)

### OPINIONS OF ATTORNEY GENERAL

**Contracts Under Federal Law.** — Where an airport authority exercises its discretionary authority under G.S. 63-54(c), pertaining to federal aid for airports and related facilities, to let federally funded contracts under federal law, it is not subject to the reporting requirements prescribed by subsection (a) of this section. See opinion of Attorney General to William O. Cooke, Cooke & Cooke, L.L.P., 2002 N.C.A.G. 32 (11/18/02).

## § 143-128.4. Historically underutilized business defined; statewide uniform certification.

(a) As used in this Chapter, the term "historically underutilized business" means a business that meets all of the following conditions:

(1) At least fifty-one percent (51%) of the business is owned by one or more persons who are members of at least one of the groups set forth in subsection (b) of this section, or in the case of a corporation, at least fifty-one percent (51%) of the stock is owned by one or more persons who are members of at least one of the groups set forth in subsection (b) of this section.

(2) The management and daily business operations are controlled by one or more owners of the business who are members of at least one of the groups set forth in subsection (b) of this section.

(a1) As used in this Chapter, the term "minority business" means a historically underutilized business.

(b) To qualify as a historically underutilized business under this section, a business must be owned and controlled as set forth in subsection (a) of this section by one or more citizens or lawful permanent residents of the United States who are members of one or more of the following groups:

(1) Black. — A person having origins in any of the black racial groups of Africa.

(2) Hispanic. — A person of Spanish or Portuguese culture having origins in Mexico, South or Central America, or the Caribbean islands, regardless of race.

(3) Asian American. — A person having origins in any of the original peoples of the Far East, Southeast Asia, Asia, Indian continent, or Pacific islands.

(4) American Indian. — A person having origins in any of the original Indian peoples of North America.

(5) Female.

(6) Disabled. — A person with a disability as defined in G.S. 168-1 or G.S. 168A-3.

(7) Disadvantaged. — A person who is socially and economically disadvantaged as defined in 15 U.S.C. § 637.

(c) In addition to the powers and duties provided in G.S. 143-49, the Secretary of Administration shall have the power, authority, and duty to:

(1) Develop and administer a statewide uniform program for: (i) the certification of a historically underutilized business, as defined in this section, for use by State departments, agencies, and institutions, and political subdivisions of the State; and (ii) the creation and maintenance of a database of the businesses certified as historically underutilized businesses.

(2) Adopt rules and procedures for the statewide uniform certification of historically underutilized businesses.

(3) Provide for the certification of all businesses designated as historically underutilized businesses to be used by State departments, agencies, and institutions, and political subdivisions of the State.

(d) The Secretary of Administration shall seek input from State departments, agencies, and institutions, political subdivisions of the State, and any other entity deemed appropriate to determine the qualifications and criteria for statewide uniform certification of historically underutilized businesses.

(e) Only businesses certified in accordance with this section shall be considered by State departments, agencies, and institutions, and political subdivisions of the State as historically underutilized businesses for minority business participation purposes under this Chapter. (2005-270, s. 3; 2007-392, s. 4; 2009-243, s. 3.)

**Editor's Note.** — Session Laws 2007-392, s. 5, provides: "Except as otherwise provided in this section, this act becomes effective October 1, 2007. The Secretary of Administration shall develop a statewide uniform program and criteria for statewide uniform certification of historically underutilized businesses as provided in G.S. 143-48.4(a)(1) and (2), as enacted by Section 2 of this act, and G.S. 143-128.4(c)(1) and (2), as enacted by Section 4 of this act, no later than March 31, 2008. G.S. 143-48.4(c), as enacted by Section 2 of this act, and G.S. 143-128.4(e), as enacted by Section 4 of this act, become effective July 1, 2009."

**Effect of Amendments.** — Session Laws 2007-392, s. 4, added "statewide uniform certification" at the end of the section heading; and added subsections (a1) and (c) through (e). See Editor's note for effective date.

Session Laws 2009-243, s. 3, effective June 30, 2009, rewrote subsection (e).

## § 143-129. Procedure for letting of public contracts.

(a) Bidding Required. — No construction or repair work requiring the estimated expenditure of public money in an amount equal to or more than five hundred thousand dollars ($500,000) or purchase of apparatus, supplies, materials, or equipment requiring an estimated expenditure of public money in an amount equal to or more than ninety thousand dollars ($90,000) may be performed, nor may any contract be awarded therefor, by any board or governing body of the State, or of any institution of the State government, or of any political subdivision of the State, unless the provisions of this section are complied with; provided that The University of North Carolina and its constituent institutions may award contracts for construction or repair work that requires an estimated expenditure of less than five hundred thousand dollars ($500,000) without complying with the provisions of this section.

For purchases of apparatus, supplies, materials, or equipment, the governing body of any political subdivision of the State may, subject to any restriction as to dollar amount, or other conditions that the governing body elects to impose, delegate to the manager, school superintendent, chief purchasing official, or other employee the authority to award contracts, reject bids, or readvertise to receive bids on behalf of the unit. Any person to whom authority is delegated under this subsection shall comply with the requirements of this Article that would otherwise apply to the governing body.

(b) Advertisement and Letting of Contracts. — Where the contract is to be let by a board or governing body of the State government or of a State institution, proposals shall be invited by advertisement in a newspaper having general circulation in the State of North Carolina. Where the contract is to be let by a political subdivision of the State, proposals shall be invited by advertisement in a newspaper having general circulation in the political subdivision or by electronic means, or both. A decision to advertise solely by electronic means, whether for particular contracts or generally for all contracts that are subject to this Article, shall be approved by the governing board of the political subdivision of the State at a regular meeting of the board.

The advertisements for bidders required by this section shall appear at a time where at least seven full days shall lapse between the date on which the notice appears and the date of the opening of bids. The advertisement shall: (i) state the time and place where plans and specifications of proposed work or a complete description of the apparatus, supplies, materials, or equipment may be had; (ii) state the time and place for opening of the proposals; and (iii) reserve to the board or governing body the right to reject any or all proposals.

Proposals may be rejected for any reason determined by the board or governing body to be in the best interest of the unit. However, the proposal shall not be rejected for the purpose of evading the provisions of this Article. No board or governing body of the State or political subdivision thereof may assume responsibility for construction or purchase contracts, or guarantee the payments of labor or materials therefor except under provisions of this Article.

All proposals shall be opened in public and the board or governing body shall award the contract to the lowest responsible bidder or bidders, taking into consideration quality, performance and the time specified in the proposals for the performance of the contract.

In the event the lowest responsible bids are in excess of the funds available for the project or purchase, the responsible board or governing body is authorized to enter into negotiations with the lowest responsible bidder above mentioned, making reasonable changes in the plans and specifications as may be necessary to bring the contract price within the funds available, and may award a contract to such bidder upon recommendation of the Department of Administration in the case of the State government or of a State institution or agency, or upon recommendation of the responsible commission, council or board in the case of a subdivision of the State, if such bidder will agree to perform the work or provide the apparatus, supplies, materials, or equipment at the negotiated price within the funds available therefor. If a contract cannot be let under the above conditions, the board or governing body is authorized to readvertise, as herein provided, after having made such changes in plans and specifications as may be necessary to bring the cost of the project or purchase within the funds available therefor. The procedure above specified may be repeated if necessary in order to secure an acceptable contract within the funds available therefor.

No proposal for construction or repair work may be considered or accepted by said board or governing body unless at the time of its filing the same shall be accompanied by a deposit with said board or governing body of cash, or a cashier's check, or a certified check on some bank or trust company insured by the Federal Deposit Insurance Corporation in an amount equal to not less than five percent (5%) of the proposal. In lieu of making the cash deposit as above provided, such bidder may file a bid bond executed by a corporate surety licensed under the laws of North Carolina to execute such bonds, conditioned that the surety will upon demand forthwith make payment to the obligee upon said bond if the bidder fails to execute the contract in accordance with the bid bond. This deposit shall be retained if the successful bidder fails to execute the contract within 10 days after the award or fails to give satisfactory surety as required herein.

Bids shall be sealed and the opening of an envelope or package with knowledge that it contains a bid or the disclosure or exhibition of the contents of any bid by anyone without the permission of the bidder prior to the time set for opening in the invitation to bid shall constitute a Class 1 misdemeanor.

(c) Contract Execution and Security. — All contracts to which this section applies shall be executed in writing. The board or governing body shall require the person to whom the award of a contract for construction or repair work is made to furnish bond as required by Article 3 of Chapter 44A; or require a deposit of money, certified check or government securities for the full amount of said contract to secure the faithful performance of the terms of said contract and the payment of all sums due for labor and materials in a manner consistent with Article 3 of Chapter 44A; and the contract shall not be altered except by written agreement of the contractor and the board or governing body. The surety bond or deposit required herein shall be deposited with the board or governing body for which the work is to be performed. When a deposit, other than a surety bond, is made with the board or governing body, the board or governing body assumes all the liabilities, obligations and duties of a surety as provided in Article 3 of Chapter 44A to the extent of said deposit.

The owning agency or the Department of Administration, in contracts involving a State agency, and the owning agency or the governing board, in contracts involving a political subdivision of the State, may reject the bonds of any surety company against which there is pending any unsettled claim or complaint made by a State agency or the owning agency or governing board of any political subdivision of the State arising out of any contract under which State funds, in contracts with the State, or funds of political subdivisions of the State, in contracts with such political subdivision, were expended, provided such claim or complaint has been pending more than 180 days.

(d) Use of Unemployment Relief Labor. — Nothing in this section shall operate so as to require any public agency to enter into a contract which will prevent the use of unemployment relief labor paid for in whole or in part by appropriations or funds furnished by the State or federal government.

(e) Exceptions. — The requirements of this Article do not apply to:

(1) The purchase, lease, or other acquisition of any apparatus, supplies, materials, or equipment from: (i) the United States of America or any agency thereof; or (ii) any other government unit or agency thereof within the United States. The Secretary of Administration or the governing board of any political subdivision of the State may designate any officer or employee of the State or political subdivision to enter a bid or bids in its behalf at any sale of apparatus, supplies, materials, equipment, or other property owned by: (i) the United States of America or any agency thereof; or (ii) any other governmental unit or agency thereof within the United States. The Secretary of Administration or the governing board of any political subdivision of the State may authorize the officer or employee to make any partial or down payment or payment in full that may be required by regulations of the governmental unit or agency disposing of the property.

(2) Cases of special emergency involving the health and safety of the people or their property.

(3) Purchases made through a competitive bidding group purchasing program, which is a formally organized program that offers competitively obtained purchasing services at discount prices to two or more public agencies.

(4) Construction or repair work undertaken during the progress of a construction or repair project initially begun pursuant to this section.

(5) Purchase of gasoline, diesel fuel, alcohol fuel, motor oil, fuel oil, or natural gas. These purchases are subject to G.S. 143-131.

(6) Purchases of apparatus, supplies, materials, or equipment when: (i) performance or price competition for a product are not available; (ii) a needed product is available from only one source of supply; or (iii) standardization or compatibility is the overriding consideration. Notwithstanding any other provision of this section, the governing board of a political subdivision of the State shall approve the purchases listed in the preceding sentence prior to the award of the contract.

In the case of purchases by hospitals, in addition to the other exceptions in this subsection, the provisions of this Article shall not apply when: (i) a particular medical item or prosthetic appliance is needed; (ii) a particular product is ordered by an attending physician for his patients; (iii) additional products are needed to complete an ongoing job or task; (iv) products are purchased for "over-the-counter" resale; (v) a particular product is needed or desired for experimental, developmental, or research work; or (vi) equipment is already installed, connected, and in service under a lease or other agreement and the governing body of the hospital determines that the equipment should be purchased. The governing body of a hospital shall keep a record of all purchases made pursuant to this subdivision. These records are subject to public inspection.

(7) Purchases of information technology through contracts established by the State Office of Information Technology Services as provided in G.S. 147-33.82(b) and G.S. 147-33.92(b).

(8) Guaranteed energy savings contracts, which are governed by Article 3B of Chapter 143 of the General Statutes.

(9) Purchases from contracts established by the State or any agency of the State, if the contractor is willing to extend to a political subdivision of the State the same or more favorable prices, terms, and conditions as established in the State contract.

(9a) Purchases of apparatus, supplies, materials, or equipment from contracts established by the United States of America or any federal agency, if the contractor is willing to extend to a political subdivision of the State the same or more favorable prices, terms, and conditions as established in the federal contract.

(10) Purchase of used apparatus, supplies, materials, or equipment. For purposes of this subdivision, remanufactured, refabricated or demo apparatus, supplies, materials, or equipment are not included in the exception. A demo item is one that is used for demonstration and is sold by the manufacturer or retailer at a discount.

(11) Contracts by a public entity with a construction manager at risk executed pursuant to G.S. 143-128.1.

(12) **(Repealed effective July 1, 2011)** Build-to-suit capital leases with a private developer under G.S. 115C-532.

(f) Repealed by Session Laws 2001-328, s. 1, effective August 2, 2001.

(g) Waiver of Bidding for Previously Bid Contracts. — When the governing board of any political subdivision of the State, or the person to whom authority has been delegated under subsection (a) of this section, determines that it is in the best interest of the unit, the requirements of this section may be waived for the purchase of apparatus, supplies, materials, or equipment from any person or entity that has, within the previous 12 months, after having completed a public, formal bid process substantially similar to that required by this Article, contracted to furnish the apparatus, supplies, materials, or equipment to:

(1) The United States of America or any federal agency;

(2) The State of North Carolina or any agency or political subdivision of the State; or

(3) Any other state or any agency or political subdivision of that state, if the person or entity is willing to furnish the items at the same or more favorable prices, terms, and conditions as those provided under the contract with the other unit or agency. Notwithstanding any other provision of this section, any purchase made under this subsection shall be approved by the governing body of the purchasing political subdivision of the State at a regularly scheduled meeting of the governing body no fewer than 10 days after publication of notice that a waiver of the bid procedure will be considered in order to contract with a qualified supplier pursuant to this section. Notice may be published in a newspaper having general circulation in the political subdivision or by electronic means, or both. A decision to publish notice solely by electronic means for a particular contract or for all contracts under this subsection shall be approved by the governing board of the political subdivision. Rules issued by the Secretary of Administration pursuant to G.S. 143-49(6) shall apply with respect to participation in State term contracts.

(h) Transportation Authority Purchases. — Notwithstanding any other provision of this section, any board or governing body of any regional public transportation authority, hereafter referred to as a "RPTA," created pursuant to Article 26 of Chapter 160A of the General Statutes, or a regional transportation authority, hereafter referred to as a "RTA," created pursuant to Article 27 of Chapter 160A of the General Statutes, may approve the entering into of any contract for the purchase, lease, or other acquisition of any apparatus, supplies, materials, or equipment without competitive bidding and without meeting the requirements of subsection (b) of this section if the following procurement by competitive proposal (Request for Proposal) method is followed.

The competitive proposal method of procurement is normally conducted with more than one source submitting an offer or proposal. Either a fixed price or cost reimbursement type contract is awarded. This method of procurement is generally used when conditions are not appropriate for the use of sealed bids. If this procurement method is used, all of the following requirements apply:

(1) Requests for proposals shall be publicized. All evaluation factors shall be identified along with their relative importance.

(2) Proposals shall be solicited from an adequate number of qualified sources.

(3) RPTAs or RTAs shall have a method in place for conducting technical evaluations of proposals received and selecting awardees, with the goal of promoting fairness and competition without requiring strict adherence to specifications or price in determining the most advantageous proposal.

(4) The award may be based upon initial proposals without further discussion or negotiation or, in the discretion of the evaluators, discussions or negotiations may be conducted either with all offerors or with those offerors determined to be within the competitive range, and one or more revised proposals or a best and final offer may be requested of all remaining offerors. The details and deficiencies of an offeror's proposal may not be disclosed to other offerors during any period of negotiation or discussion.

(5) The award shall be made to the responsible firm whose proposal is most advantageous to the RPTA's or the RTA's program with price and other factors considered.

The contents of the proposals shall not be public records until 14 days before the award of the contract.

The board or governing body of the RPTA or the RTA shall, at the regularly scheduled meeting, by formal motion make findings of fact that the procurement by competitive proposal (Request for Proposals) method of procuring the particular apparatus, supplies, materials, or equipment is the most appropriate acquisition method prior to the issuance of the requests for proposals and shall by formal motion certify that the requirements of this subsection have been followed before approving the contract.

Nothing in this subsection subjects a procurement by competitive proposal under this subsection to G.S. 143-49, 143-52, or 143-53.

RPTAs and RTAs may adopt regulations to implement this subsection. (1931, c. 338, s. 1; 1933, c. 50; c. 400, s. 1; 1937, c. 355; 1945, c. 144; 1949, c. 257; 1951, c. 1104, ss. 1, 2; 1953, c. 1268; 1955, c. 1049; 1957, c. 269, s. 3; c. 391; c. 862, ss. 1-4; 1959, c. 392, s. 1; c. 910, s. 1; 1961, c. 1226; 1965, c. 841, s. 2; 1967, c. 860; 1971, c. 847; 1973, c. 1194, s. 2; 1975, c. 879, s. 46; 1977, c. 619, ss. 1, 2; 1979, c. 182, s. 1; 1979, 2nd Sess., c. 1081; 1981, c. 346, s. 1; c. 754, s. 1; 1985, c. 145, ss. 1, 2; 1987, c. 590; 1987 (Reg. Sess., 1988), c. 1108, ss. 7, 8; 1989, c. 350; 1993, c. 539, s. 1007; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 367, s. 6; 1997-174, ss. 1-4; 1998-185, s. 1; 1998-217, s. 16; 2001-328, s. 1; 2001-487, s. 88; 2001-496, ss. 4, 5; 2005-227, s. 1; 2006-232, s. 2; 2007-94, s. 1; 2007-322, s. 4; 2007-446, s. 6.)

**Local Modification.** — (As to school building contracts) Cabarrus: 2009-430, s. 2 (expires June 30, 2014); Cherokee: 2007-48, s. 1; Clay: 2006-94, s. 1; Currituck: 1993 (Reg. Sess., 1994), c. 668, s. 1; Dare: 1999-40, s. 1; 2003-47, s. 1 (as to design and construction of administration building and renovation of Old Dare Court House, and expires July 1, 2008); Forsyth: 1987 (Reg. Sess., 1988), c. 927; 1993, c. 128, s. 1; Franklin: 1993 (Reg. Sess., 1994), c. 757, s. 1; Greene: 1953, c. 718; Guilford: 1987 (Reg. Sess., 1988), c. 1010, s. 2; (As to water treatment and wastewater treatment plant expansion projects) Harnett: 2007-214, s. 1 (expires December 31, 2010); Iredell: (as to animal shelter project) 2008-67, s. 1 (expires July 1, 2010); Johnston: 1995 (Reg. Sess., 1996), c. 611, s. 1; 2008-40 (as to contracts for renovations to the county courthouse); Mecklenburg: 1987, cc. 184, 220, 823; 1989, c. 150, s. 1; 1993 (Reg. Sess., 1994), c. 709, s. 1; 1997-184, s. 1; (As to contracts with Water and Sewer Authority) New Hanover: 2007-135, s. 1 (expires December 31, 2009); Pasquotank: 1979, 2nd Sess., c. 1164;

1989, c. 268, s. 3; Stokes: 2006-50, s. 1; Surry: 1993 (Reg. Sess., 1994), c.705, s. 1; Union: 1991, c. 393, s. 1; Wilson: 1991, c. 200; city of Bessemer City: 1985 (Reg. Sess., 1986), c. 959; 1981, c. 89; 1987, cc. 151, 329, s. 1; 1991, c. 200; city of Charlotte: 1995, c. 273, s. 1; 2000-26, s. 1; 2002-91, s. 1, as amended by 2007-255, s. 1, and as amended by 2008-101; (as to water and wastewater treatment plants) 2007-312, s. 1; (as to speedway area infrastructure projects) city of Concord: 2008-7, s. 1 (expires December 31, 2013); city of Durham: 1983, c. 458; 1991 (Reg. Sess., 1992), c. 992, s. 1; 2001-350, s. 3; city of Greensboro: 1987, c. 53, ss. 1, 2; 1987 (Reg. Sess., 1988), c. 1010, s. 2; 1995, c. 218, s. 1; city of Greenville; 1989, c. 18, s. 1; city of Lexington: 1987, c. 21; city of Kings Mountain: 1985 (Reg. Sess., 1986), c. 959; 1981, c. 89; city of Monroe: 1989, c. 18, s. 1; 2000-35, s. 1; city of Raleigh: 2007-333, s. 1, as amended by Session Laws 2009-149, s. 1; city of Roanoke Rapids: 2001-245, s. 3; 2005-174, s. 2; city of Rocky Mount; 1989, c. 18, s. 1; city of Shelby: 1987, c. 87; (As to contracts with Water and Sewer Authority) city of Wilmington: 2007-135, s. 1 (expires December 31, 2009); city of Wilson: 1985 (Reg. Sess., 1986), c. 871; 1987 (Reg. Sess., 1988), c. 1108, s. 11; city of Winston-Salem: 1985, c. 632; 1987, c. 575; 1987 (Reg. Sess., 1988), c. 927; town of Blowing Rock: 2006-171, s. 10 (public parking facility); town of Clayton: 1995, c. 125, s. 1; town of Louisburg: 2007-216, s. 3, as amended by 2009-370, s. 1 (expires January 1, 2011); town of Manteo: 1985 (Reg. Sess., 1986), c. 808; town of Southern Shores: 1995, c. 70, s. 1; town of Yadkinville, 1997-3, s. 1; Alamance-Caswell Area Mental Health, Developmental Disabilities and Substance Abuse Authority: 1987, c. 120; Albermarle Hospital Board of Trustees: 1989, c. 468, s. 2; Bladen County Board of Education: 1973, c. 891; Charlotte-Mecklenburg Board of Education: 1981, c. 477; 1999-207, ss. 2, 3, 4; 2001-496, s. 10(c); Forsyth/Stokes Area Mental Health, Developmental Disabilities and Substance Abuse Authority: 1987 (Reg. Sess., 1988), c. 927; Lee Board of Education: 1953, c. 228; Union County Public Schools Board of Education: 2007-90, s. 1-3 (expires July 1, 2011); University of North Carolina at Chapel Hill: 1985 (Reg. Sess., 1986), c. 865, s. 3; Winston-Salem/Forsyth County Board of Education: 1993, c. 128, s. 1; 2003-269, s. 1.

**Cross References.** — As to legislation regarding construction of juvenile facilities, see the editor's note under G.S. 7B-1500. As to exception for school food services, see G.S. 115C-264.

**Editor's Note.** — Session Laws 1959, c. 910, which rewrote the last two paragraphs of this section, provides: "Nothing in this act shall be construed to authorize the Division of Purchase and Contract of the Department of Administration to make any purchases for or on behalf of any county, city or town government in this State or any other political subdivision.

"The powers granted herein are in addition to and not in substitution for existing powers granted by general laws or special acts to cities and towns."

As to the exemption of the Office of State Budget and Management from the requirements of G.S. 143-135.26(1), 143-128, 143-129, 143-131, 143-132, 143-134, 143-135.26, 143-64.10 through 143-64.13, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(b), and 133-1.1(g) and rules implementing those statutes for the purpose of construction of prison facilities, see Session Laws 1989, c. 754, s. 28(a).

As to exemption of the Office of State Budget and Management from the requirements of this section in the administration and implementation of the Prison Facilities Legislative Bond Act of 1990, see Session Laws 1989 (Reg. Sess., 1990), c. 933, s. 6(4).

As to the exemption of the Office of State Budget and Management (now the Office of State Budget, Planning, and Management) from the requirements of this section in providing prison facilities under the provisions of the State Prison and Youth Services Facilities Bond Act, see Session Laws 1989 (Reg. Sess., 1990), c. 935, s. 6(a)(4).

As to exemption of the Office of Management and Budget from the requirements of this section with respect to facilities authorized for the Department of Correction, see Session Laws 1991, c. 689, s. 239(f), as amended by Session Laws 1991 (Reg. Sess., 1992), c. 1044, s. 41(b), quoted under G.S. 143-64.10.

As to exemption of the Department of Transportation from the provisions of this section for the purpose of entering into contracts with respect to the development of a "Congestion Avoidance and Reduction for Autos and Trucks (CARAT)" system of traffic management for the greater Charlotte-Mecklenburg urban areas, see Session Laws 1993, c. 321, s. 162, Session Laws 1995, c. 324, s. 18.14, and Session Laws 1997-443, s. 32.11.

As to the exemption of the Office of State Construction of the Department of Administration from the requirements of this section to the extent necessary to expedite delivery of certain prison facilities, see Session Laws 1994, Extra Session, c. 24, s. 67.

Session Laws 1993, c. 550, s. 6, effective July 1, 1993, provides that if the Secretary of Administration, after consultation with the Secretary of Correction, finds that the delivery of state prison and youth services facilities authorized to be constructed under that act must be expedited for good cause, the Office of State Construction of the Department of Administration may use alternative delivery systems and shall be exempt from several statutes, including this section, and rules implementing those statutes to the extent necessary to expedite delivery. Section 6 also sets out the provisions governing the exercise of the exemptions allowable and other relevant provisions.

Session Laws 1995, c. 507, s. 27.10, provides that if the construction of prison facilities in Avery and Mitchell Counties must be expedited for good cause, as determined by the Secretary of Administration and Secretary of Correction, the Office of State Construction of the Department of Administration shall be exempt from the following statutes and rules to the extent necessary to expedite delivery: G.S. 143-135.26, 143-128, 143-129, 143-131, 143-132, 143-134, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(g), and 143-408.1 through 143-408.7.

Session Laws 1997-174, s. 8, provides: "This act raises the threshold amount in G.S. 143-129 and G.S. 160A-266. If any local act provides a threshold amount for the subjects addressed in these statutes that is less than the amount provided in this act, this act prevails to the extent of that conflict."

As to exemption of the Office of State Construction of the Department of Administration from this section and rules implementing this section, to the extent necessary to expedite delivery of juvenile facilities, see Session Laws 1998-202, s. 35(a), quoted under G.S. 143-128.

Session Laws 2007-322, which, in s. 4, added the proviso at the end of the first paragraph of subsection (a), in s. 13, provides: "This act is effective when it becomes law [July 30, 2007]. Sections 1 through 4 of this act apply to construction projects for which bids or proposals are solicited on or after that date. Section 5 of this act applies to construction or repair work commenced on or after that date."

This section, as amended by Session Laws 2007-446, s. 6, effective August 23, 2007, which substituted "five hundred thousand dollars ($500,000)" for "three hundred thousand dollars ($300,000)," is applicable to projects that are funded on or after July 1, 2007.

Session Laws 2009-451, s. 9.14(b), provides: "With respect to the demonstration wind turbines and necessary support facilities authorized by subsection (a) of this section, the facilities authorized under this act shall be constructed in accordance with the provisions of general law applicable to the construction of State facilities, except that the State Property Office shall expedite and grant all easements and use agreements required for construction of the facilities without payment of any fee, royalty, or other cost. Notwithstanding any other provision of law, construction of the facilities authorized by this section shall be exempt from the following statutes and rules implementing those statutes: G.S. 143-48 through 143-64, 143-128, 143-129, 143-132, 113A-1 through 113A-10, 113A-50 through 113A-66, and 113A-116 through 113A-128. If Senate Bill 1068, 2009 Regular Session, becomes law, the provisions of Part 12 of Article 21 of Chapter 143 of the General Statutes as enacted by that act shall not apply to the facilities authorized by this section. With respect to any other environmental permits required for construction of the facilities, the Department of Environment and Natural Resources is directed to expedite permitting of the project to the extent allowed by law and shall waive any application fees that would be otherwise applicable to applications for permits required for the facilities and, where possible under applicable law, issue all permits within 40 days of receipt of a complete application." Senate Bill 1068, 2009 Regular Session, did not become law.

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2006-232, s. 2, effective August 12, 2006, and repealed effective July 1, 2011, added subdivision (e)(12).

**Legal Periodicals.** — For brief comment on the 1949 amendment, see 27 N.C.L. Rev. 423 (1949).

See legislative survey, 21 Campbell L. Rev. 323 (1999).

## CASE NOTES

***Editor's Note.*** *— The cases below were decided prior to the 2001 amendment to this section.*

**The purpose of this section** is to prevent favoritism, corruption, fraud and imposition in the awarding of public contracts by giving notice to prospective bidders and thus assuring competition, which in turn guarantees fair play and reasonable prices in contracts involving the expenditure of a substantial amount of public money. Mullen v. Town of Louisburg, 225 N.C. 53, 33 S.E.2d 484 (1945).

The purpose of the public contract bidding laws is to prevent favoritism, corruption, fraud and imposition in the awarding of public contracts by giving notice to prospective bidders and thus assuring competition which in turn guarantees fair play and reasonable prices in contracts involving the expenditure of a substantial amount of public money. Ronald G. Hinson Elec., Inc. v. Union County Bd. of Educ., 125 N.C. App. 373, 481 S.E.2d 326 (1997).

**The requirements of this section are mandatory,** and a contract made in contravention of such requirements is ultra vires and void. Raynor v. Commissioners for Town of Louisburg, 220 N.C. 348, 17 S.E.2d 495 (1941).

**Public policy has for many years required governmental needs to be supplied pursuant to contracts with low bidders** ascertained by public advertisement. North Carolina has for many years so provided by this section. Douglas Aircraft Co. v. Electrical Workers Local 379, 247 N.C. 620, 101 S.E.2d 800 (1958).

**This section applies only to contracts where the bidders have the right to name the price** for which they are willing to furnish supplies and materials. It has no application whatever to a contract between a municipality and a public utility, where there can be no competition between bidders because the municipality or the State has the power and authority to fix the price of the service to be rendered or the commodity to be furnished. Mullen v. Town of Louisburg, 225 N.C. 53, 33 S.E.2d 484 (1945).

**Discretionary Nature of Process.** — Plaintiff public contracts bidder's 18 U.S.C.S. § 1962 Racketeer Influenced and Corrupt Organizations Act claims against defendants, a state official, other bidders, and co-conspirators, based upon illegal campaign contributions solicited by the official in connection with awarding state fair contracts, failed for lack of standing because being awarded contracts was an expectancy interest only and the discretionary criteria involved in the decision-making process, as evident from G.S. 146-29, 146-29.1, 143-129, in awarding contracts precluded proximate cause as required under 18 U.S.C.S. § 1964(c). Strates Shows v. Amusements of Am., 379 F. Supp. 2d 817, 2005 U.S. Dist. LEXIS 15741 (E.D.N.C. 2005).

**The terms "apparatus," "materials" and "equipment,"** as used in this section, denote particular types of tangible personal property and cannot be construed to include electric current. Mullen v. Town of Louisburg, 225 N.C. 53, 33 S.E.2d 484 (1945).

**The word "supplies"** in this section is used in conjunction with the terms "apparatus," "materials" and "equipment," and its meaning is confined to property of like kind and nature. Mullen v. Town of Louisburg, 225 N.C. 53, 33 S.E.2d 484 (1945).

**Meaning of "Emergency."** — The meaning of the word "emergency" within the exception to this section is not susceptible of precise definition, and each case must, to some extent, stand upon its own bottom; but in any event, the term connotes an immediate and present condition, and not one which may or may not arise in the future, or one that is apt to arise or may be expected to arise. Raynor v. Commissioners for Town of Louisburg, 220 N.C. 348, 17 S.E.2d 495 (1941).

**Provision of Section Held Punitive.** — This section allows a municipality to reject a licensed surety company's bid if it fails to settle a pending claim against it within 180 days, and operates to prevent a licensed surety company from engaging in the business it is otherwise authorized to participate in under G.S. 55-3-02 and 55-15-05; therefore, this provision is punitive in nature. United States Fid. & Guar. Co. v. City of Raleigh, 93 N.C. App. 159, 376 S.E.2d 768 (1989).

**This section contains no provision for reviving claims after settlement,** and no language suggests that a surety company's subsequent action against a municipality arising from their settlement constitutes a claim against the surety; therefore, city could not invoke this provision to justify its blanket refusal to accept plaintiff's bonds. United States Fid. & Guar. Co. v. City of Raleigh, 93 N.C. App. 159, 376 S.E.2d 768 (1989).

**Judicial Review of Finding of Emergency.** — The provision of this section that a municipality may let a contract for expenditures in excess of the specified dollar amount without advertisement "in cases of special emergency" constitutes an exception to the general rule; the commissioners of a municipality may not declare an emergency where none exists and thus defeat the law, nor is the finding of an emergency by the municipal board upon competent evidence conclusive on the courts, but the courts may review the evidence and determine whether an emergency as contemplated by this section does in fact exist. Raynor v. Commissioners for Town of Louisburg, 220 N.C. 348, 17 S.E.2d 495 (1941).

**Contract Made in Violation of This Section Is Void.** — A contract involving more than the specified dollar amount, let without advertisement as required by this section, is void, and the contractor may not recover on it. Hawkins v. Town of Dallas, 229 N.C. 561, 50 S.E.2d 561 (1948).

A purported public contract not made in conformity with the requirements of this section is void. Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

**Trial Court Did Not Have Jurisdiction to Enter Permanent Injunction.** — Appeals court (1) vacated the permanent injunctive relief, which purported to effectively determine the controversy between an unsuccessful bidder for a town's water tank and the town and the successful bidder, based upon whether the town was in the process of awarding the contract in violation of to G.S. 143-128, 143-129 after negotiating with the successful bidder, on its merits, for lack of trial court jurisdiction to award that relief, since the trial court issued the permanent injunction at a hearing held only to determine whether a temporary restraining order was to be continued as a preliminary injunction, and (2) dismissed, and remanded for further proceedings the appeal of the remaining part of the order awarding a preliminary injunction, since that order was a non-final interlocutory order that was not yet appealable. CB&I Constructors, Inc. v. Town of Wake Forest, 157 N.C. App. 545, 579 S.E.2d 502, 2003 N.C. App. LEXIS 736 (2003).

**But Recovery May Be Had on Basis of Quantum Meruit.** — Where the work under the contract has been actually done and accepted, the county, city or town is bound on a quantum meruit for the reasonable and just value of the work and labor done and materials furnished. Hawkins v. Town of Dallas, 229 N.C. 561, 50 S.E.2d 561 (1948).

**As performance and acceptance of construction work imposes an obligation** to pay the reasonable and just value of the work done and materials furnished. Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

**Such recovery excludes profits,** and the reasonable and just value recoverable cannot exceed actual cost. Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

**Contracts Held Void.** — Public Laws 1903, c. 305 did not authorize the town of Louisburg to contract for machinery for its water and sewer system and electric light plant in a sum in excess of $1,000 without submitting the same to competitive bidding after due advertisement. Raynor v. Commissioners for Town of Louisburg, 220 N.C. 348, 17 S.E.2d 495 (1941).

Where plaintiffs laid water lines as a business investment pursuant to an agreement with the city's director of utilities that the city would reimburse them for the moneys so expended if the lines were incorporated within the city's limits, the contract was void. Styers v. City of Gastonia, 252 N.C. 572, 114 S.E.2d 348 (1960).

**Applied** in N.C. Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

**Cited** in Karpark Corp. v. Town of Graham, 99 F. Supp. 124 (M.D.N.C. 1951); Smith v. City of Rockingham, 268 N.C. 697, 151 S.E.2d 568 (1966); Wm. Muirhead Constr. Co. v. Housing Auth., 1 N.C. App. 181, 160 S.E.2d 542 (1968).

## OPINIONS OF ATTORNEY GENERAL

***Editor's Note.*** *— The opinions below were rendered prior to the 2001 amendment to this section.*

**Advertisement for formal bids under this section is required** whenever an estimated expenditure for purchase of apparatus, supplies, materials or equipment exceeds $2,000 and whenever an estimated expenditure for construction or repair work exceeds $7,500. See opinion of Attorney General to Mr. L.A. Stith, Craven County Attorney, 40 N.C.A.G. 459 (1969), issued prior to amendments to this section increasing the specified dollar amounts.

**Sales Tax Must Be Included as an "Estimated Expenditure of Public Money."** — See opinion of Attorney General to Mr. James B. Garland, 41 N.C.A.G. 479 (1971).

**Applicability of Competitive Bidding Requirements to Lease with Option to Purchase.** — As to necessity of counties complying with competitive bidding requirements in lease agreement of equipment with option to purchase, see opinion of Attorney General to Senator John J. Burney, Jr., 41 N.C.A.G. 504 (1971).

A city may not enter into a lease for equipment, with option to purchase within the first five years, without complying with the bidding requirements of this section, where the purchase price of the equipment exceeds $2,000, even though the rental payments will be credited toward the purchase price should the option be exercised. See opinion of Attorney General to Mr. James B. Garland, Gastonia City Attorney, 40 N.C.A.G. 460 (1969), issued prior to amendments to this section increasing the specified dollar amounts.

**Modification of Bid After Opening of Sealed Bids Is Impermissible.** — See opinion of Attorney General to Mr. John B. Lewis, Farmville Town Attorney, 41 N.C.A.G. 187 (1970).

**County May Accept Single Bid Filed Pursuant to Requirement of Statute.** — See opinion of Attorney General to Mr. Elbert L. Peters, Coordinator, Governor's Highway Safety Program, 41 N.C.A.G. 527 (1971).

**Provision as to Purchase Price of Additional Equipment.** — A contract let to bids pursuant to this section for the purchase of equipment may contain a provision that the city may purchase additional equipment at the same price as the original contract. See opinion of Attorney General to Mr. James B. Garland, Gastonia City Attorney, 40 N.C.A.G. 460 (1969).

**Construction of Correctional Facilities.** — The public bidding requirements of Article 8, Chapter 143, G.S. 143-128 et seq., are not applicable to the construction of the three close security correctional facilities authorized by G.S. 148-37(b1), as the statute clearly contemplates that such facilities will be constructed by the private sector using private funds. See opinion of Attorney General to Mr. Robert M. High, Deputy Treasurer, N. C. Department of State Treasurer, 2000 N.C. AG LEXIS 34 (4/17/2000).

## § 143-129.1. Withdrawal of bid.

A public agency may allow a bidder submitting a bid pursuant to G.S. 143-129 for construction or repair work or for the purchase of apparatus, supplies, materials, or equipment to withdraw his bid from consideration after the bid opening without forfeiture of his bid security if the price bid was based upon a mistake, which constituted a substantial error, provided the bid was submitted in good faith, and the bidder submits credible evidence that the mistake was clerical in nature as opposed to a judgment error, and was actually due to an unintentional and substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor, apparatus, supplies, materials, equipment, or services made directly in the compilation of the bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of the original work papers, documents or materials used in the preparation of the bid sought to be withdrawn. A request to withdraw a bid must be made in writing to the public agency which invited the proposals for the work prior to the award of the contract, but not later than 72 hours after the opening of bids, or for a longer period as may be specified in the instructions to bidders provided prior to the opening of bids.

If a request to withdraw a bid has been made in accordance with the provisions of this section, action on the remaining bids shall be considered, in accordance with North Carolina G.S. 143-129, as though said bid had not been received. Notwithstanding the foregoing, such bid shall be deemed to have been received for the purpose of complying with the requirements of G.S. 143-132. If the work or purchase is relet for bids, under no circumstances may the bidder who has filed a request to withdraw be permitted to rebid the work or purchase.

If a bidder files a request to withdraw his bid, the agency shall promptly hold a hearing thereon. The agency shall give to the withdrawing bidder reasonable notice of the time and place of any such hearing. The bidder, either in person or through counsel, may appear at the hearing and present any additional facts and arguments in support of his request to withdraw his bid. The agency shall issue a written ruling allowing or denying the request to withdraw within five days after the hearing. If the agency finds that the price bid was based upon a mistake of the type described in the first paragraph of this section, then the agency shall issue a ruling permitting the bidder to withdraw without forfeiture of the bidder's security. If the agency finds that the price bid was based upon a mistake not of the type described in the first paragraph of this section, then the agency shall issue a ruling denying the request to withdraw and requiring the forfeiture of the bidder's security. A denial by the agency of the request to withdraw a bid shall have the same effect as if an award had been made to the bidder and a refusal by the bidder to accept had been made, or as if there had been a refusal to enter into the contract, and the bidder's bid deposit or bid bond shall be forfeited.

In the event said ruling denies the request to withdraw the bid, the bidder shall have the right, within 20 days after receipt of said ruling, to contest the matter by the filing of a civil action in any court of competent jurisdiction of the State of North Carolina. The procedure shall be the same as in all civil actions except all issues of law and fact and every other issue shall be tried de novo by the judge without jury; provided that the matter may be referred in the instances and in the manner provided for by North Carolina G.S. 1A-1, Rule 53, as amended. Notwithstanding the foregoing, if the public agency involved is the Department of Administration, it may follow its normal rules and regulations with respect to contested matters, as opposed to following the administrative procedures set forth herein. If it is finally determined that the bidder did not have the right to withdraw his bid pursuant to the provisions of this section, the bidder's security shall be forfeited. Every bid bond or bid deposit given by a bidder to a public agency pursuant to G.S. 143-129 shall be conclusively presumed to have been given in accordance with this section, whether or not it be so drawn as to conform to this section. This section shall be conclusively presumed to have been written into every bid bond given pursuant to G.S. 143-129.

Neither the agency nor any elected or appointed official, employee, representative or agent of such agency shall incur any liability or surcharge, in the absence of fraud or collusion, by permitting the withdrawal of a bid pursuant to the provisions of this section.

No withdrawal of the bid which would result in the award of the contract on another bid of the same bidder, his partner, or to a corporation or business venture owned by or in which he has an interest shall be permitted. No bidder who is permitted to withdraw a bid shall supply any material or labor to, or perform any subcontract or work agreement for, any person to whom a contract or subcontract is awarded in the performance of the contract for which the withdrawn bid was submitted, without the prior written approval of the agency. Whoever violates the provisions of the foregoing sentence shall be guilty of a Class 1 misdemeanor. (1977, c. 617, s. 1; 1993, c. 539, s. 1008; 1994, Ex. Sess., c. 24, s. 14(c); 2001-328, s. 2.)

## § 143-129.2. Construction, design, and operation of solid waste management and sludge management facilities.

(a) All terms relating to solid waste management and disposal as used in this section shall be defined as set forth in G.S. 130A-290, except that the term "unit of local government" also includes a sanitary district created under Part 2 of Article 2 of Chapter 130A of the General Statutes, an authority created under Article 1 of Chapter 162A of the General Statutes, a metropolitan sewerage district created under Article 5 of Chapter 162A of the General Statutes, and a county water and sewer district created under Article 6 of Chapter 162A of the General Statutes. As used in this section, the term "sludge management facility" means a facility that processes sludge that has been generated by a municipal wastewater treatment plant for final end use or disposal but does not include any component of a wastewater treatment process or facility that generates sludge.

(b) To acknowledge the highly complex and innovative nature of solid waste and sludge management technologies for processing mixed solid waste and sludge generated by water and wastewater treatment facilities, the relatively limited availability of existing and proven proprietary technology involving solid waste and sludge management facilities, the desirability of a single point of responsibility for the development of facilities and the economic and technical utility of contracts for solid waste and sludge management which include in their scope combinations of design, construction, operation, management and maintenance responsibilities over prolonged periods of time and that in some instances it may be beneficial to a unit of local government to award a contract on the basis of factors other than cost alone, including but not limited to facility design, operational experience, system reliability, energy production efficiency, long-term operational costs, compatibility with source separation and other recycling systems, environmental impact and operational guarantees. Accordingly, and notwithstanding other provisions of this Article or any local law, a contract entered into between a unit of local government and any person pursuant to this section may be awarded in accordance with the following provisions for the award of a contract based upon an evaluation of proposals submitted in response to a request for proposals prepared by or for a unit of local government.

(c) The unit of local government shall require in its request for proposals that each proposal to be submitted shall include all of the following:

(1) Information relating to the experience of the proposer on the basis of which said proposer purports to be qualified to carry out all work required by a proposed contract; the ability of the proposer to secure adequate financing; and proposals for project staffing, implementation of work tasks, and the carrying out of all responsibilities required by a proposed contract.

(2) A proposal clearly identifying and specifying all elements of cost which would become charges to the unit of local government, in whatever form, in return for the fulfillment by the proposer of all tasks and responsibilities established by the request for the proposal for the full lifetime of a proposed contract, including, as appropriate, but not limited to, the cost of planning, design, construction, operation, management and/or maintenance of any facility; provided, that the unit of local government may prescribe the form and content of the proposal and that, in any event, the proposer must submit sufficiently detailed information to permit a fair and equitable evaluation of the proposal.

(3) Any other information as the unit of local government may determine to have a material bearing on its ability to evaluate any proposal in accordance with this section.

(d) Proposals received in response to a request for proposals may be evaluated on the basis of a technical analysis of facility design, operational experience of the technology to be utilized in the proposed facility, system reliability and availability, energy production balance and efficiency, environmental impact and protection, recovery of materials, required staffing level during operation, projection of anticipated revenues from the sale of energy and materials recovered by the facility, net cost to the unit of local government for operation and maintenance of the facility for the duration of time to be established in the request for proposals and upon any other factors and information that the unit of local government determined to have a material bearing on its ability to evaluate any proposal, which factors were set forth in said request for proposal.

(e) The unit of local government may make a contract award to any responsible proposer selected pursuant to this section based upon a determination that the selected proposal is more responsive to the request for proposals and may thereupon negotiate a contract with said proposer for the performance of the services set forth in the request for proposals and the response thereto, the determination shall be deemed to be conclusive. Notwithstanding other provisions of this Article or any local law, a contract may be negotiated and entered into between a unit of local government and any person selected as a responsible proposer hereunder which may provide for, but not be limited to, the following:

(1) A contract, lease, rental, license, permit or other authorization to design, construct, operate and maintain a solid waste or sludge management facility upon such terms and conditions, for such consideration, and for such duration, not to exceed 40 years, as may be agreed upon by the unit of local government and the person.

(2) Payment by the unit of local government of a fee or other charge to the person for acceptance, processing, recycling, management and disposal of solid waste or sludge.

(3) An obligation on the part of a unit of local government to deliver or cause to be delivered to a solid waste or sludge management facility guaranteed quantities of solid wastes or sludge.

(4) The sale, utilization or disposal of any form of energy, recovered material or residue resulting from the operation of any solid waste or sludge management facility.

(f) Except for authorities created pursuant to Article 22 of Chapter 153A of the General Statutes, the construction work for any facility or structure that is ancillary to a solid waste or sludge management facility and that does not involve storage and processing of solid waste or sludge or the separation, extraction, and recovery of useful or marketable forms of energy and materials from solid waste at a solid waste management facility shall be procured through competitive bidding procedures described by G.S. 143-128 through 143-129.1. Ancillary facilities include but are not limited to roads, water and sewer lines to the facility limits, transfer stations, scale houses, administration buildings, and residue and bypass disposal sites. (1983, c. 795, ss. 4, 8.1; 2005-176, s. 1; 2007-131, s. 3.)

### CASE NOTES

**The plain language of this section gives broad discretion to local governments in making a contract-award decision;** the section does not mandate that the local government follow the recommendation of county officials nor does it require that the county award the contract to the low bidder. City-Wide Asphalt Paving, Inc. v. Alamance County, 966 F. Supp. 395 (M.D.N.C. 1997).

**This section does not vest a property interest in a contract award** to the low bidder for purposes of a due process claim under 42 U.S.C. § 1983. City-Wide Asphalt Paving, Inc. v. Alamance County, 966 F. Supp. 395 (M.D.N.C. 1997).

**No Private Cause of Action to Contest Contract Award.** — The low bidder on the county's request for proposals to maintain and operate a county landfill could not maintain a private cause of action under this section upon the county's award of the contract to a competing bidder, since the low bidder failed to allege that the county had waived its sovereign immunity. City-Wide Asphalt Paving, Inc. v. Alamance County, 132 N.C. App. 347, 513 S.E.2d 335 (1999).

## § 143-129.3. Exemption of General Assembly from certain purchasing requirements.

(a) The Legislative Services Commission may provide that the provisions of G.S. 143-129 and Article 3 of this Chapter do not apply to purchases by the General Assembly of data processing and data communications equipment, supplies, and services. Such exemption may vary according to the type or amount of purchase, and may vary as to whether the exemption is from some or all of those statutory provisions.

(b) The Legislative Services Commission must give specific approval to any purchase in excess of five thousand dollars ($5,000) made under an exemption provided by subsection (a) of this section. (1989, c. 82, s. 1.)

## § 143-129.4. Guaranteed energy savings contracts.

The solicitation and evaluation of proposals for guaranteed energy savings contracts, as defined in Part 2 of Article 3B of this Chapter, and the letting of contracts for these proposals are not governed by this Article but instead are governed by the provisions of that Part; except that guaranteed energy savings contracts are subject to the requirements of G.S. 143-128.2 and G.S. 143-135.3.

(1993 (Reg. Sess., 1994), c. 775, s. 4; 1995, c. 509, s. 135.2(k); 2001-496, s. 3.3; 2002-161, s. 11.)

## § 143-129.5. Purchases from nonprofit work centers for the blind and severely disabled.

Notwithstanding G.S 143-129, a city, county, or other governmental entity subject to this Article may purchase goods and services directly from a nonprofit work center for the blind and severely disabled, as defined in G.S. 143-48.

The Department of Administration shall report annually to the Joint Legislative Commission on Governmental Operations on its administration of this program. (1995, c. 265, ss. 4, 5; 1999-20, s. 1.)

## § 143-129.6: Reserved for future codification purposes.

## § 143-129.7. Purchase with trade-in of apparatus, supplies, materials, and equipment.

Notwithstanding the provisions of Article 12 of Chapter 160A of the General Statutes, municipalities, counties, and other political subdivisions of the State may include in specifications for the purchase of apparatus, supplies, materials, or equipment an opportunity for bidders to purchase as "trade-in" specified personal property owned by the municipality, county, or other political subdivision, and the awarding authority may award a contract for both the purchase of the apparatus, supplies, materials, or equipment and the sale of trade-in property, taking into consideration the amount offered on the trade-in when applying the criteria for award established in this Article. (1997-174, s. 7.)

## § 143-129.8. Purchase of information technology goods and services.

(a) In recognition of the complex and innovative nature of information technology goods and services and of the desirability of a single point of responsibility for contracts that include combinations of purchase of goods, design, installation, training, operation, maintenance, and related services, a political subdivision of the State may contract for information technology, as defined in G.S. 147-33.81(2), using the procedure set forth in this section, in addition to or instead of any other procedure available under North Carolina law.

(b) Contracts for information technology may be entered into under a request for proposals procedure that satisfies the following minimum requirements:

(1) Notice of the request for proposals shall be given in accordance with G.S. 143-129(b).

(2) Contracts shall be awarded to the person or entity that submits the best overall proposal as determined by the awarding authority. Factors to be considered in awarding contracts shall be identified in the request for proposals.

(c) The awarding authority may use procurement methods set forth in G.S. 143-135.9 in developing and evaluating requests for proposals under this section. The awarding authority may negotiate with any proposer in order to obtain a final contract that best meets the needs of the awarding authority. Negotiations allowed under this section shall not alter the contract beyond the scope of the original request for proposals in a manner that: (i) deprives the proposers or potential proposers of a fair opportunity to compete for the contract; and (ii) would have resulted in the award of the contract to a different person or entity if the alterations had been included in the request for proposals.

(d) Proposals submitted under this section shall not be subject to public inspection until a contract is awarded. (2001-328, s. 3; 2004-199, s. 36(b); 2004-203, s. 10.)

## § 143-129.8A. Purchase of certain goods and services for the North Carolina Zoological Park.

(a) Exemption. — The North Carolina Zoological Park is a State entity whose primary purpose is the attraction of, interaction with, and education of the public regarding issues of global conservation, ecological preservation, and scientific exploration, and that purpose presents unique challenges requiring greater flexibility and faster responsiveness in meeting the needs of and creating the attractions for the Park. Accordingly, the Department of Environment and Natural Resources may use the procedure set forth in this section, in addition to or instead of any other procedure available under North Carolina law, to contract with a non-State entity on behalf of the Park for the acquisition of goods and services where: (i) the contract directly results in the generation of revenue for the State of North Carolina or (ii) the use of the acquired goods and services by the Park results in increased revenue or decreased expenditures for the State of North Carolina.

(b) Limitation. — Contracts executed pursuant to the exemption of subsection (a) of this section may be entered into under a request for proposals procedure that satisfies the following minimum requirements:

(1) Notice of the request for proposals shall be given in accordance with G.S. 143-129(b).

(2) Contracts shall be awarded to the person or entity that submits the best overall proposal as determined by the awarding authority. Factors to be considered in awarding contracts shall be identified in the request for proposals.

(c) Procurement Methods. — The Department may use procurement methods set forth in G.S. 143-135.9 in developing and evaluating requests for proposals under this section. The Department may negotiate with any proposer in order to obtain a final contract that best meets the needs of the awarding authority. Negotiations allowed under this section shall not alter the contract beyond the scope of the original request for proposals in a manner that: (i) deprives the proposers or potential proposers of a fair opportunity to compete for the contract; and (ii) would have resulted in the award of the contract to a different person or entity if the alterations had been included in the request for proposals.

(d) Promotional Rights. — Subject to the approval of the Department, a non-State entity awarded a contract that results in increased revenue or decreased expenditures for the Park may advertise, announce, or otherwise publicize the provision of services pursuant to award of the contract. (2009-329, s. 1.1.)

**Editor's Note.** — Session Laws 2009-329, s. 7, made this section effective July 24, 2009.

Session Laws 2009-329, s. 4, provides: "The Department of Environment and Natural Resources shall report to the North Carolina Zoological Park Funding and Organization Study Committee and to the Fiscal Research Division of the Legislative Services Office on the progress and implementation of Parts I and III of this act no later than January 15, 2010." Parts I and III of this act pertain to purchasing and contracting authority on behalf of the

North Carolina Zoological Park and administrative improvements to the North Carolina Zoological Park operations.

## § 143-129.9. Alternative competitive bidding methods.

(a) A political subdivision of the State may use any of the following methods to obtain competitive bids for the purchase of apparatus, supplies, materials, or equipment as an alternative to the otherwise applicable requirements in this Article:

(1) Reverse auction. — For purposes of this section, "reverse auction" means a real-time purchasing process in which bidders compete to provide goods at the lowest selling price in an open and interactive environment. The bidders' prices may be revealed during the reverse auction. A reverse auction may be conducted by the political subdivision or by a third party under contract with the political subdivision. A political subdivision may also conduct a reverse auction through the State electronic procurement system, and compliance with the procedures and requirements of the State's reverse auction process satisfies the political subdivision's obligations under this Article.

(2) Electronic bidding. — A political subdivision may receive bids electronically in addition to or instead of paper bids. Procedures for receipt of electronic bids for contracts that are subject to the requirements of G.S. 143-129 shall be designed to ensure the security, authenticity, and confidentiality of the bids to at least the same extent as is provided for with sealed paper bids.

(b) The requirements for advertisement of bidding opportunities, timeliness of the receipt of bids, the standard for the award of contracts, and all other requirements in this Article that are not inconsistent with the methods authorized in this section shall apply to contracts awarded under this section.

(c) Reverse auctions shall not be utilized for the purchase or acquisition of construction aggregates, including, but not limited to, crushed stone, sand, and gravel. (2002-107, s. 1.)

**Local Modification.** — City of Charlotte: 2007-158, s. 1.

**Editor's Note.** — Session Laws 2002-107, s. 3, provides: "Notwithstanding any other provision of law to the contrary, the Secretary may conduct a pilot program for reverse auctions. The reverse auctions shall be utilized only for the purchase or exchange of those supplies, equipment, and materials as provided in G.S. 115C-522, for use by the public school systems. The Secretary shall report the results of the pilot program to the Joint Select Committee on Information Technology, upon the convening of the 2003 General Assembly."

Session Laws 2003-147, s. 11, provides: "Nothing in this act shall be construed to limit the authority of the Department of Administration to develop, implement, and monitor a pilot program for reverse auctions for public school systems as provided in Section 3 of Chapter 107 of the 2002 Session Laws."

## § 143-130. Allowance for convict labor must be specified.

In cases where the board or governing body of a State agency or of any political subdivision of the State may furnish convict or other labor to the contractor, manufacturer, or others entering into contracts for the performance of construction work, installation of apparatus, supplies, materials or equipment, the specifications covering such projects shall carry full information as to what wages shall be paid for such labor or the amount of allowance for same. (1933, c. 400, s. 2; 1967, c. 860.)

## § 143-131. When counties, cities, towns and other subdivisions may let contracts on informal bids.

(a) All contracts for construction or repair work or for the purchase of apparatus, supplies, materials, or equipment, involving the expenditure of public money in the amount of thirty thousand dollars ($30,000) or more, but less than the limits prescribed in G.S. 143-129, made by any officer, department, board, local school administrative unit, or commission of any county, city, town, or other subdivision of this State shall be made after informal bids have been secured. All such contracts shall be awarded to the lowest responsible, responsive bidder, taking into consideration quality, performance, and the time specified in the bids for the performance of the contract. It shall be the duty of any officer, department, board, local school administrative unit, or commission entering into such contract to keep a record of all bids submitted, and such record shall not be subject to public inspection until the contract has been awarded.

(b) All public entities shall solicit minority participation in contracts for the erection, construction, alteration or repair of any building awarded pursuant to this section. The public entity shall maintain a record of contractors solicited and shall document efforts to recruit minority business participation in those contracts. Nothing in this section shall be construed to require formal advertisement of bids. All data, including the type of project, total dollar value of the project, dollar value of minority business participation on each project, and documentation of efforts to recruit minority participation shall be reported to the Department of Administration, Office for Historically Underutilized Business, upon the completion of the project. (1931, c. 338, s. 2; 1957, c. 862, s. 5; 1959, c. 406; 1963, c. 172; 1967, c. 860; 1971, c. 593; 1981, c. 719, s. 1; 1987 (Reg. Sess., 1988), c. 1108, s. 6; 1997-174, s. 5; 2001-496, s. 5.1; 2005-227, s. 2.)

**Local Modification.** — (As to school building contracts) Cabarrus: 2009-430, s. 2 (expires June 30, 2014); Cherokee: 2007-48, s. 1; Currituck: 1993 (Reg. Sess., 1994), c. 668, s. 1; Dare: 1999-40, s. 1; 2003-47, s. 1 (as to design and construction of administration building and renovation of Old Dare Court House, and expires July 1, 2008); Forsyth: 1993, c. 128, s. 1; Franklin: 1993 (Reg. Sess., 1994), c. 757, s. 1; (As to water treatment and wastewater treatment plant expansion projects) Harnett: 2007-214, s. 1 (expires December 31, 2010); Johnston: 1995 (Reg. Sess., 1996), c. 611, s. 1; 2008-40 (as to contracts for renovations to the county courthouse); (As to contracts with Water and Sewer Authority) New Hanover: 2007-135, s. 1 (expires December 31, 2009); city of Charlotte: 2000-26, s. 1; 2002-91, s. 1, as amended by 2007-255, s. 1, and as amended by 2008-101; (as to water and wastewater treatment plants) 2007-312, s. 1; (as to speedway area infrastructure projects) city of Concord: 2008-7, s. 1 (expires December 31, 2013); city of Durham: 2001-350, s. 3; city of Greensboro: 1951, c. 707, s. 5; 1987, c. 53, s. 3; 1995, c. 218, s. 2; city of Raleigh: 2007-333, s. 1, as amended by Session Laws 2009-149, s. 1; (As to contracts with Water and Sewer Authority) city of Wilmington: 2007-135, s. 1 (expires December 31, 2009); city of Winston-Salem: 1985, c. 632; 1987, c. 575; town of Clayton: town of Louisburg: 2007-216, s. 3, as amended by 2009-370, s. 1 (expires January 1, 2011); town of Manteo: 1995, c. 125, s. 1; town of Southern Shores: 1995, c. 70, s. 1; town of Sunset Beach: 1993, c. 381, s. 3; 1995, c. 124; 1995 (Reg. Sess., 1996), c. 732; 1997-63; town of Yadkinville: 1997-3, s. 1; Alamance-Caswell Area Mental Health, Developmental Disabilities and Substance Abuse Authority: 1987, c. 120; Winston-Salem/Forsyth County Board of Education: 1993, c. 128, s. 1.

**Cross References.** — As to legislation regarding construction of juvenile facilities, see the editor's note under G.S. 7B-1500.

**Editor's Note.** — As to the exemption of the Office of State Budget and Management from the requirements of G.S. 143-135.26(1), 143-128, 143-129, 143-131, 143-132, 143-134, 143-135.26, 143-64.10 through 143-64.13, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(b), and 133-1.1(g) and rules implementing those statutes for the purpose of construction of prison facilities, see Session Laws 1989, c. 754, s. 28(a).

As to exemption of the Office of State Budget and Management from the requirements of this section in the administration and implementation of the Prison Facilities Legislative Bond

Act of 1990, see Session Laws 1989 (Reg. Sess., 1990), c. 933, s. 6(4).

As to the exemption of the Office of State Budget and Management from the requirements of this section in providing prison facilities under the provisions of the State Prison and Youth Services Facilities Bond Act, see Session Laws 1989 (Reg. Sess., 1990), c. 935, s. 6(a)(4).

As to exemption of the Office of Management and Budget from the requirements of this section with respect to facilities authorized for the Department of Correction, see Session Laws 1991, c. 689, s. 239(f), as amended by Session Laws 1991 (Reg. Sess., 1992), c. 1044, s. 41(b), quoted under G.S. 143-64.10.

Session Laws 1993, c. 550, s. 6, effective July 1, 1993, provides that if the Secretary of Administration, after consultation with the Secretary of Correction, finds that the delivery of state prison and youth services facilities authorized to be constructed under that act must be expedited for good cause, the Office of State Construction of the Department of Administration may use alternative delivery systems and shall be exempt from several statutes, including this section, and rules implementing those statutes to the extent necessary to expedite delivery. Section 6 also sets out the provisions governing the exercise of the exemptions allowable and other relevant provisions.

As to the exemption of the Office of State Construction of the Department of Administration from the requirements of this section to the extent necessary to expedite delivery of certain prison facilities, see Session Laws 1994, Extra Session, c. 24, s. 67.

Session Laws 1995, c. 507, s. 27.10, provides that if the construction of prison facilities in Avery and Mitchell Counties must be expedited for good cause, as determined by the Secretary of Administration and Secretary of Correction, the Office of State Construction of the Department of Administration shall be exempt from the following statutes and rules to the extent necessary to expedite delivery: G.S. 143-135.26, 143-128, 143-129, 143-131, 143-132, 143-134, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(g), and 143-408.1 through 143-408.7.

Session Laws 1996, Second Extra Session, c. 18, s. 23.4(a), provides: "The Department of Justice, in consultation with the Office of State Construction of the Department of Administration, shall contract for and supervise all aspects of administration, technical assistance, design, construction, or demolition of facilities in order to implement the repairs and renovations of the Western Justice Academy under the provisions of this section without being subject to the following statutes and rules implementing those statutes: G.S. 143-135.26, 143-131, 143-132, 113A-1 through 113A-10, 113A-50 through 113A-66, and 133-1.1(g). The Department of Justice shall let contracts for all repairs and renovations of the Academy as soon as possible, but not later than December 1, 1996.

"The Department of Justice shall have a verifiable ten percent (10%) goal for participation by minority and women-owned businesses. All contracts for the design, construction, or demolition of facilities shall include a penalty for failure to complete the work by a specified date."

As to exemption of the Office of State Construction of the Department of Administration from this section and rules implementing this section, to the extent necessary to expedite delivery of juvenile facilities, see Session Laws 1998-202, s. 35(a), quoted under G.S. 143-128.

Session Laws 2005-227, s. 5, provides: "This act raises the threshold amount from five thousand dollars ($5,000) to thirty thousand dollars ($30,000) in G.S. 143-131 and G.S. 160A-266. If any local act provides a threshold amount for the subjects addressed in these statutes that is less than the amount provided in this act, this act prevails to the extent of that conflict."

## CASE NOTES

**Purchases over $5000.** — Petitioner purchased equipment in an amount over $5,000, and thus was required to comply with the bidding provisions of this statute. Fuqua v. Rockingham County Bd. of Social Servs., 125 N.C. App. 66, 479 S.E.2d 273 (1996).

## OPINIONS OF ATTORNEY GENERAL

**Contracts Under Federal Law.** — If an airport authority, consistent with authority granted by G.S. 63-54(c), pertaining to federal aid for airports and related facilities, chooses to let contracts under federal law, the mandatory reporting requirements of subsection (b) of this section would not apply. See opinion of Attorney General to William O. Cooke, Cooke & Cooke, L.L.P., 2002 N.C.A.G. 32 (11/18/02).

## § 143-132. Minimum number of bids for public contracts.

(a) No contract to which G.S. 143-129 applies for construction or repairs shall be awarded by any board or governing body of the State, or any subdivision thereof, unless at least three competitive bids have been received from reputable and qualified contractors regularly engaged in their respective lines of endeavor; however, this section shall not apply to contracts which are negotiated as provided for in G.S. 143-129. Provided that if after advertisement for bids as required by G.S. 143-129, not as many as three competitive bids have been received from reputable and qualified contractors regularly engaged in their respective lines of endeavor, said board or governing body of the State agency or of a county, city, town or other subdivision of the State shall again advertise for bids; and if as a result of such second advertisement, not as many as three competitive bids from reputable and qualified contractors are received, such board or governing body may then let the contract to the lowest responsible bidder submitting a bid for such project, even though only one bid is received.

(b) For purposes of contracts bid in the alternative between the separate-prime and single-prime contracts, pursuant to G.S. 143-128(d1) each single-prime bid shall constitute a competitive bid in each of the four subdivisions or branches of work listed in G.S. 143-128(a), and each full set of separate-prime bids shall constitute a competitive single-prime bid in meeting the requirements of subsection (a) of this section. If there are at least three single-prime bids but there is not at least one full set of separate-prime bids, no separate-prime bids shall be opened.

(c) The State Building Commission shall develop guidelines no later than January 1, 1991, governing the opening of bids pursuant to this Article. These guidelines shall be distributed to all public bodies subject to this Article. The guidelines shall not be subject to the provisions of Chapter 150B of the General Statutes. (1931, c. 291, s. 3; 1951, c. 1104, s. 3; 1959, c. 392, s. 2; 1963, c. 289; 1967, c. 860; 1977, c. 644; 1979, c. 182, s. 2; 1989, c. 480, s. 2; 1989 (Reg. Sess., 1990), c. 1051, s. 4; 1991 (Reg. Sess., 1992), c. 985, s. 1; 1995, c. 358, s. 4; c. 367, ss. 1, 7; 2001-496, s. 9.)

**Local Modification.** — Alamance, and municipalities and local school administrative units within that county: 1999-93, s. 1; Beaufort, and municipalities and local school administrative units within that county: 1999-93, s. 1; Bertie: 1953, c. 1257; (As to school building contracts) Cabarrus: 2009-430, s. 2 (expires June 30, 2014); Camden, and municipalities and local school administrative units within that county: 1999-93, s. 1; Cherokee: 2007-48, s. 1; Clay: 2006-94, s. 1; Currituck: 1993 (Reg. Sess., 1994), c. 668, s. 1; Currituck, and municipalities and local school administrative units within that county: 1999-93, s. 1; Dare: 1999-40, s. 1; 2003-47, s. 1 (as to design and construction of administration building and renovation of Old Dare Court House, and expires July 1, 2008); Forsyth: 1993, c. 128, s. 1; Franklin: 1993 (Reg. Sess., 1994), c. 757, s. 1; (As to water treatment and wastewater treatment plant expansion projects) Harnett: 2007-214, s. 1 (expires December 31, 2010); Iredell: (as to animal shelter project) 2008-67, s. 1 (expires July 1, 2010); Johnston: 2008-40 (as to contracts for renovations to the county courthouse); (As to contracts with Water and Sewer Authority) New Hanover: 2007-135, s. 1 (expires December 31, 2009); Northampton: 1953, c. 1257; Pasquotank and Perquimans, and municipalities and local school administrative units within those counties: 1999-93, s. 1; Stokes: 2006-50, s. 1; Surry: 1993 (Reg.Sess., 1994), c. 705. s. 1; Wilson: 1991, c. 200; city of Charlotte (as to water and wastewater treatment plants) 2007-312, s. 1; (as to speedway area infrastructure projects) city of Concord: 2008-7, s. 1 (expires December 31, 2013); city of Durham: 2001-350, s. 3; city of Elizabeth City: 2001-227, s. 1; city of Raleigh: 2007-333, s. 1, as amended by Session Laws 2009-149, s. 1; city of Roanoke Rapids: 2001-245, s. 3; 2005-174, s. 2; (As to contracts with Water and Sewer Authority) city of Wilmington: 2007-135, s. 1 (expires December 31, 2009); town of Blowing Rock: 2006-171, s. 10 (public parking facility); town of Clayton: 1995, c. 125, s. 1; town of Louisburg: 2007-216, s. 3, as amended by 2009-370, s. 1 (expires January 1, 2011); town of Manteo: 1985 (Reg. Sess., 1986), c. 808; town of Southern Shores: 1995, c. 70, s. 1; town of Yadkinville: 1997-3, s.

1; Alamance-Caswell Area Mental Health, Development Disabilities and Substance Abuse Authority: 1987, c. 120; Charlotte/Mecklenburg Board of Education: 1999-207, ss. 3, 4; 2001-496, s. 10(c); Union County Public Schools Board of Education: 2007-90, ss. 2 and 3 (expires July 1, 2011); Winston-Salem/Forsyth County Board of Education: 1993, c. 128, s. 1; 2003-269, s. 1.

**Cross References.** — As to legislation regarding construction of juvenile facilities, see the editor's note under G.S. 7B-1500.

**Editor's Note.** — As to the design for construction of dormitories and the exemption of the Office of State Budget and Management from the requirements of G.S. 143-135.26(1), 143-128, 143-129, 143-132, 143-134, 143-131, 143-135.26, 143-64.10 through 143-64.13, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(b), and 133-1.1(g) and rules implementing those statutes for contracting and supervising the design, construction, or demolition of prison facilities, see Session laws 1987 (Reg. Sess., 1988), c. 1086, s. 123(b).

As to the exemption of the Office of State Budget and Management from the requirements of G.S. 143-135.26(1), 143-128, 143-129, 143-131, 143-132, 143-134, 143-135.26, 143-64.10 through 143-64.13, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(b), and 133-1.1(g) and rules implementing those statutes for the purpose of construction of prison facilities, see Session Laws 1989, c. 754, s. 28(a).

As to exemption of the Office of State Budget and Management from the requirements of this section in the administration and implementation of the Prison Facilities Legislative Bond Act of 1990, see Session Laws 1989 (Reg. Sess., 1990), c. 933, s. 6(4).

As to the exemption of the Office of State Budget and Management from the requirements of this section in providing prison facilities under the provisions of the State Prison and Youth Services Facilities Bond Act, see Session Laws 1989 (Reg. Sess., 1990), c. 935, s. 6(a)(4).

As to exemption of the Office of Management and Budget from the requirements of this section with respect to facilities authorized for the Department of Correction, see Session Laws 1991, c. 689, s. 239(f), as amended by Session Laws 1991 (Reg. Sess., 1992), c. 1044, s. 41(b), quoted under G.S. 143-64.10.

Session Laws 1993, c. 550, s. 6, effective July 1, 1993, provides that if the Secretary of Administration, after consultation with the Secretary of Correction, finds that the delivery of state prison and youth services facilities authorized to be constructed under that act must be expedited for good cause, the Office of State Construction of the Department of Administration may use alternative delivery systems and shall be exempt from several statutes, including this section, and rules implementing those statutes to the extent necessary to expedite delivery. Section 6 also sets out the provisions governing the exercise of the exemptions allowable and other relevant provisions.

As to the exemption of the Office of State Construction of the Department of Administration from the requirements of this section to the extent necessary to expedite delivery of certain prison facilities, see Session Laws 1994, Extra Session, c. 24, s. 67.

Session Laws 1995, c. 507, s. 27.10, provides that if the construction of prison facilities in Avery and Mitchell Counties must be expedited for good cause, as determined by the Secretary of Administration and Secretary of Correction, the Office of State Construction of the Department of Administration shall be exempt from the following statutes and rules to the extent necessary to expedite delivery: G.S. 143-135.26, 143-128, 143-129, 143-131, 143-132, 143-134, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(g), and 143-408.1 through 143-408.7.

Session Laws 1996, Second Extra Session, c. 18, s. 23.4, provides: "(a) The Department of Justice, in consultation with the Office of State Construction of the Department of Administration, shall contract for and supervise all aspects of administration, technical assistance, design, construction, or demolition of facilities in order to implement the repairs and renovations of the Western Justice Academy under the provisions of this section without being subject to the following statutes and rules implementing those statutes: G.S. 143-135.26, 143-131, 143-132, 113A-1 through 113A-10, 113A-50 through 113A-66, and 133-1.1(g). The Department of Justice shall let contracts for all repairs and renovations of the Academy as soon as possible, but not later than December 1, 1996.

"The Department of Justice shall have a verifiable ten percent (10%) goal for participation by minority and women-owned businesses. All contracts for the design, construction, or demolition of facilities shall include a penalty for failure to complete the work by a specified date."

As to exemption of the Office of State Construction of the Department of Administration from this section and rules implementing this section, to the extent necessary to expedite delivery of juvenile facilities, see Session Laws 1998-202, s. 35(a), quoted under G.S. 143-128.

Session Laws 2009-451, s. 9.14(b), provides: "With respect to the demonstration wind turbines and necessary support facilities authorized by subsection (a) of this section, the facilities authorized under this act shall be constructed in accordance with the provisions of general law applicable to the construction of State facilities, except that the State Property

Office shall expedite and grant all easements and use agreements required for construction of the facilities without payment of any fee, royalty, or other cost. Notwithstanding any other provision of law, construction of the facilities authorized by this section shall be exempt from the following statutes and rules implementing those statutes: G.S. 143-48 through 143-64, 143-128, 143-129, 143-132, 113A-1 through 113A-10, 113A-50 through 113A-66, and 113A-116 through 113A-128. If Senate Bill 1068, 2009 Regular Session, becomes law, the provisions of Part 12 of Article 21 of Chapter 143 of the General Statutes as enacted by that act shall not apply to the facilities authorized by this section. With respect to any other environmental permits required for construction of the facilities, the Department of Environment and Natural Resources is directed to expedite permitting of the project to the extent allowed by law and shall waive any application fees that would be otherwise applicable to applications for permits required for the facilities and, where possible under applicable law, issue all permits within 40 days of receipt of a complete application." Senate Bill 1068, 2009 Regular Session, did not become law.

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

### CASE NOTES

**Purpose.** — The purpose of the public contract bidding laws is to prevent favoritism, corruption, fraud and imposition in the awarding of public contracts by giving notice to prospective bidders and thus assuring competition which in turn guarantees fair play and reasonable prices in contracts involving the expenditure of a substantial amount of public money. Ronald G. Hinson Elec., Inc. v. Union County Bd. of Educ., 125 N.C. App. 373, 481 S.E.2d 326 (1997).

### OPINIONS OF ATTORNEY GENERAL

**Receipt of "No Bid" Notes Is Not a Bid Within Requirement of Receipt of Certain Number of Bids.** — See opinion of Attorney General to Mr. Thomas S. Harrington, Eden City Attorney, 40 N.C.A.G. 541 (1970).

## § 143-133. No evasion permitted.

No bill or contract shall be divided for the purpose of evading the provisions of this Article. (1933, c. 400, s. 3; 1967, c. 860.)

**Local Modification.** — Johnston: 1995 (Reg. Sess., 1996), c. 611, s. 1; 2002-93, s. 2 (expires June 30, 2005).

## § 143-134. Applicable to Department of Transportation and Department of Correction; exceptions.

This Article shall apply to the Department of Transportation and the Department of Correction except in the construction of roads, bridges and their approaches; provided however, that whenever the Director of the Budget determines that the repair or construction of a building by the Department of Transportation or by the Department of Correction can be done more economically through use of employees of the Department of Transportation and/or prison inmates than by letting such repair or building construction to contract, the provisions of this Article shall not apply to such repair or construction. (1933, c. 400, s. 3-A; 1955, c. 572; 1957, c. 65, s. 11; 1967, c. 860; c. 996, s. 13; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

**Cross References.** — As to legislation regarding construction of juvenile facilities, see the editor's note under G.S. 7B-1500.

**Editor's Note.** — See the Editor's Note regarding Session Laws 1987 (Reg. Sess., 1988), c. 1086, s. 123(b) and Session Laws 1989, c. 754, s. 28(a) under G.S. 143-132.

As to exemption of the Office of State Budget and Management from the requirements of this section in the administration and implementation of the Prison Facilities Legislative Bond Act of 1990, see Session Laws 1989 (Reg. Sess., 1990), c. 933, s. 6(4).

As to the exemption of the Office of State Budget and Management from the requirements of this section in providing prison facilities under the provisions of the State Prison and Youth Services Facilities Bond Act, see Session Laws 1989 (Reg. Sess., 1990), c. 935, s. 6(a)(4).

As to exemption of the Office of Management and Budget from the requirements of this section with respect to facilities authorized for the Department of Correction, see Session Laws 1991, c. 689, s. 239(f), as amended by Session Laws 1991 (Reg. Sess., 1992), c. 1044, s. 41(b), quoted under G.S. 143-64.10.

Session Laws 1993, c. 550, s. 6, effective July 1, 1993, provides that if the Secretary of Administration, after consultation with the Secretary of Correction, finds that the delivery of state prison and youth services facilities authorized to be constructed under that act must be expedited for good cause, the Office of State Construction of the Department of Administration may use alternative delivery systems and shall be exempt from several statutes, including this section, and rules implementing those statutes to the extent necessary to expedite delivery. Section 6 also sets out the provisions governing the exercise of the exemptions allowable and other relevant provisions.

As to the exemption of the Office of State Construction of the Department of Administration from the requirements of this section to the extent necessary to expedite delivery of certain prison facilities, see Session Laws 1994, Extra Session, c. 24, s. 67.

Session Laws 1995, c. 507, s. 27.10, provides that if the construction of prison facilities in Avery and Mitchell Counties must be expedited for good cause, as determined by the Secretary of Administration and Secretary of Correction, the Office of State Construction of the Department of Administration shall be exempt from the following statutes and rules to the extent necessary to expedite delivery: G.S. 143-135.26, 143-128, 143-129, 143-131, 143-132, 143-134, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(g), and 143-408.1 through 143-408.7.

As to exemption of the Office of State Construction of the Department of Administration from this section and rules implementing this section, to the extent necessary to expedite delivery of juvenile facilities, see Session Laws 1998-202, s. 35(a), quoted under G.S. 143-128.

## § 143-134.1. Interest on final payments due to prime contractors; payments to subcontractors.

(a) On all public construction contracts which are let by a board or governing body of the State government or any political subdivision thereof, except contracts let by the Department of Transportation pursuant to G.S. 136-28.1, the balance due prime contractors shall be paid in full within 45 days after respective prime contracts of the project have been accepted by the owner, certified by the architect, engineer or designer to be completed in accordance with terms of the plans and specifications, or occupied by the owner and used for the purpose for which the project was constructed, whichever occurs first. However, when the architect or consulting engineer in charge of the project determines that delay in completion of the project in accordance with terms of the plans and specifications is the fault of the contractor, the project may be occupied and used for the purposes for which it was constructed without payment of any interest on amounts withheld past the 45 day limit. No payment shall be delayed because of the failure of another prime contractor on the project to complete his contract. Should final payment to any prime contractor beyond the date the contracts have been certified to be completed by the designer or architect, accepted by the owner, or occupied by the owner and used for the purposes for which the project was constructed, be delayed by more than 45 days, the prime contractor shall be paid interest, beginning on the 46th day, at the rate of one percent (1%) per month or fraction thereof unless a lower rate is agreed upon on the unpaid balance as may be due. In addition to the above final payment provisions, periodic payments due a prime contractor during construction shall be paid in accordance with the provisions of this section and the payment provisions of the contract documents that do not conflict with this section, or the prime contractor shall be paid interest on any unpaid amount at the rate stipulated above for delayed final payments. The interest shall begin on the date the payment is due and continue until the date on which payment is made. The due date may be established by the terms of the contract. Funds for payment of the interest on state-owned projects shall be obtained from the current budget of the owning department, institution, or agency. Where a conditional acceptance of a contract exists, and where the owner is retaining a reasonable sum pending correction of the conditions, interest on the reasonable sum shall not apply.

(b) Within seven days of receipt by the prime contractor of each periodic or final payment, the prime contractor shall pay the subcontractor based on work completed or service provided under the subcontract. If any periodic or final payment to the subcontractor is delayed by more than seven days after receipt of periodic or final payment by the prime contractor, the prime contractor shall pay the subcontractor interest, beginning on the eighth day, at the rate of one percent (1%) per month or fraction thereof on the unpaid balance as may be due.

(b1) No retainage on periodic or final payments made by the owner or prime contractor shall be allowed on public construction contracts in which the total project costs are less than one hundred thousand dollars ($100,000). Retainage on periodic or final payments on public construction contracts in which the total project costs are equal to or greater than one hundred thousand dollars ($100,000) is allowed as follows:

(1) The owner shall not retain more than five percent (5%) of any periodic payment due a prime contractor.

(2) When the project is fifty percent (50%) complete, the owner, with written consent of the surety, shall not retain any further retainage from periodic payments due the contractor if the contractor continues to perform satisfactorily and any nonconforming work identified in writing prior to that time by the architect, engineer, or owner has been corrected by the contractor and accepted by the architect, engineer, or owner. If the owner determines the contractor's performance is unsatisfactory, the owner may reinstate retainage for each subsequent periodic payment application as authorized in this subsection up to the maximum amount of five percent (5%). The project shall be deemed fifty percent (50%) complete when the contractor's gross project invoices, excluding the value of materials stored off-site, equal or exceed fifty percent (50%) of the value of the contract, except the value of materials stored on-site shall not exceed twenty percent (20%) of the contractor's gross project invoices for the purpose of determining whether the project is fifty percent (50%) complete.

(3) A subcontract on a contract governed by this section may include a provision for the retainage on periodic payments made by the prime contractor to the subcontractor. However, the percentage of the payment retained: (i) shall be paid to the subcontractor under the same terms and conditions as provided in subdivision (2) of this subsection and (ii) subject to subsection (b3) of this section, shall not exceed the percentage of retainage on payments made by the owner to the prime contractor. Subject to subsection (b3) of this section, any percentage of retainage on payments made by the prime contractor to the subcontractor that exceeds the percentage of retainage on payments made by the owner to the prime contractor shall be subject to interest to be paid by the prime contractor to the subcontractor at the rate of one percent (1%) per month or fraction thereof.

(4) Within 60 days after the submission of a pay request and one of the following occurs, as specified in the contract documents, the owner with written consent of the surety shall release to the contractor all retainage on payments held by the owner: (i) the owner receives a certificate of substantial completion from the architect, engineer, or designer in charge of the project; or (ii) the owner receives beneficial occupancy or use of the project. However, the owner may retain sufficient funds to secure completion of the project or corrections on any work. If the owner retains funds, the amount retained shall not exceed two and one-half times the estimated value of the work to be completed or corrected. Any reduction in the amount of the retainage on payments shall be with the consent of the contractor's surety.

(5) The existence of any third-party claims against the contractor or any additive change orders to the construction contract shall not be a basis for delaying the release of any retainage on payments.

(b2) Full payment, less authorized deductions, shall also be made for those trades that have reached one hundred percent (100%) completion of their contract by or before the project is fifty percent (50%) complete if the contractor has performed satisfactorily. However, payment to the early finishing trades is contingent upon the owner's receipt of an approval or certification from the architect of record or applicable engineer that the work performed by the subcontractor is acceptable and in accordance with the contract documents. At that time, the owner shall reduce the retainage for such trades to five-tenths percent (0.5%) of the contract. Payments under this subsection shall be made no later than 60 days following receipt of the subcontractor's request or immediately upon receipt of the surety's consent, whichever occurs later. Early finishing trades under this subsection shall include structural steel, piling, caisson, and demolition. The early finishing trades for which line-item release of retained funds is required shall not be construed to prevent an owner or an owner's representative from identifying any other trades not listed in this subsection that are also allowed line-item release of retained funds. Should the owner or owner's representative identify any other trades to be afforded line-item release of retainage, the trade shall be listed in the original bid documents. Each bid document shall list the inspections required by the owner before accepting the work, and any financial information required by the owner to release payment to the trades, except the failure of the bid documents to contain this information shall not obligate the owner to release the retainage if it has not received the required certification from the architect of record or applicable engineer.

(b3) Notwithstanding subdivisions (2) and (3) of subsection (b1) of this section, and subsection (b2) of this section, following fifty percent (50%) completion of the project, the owner shall be authorized to withhold additional retainage from a subsequent periodic payment, not to exceed five percent (5%) as set forth in subdivision (1) of subsection (b1) of this section, in order to allow the owner to retain two and one-half percent (2.5%) total retainage through the completion of the project. In the event that the owner elects to withhold additional retainage on any periodic payment subsequent to release of retainage pursuant to subsection (b2) of this section, the general contractor may also withhold from the subcontractors remaining on the project sufficient retainage to offset the additional retainage held by the owner, notwithstanding the actual percentage of retainage withheld by the owner of the project as a whole.

(b4) Neither the owner's nor contractor's release of retainage on payments as part of a payment in full on a line-item of work under subsection (b2) of this section shall affect any applicable warranties on work done by the contractor or subcontractor, and the warranties shall not begin to run any earlier than either the owner's receipt of a certificate of substantial completion from the architect, engineer, or designer in charge of the project or the owner receives beneficial occupancy.

(b5) The State or any political subdivision of the State may allow contractors to bid on bonded projects with and without retainage on payments.

(b6) Nothing in subsections (b1), (b2), (b3), and (b4) of this section shall operate to prevent any agency or any political subdivision of the State from complying with the requirements of a federal contract or grant when the requirements of the federal contract or grant conflict with subsections (b1), (b2), (b3), or (b4) of this section. Each bid document must specify when federal preemption of this section shall apply.

(c) Repealed by Session Laws 2007-365, s. 1, effective January 1, 2008.

(d) Nothing in this section shall prevent the prime contractor at the time of application and certification to the owner from withholding application and certification to the owner for payment to the subcontractor for unsatisfactory job progress; defective construction not remedied; disputed work; third party claims filed or reasonable evidence that claim will be filed; failure of subcontractor to make timely payments for labor, equipment, and materials; damage to prime contractor or another subcontractor; reasonable evidence that subcontract cannot be completed for the unpaid balance of the subcontract sum; or a reasonable amount for retainage not to exceed the initial percentage retained by the owner.

(e) Nothing in this section shall prevent the owner from withholding payment to the contractor in addition to the amounts authorized by this section for unsatisfactory job progress, defective construction not remedied, disputed work, or third-party claims filed against the owner or reasonable evidence that a third-party claim will be filed. (1959, c. 1328; 1967, c. 860; 1979, c. 778; 1983, c. 804, ss. 1, 2; 2007-365, s. 1.)

**Effect of Amendments.** — Session Laws 2007-365, s. 1, effective January 1, 2008, and applicable to contracts entered into on or after that date, in subsection (a), substituted "However, when" for "Provided, however, that whenever" at the beginning of the second sentence, and, in the fifth sentence, inserted "the provisions of this section and" and inserted "that do not conflict with this section"; added subsections (b1) through (b6); deleted subsection (c) relating to the percentage of retainage on payments; added subsection (e); and made minor stylistic changes throughout.

**Legal Periodicals.** — For survey of North Carolina construction law, see 21 Wake Forest L. Rev. 633 (1986).

## CASE NOTES

**Judgment Interest Not Awardable.** — Trial court erred in awarding prejudgment and postjudgment interest because a state university was not obligated under a contract to pay interest on damages suffered by a contractor as a result of the university's breach of contract where the contractor's recovery was based on damages it incurred as a result of the university's breaches of contract and of warranty, and not for any unpaid balance due under the contract. RPR & Assocs. v. Univ. of North Carolina-Chapel Hill, 153 N.C. App. 342, 570 S.E.2d 510, 2002 N.C. App. LEXIS 1191 (2002), cert. dismissed, 357 N.C. 166, 579 S.E.2d 882 (2003), cert. denied, 357 N.C. 166, 579 S.E.2d 882 (2003).

**Applied** in Davidson & Jones, Inc. v. North Carolina Dep't of Admin., 69 N.C. App. 563, 317 S.E.2d 718 (1984).

## § 143-134.2. Actions by contractor on behalf of subcontractor.

(a) A contractor may, on behalf of a subcontractor of any tier under the contractor, file an action against an owner regarding a claim arising out of or relating to labor, materials, or services furnished by the subcontractor to the contractor pursuant to a contract between the subcontractor and the contractor for the same project that is the subject of the contract between the contractor and the owner.

(b) In any action filed by a contractor against an owner under subsection (a) of this section, it shall not be a defense that the costs and damages at issue were incurred by a subcontractor and that subcontractor has not been paid for these costs and damages. The owner shall not be required to pay the contractor for the costs and damages incurred by a subcontractor, unless the subcontractor submits proof to the court that the contractor has paid these costs and damages to the subcontractor. (1997-489, s. 1.)

## § 143-134.3. No damage for delay clause.

No contractual language forbidding or limiting compensable damages for delays caused solely by the owner or its agent may be enforced in any construction contract let by any board or governing body of the State, or of any institution of State government, or of any county, city, town, or other political subdivision thereof. For purposes of this section, the phrase “owner or its agent” does not include prime contractors or their subcontractors. (1997-489, s. 1.)

## § 143-135. Limitation of application of Article.

Except for the provisions of G.S. 143-129 requiring bids for the purchase of apparatus, supplies, materials or equipment, this Article shall not apply to construction or repair work undertaken by the State or by subdivisions of the State of North Carolina (i) when the work is performed by duly elected officers or agents using force account qualified labor on the permanent payroll of the agency concerned and (ii) when either the total cost of the project, including without limitation all direct and indirect costs of labor, services, materials, supplies and equipment, does not exceed one hundred twenty-five thousand dollars ($125,000) or the total cost of labor on the project does not exceed fifty thousand dollars ($50,000); provided that, for The University of North Carolina and its constituent institutions, force account qualified labor may be used (i) when the work is performed by duly elected officers or agents using force account qualified labor on the permanent payroll of the university and (ii) when either the total cost of the project, including, without limitation, all direct and indirect costs of labor, services, materials, supplies, and equipment, does not exceed two hundred thousand dollars ($200,000) or the total cost of labor on the project does not exceed one hundred thousand dollars ($100,000). This force account work shall be subject to the approval of the Director of the Budget in the case of State agencies, of the responsible commission, council, or board in the case of subdivisions of the State. Complete and accurate records of the entire cost of such work, including without limitation, all direct and indirect costs of labor, services, materials, supplies and equipment performed and furnished in the prosecution and completion thereof, shall be maintained by such agency, commission, council or board for the inspection by the general public. Construction or repair work undertaken pursuant to this section shall not be divided for the purposes of evading the provisions of this Article. (1933, c. 552, ss. 1, 2; 1949, c. 1137, s. 2; 1951, c. 1104, s. 6; 1967, c. 860; 1975, c. 292, ss. 1, 2; c. 879, s. 46; 1979, 2nd Sess., c. 1248; 1981, c. 860, s. 13; 1995, c. 274, s. 1; 2007-322, s. 5.)

**Local Modification.** — Ashe: 1959, c. 627; Avery: 1995, c. 175, s. 1; Beaufort: 1955, c. 1136; Brunswick: 1961, c. 503; Buncombe: 2009-76, s. 1 (As to certain streets in area of Buncombe County jail annex; expires July 1, 2010); Catawba: 2004-35 (expires December 30, 2006); 2007-1 (as to construction of Catawba County Blackburn Landfill, effective June 1 2007, expires December 1, 2008); Davie: 2005-32, ss. 1, 2 (as to expansion and improvement of Emergency Medical Services Station Number One); Duplin: 1983 (Reg. Sess., 1984), c. 959; 1985, c. 124; Franklin: 1957, c. 288; Halifax: 1957, c. 803; Macon: 1983, c. 355; McDowell: 1959, c. 553; Mecklenburg: 2009-250 (as to non-utility construction or repair work for park and greenway projects, effective July 2, 2009, expires June 30, 2012); New Hanover Northeast Interceptor Sewer Force Main projects: 2007-135, s. 2 (expires December 31, 2009); Pender: 1955, c. 187; Union: 1985 (Reg. Sess., 1986), c. 914, s. 1; Watauga: 1993 (Reg. Sess., 1994), c. 667, s. 1; (as to Anne Marie Drive Park) 2005-197, s. 7; city of Asheboro: (as to Zoo City Park Project) 2008-55, s. 2(a) (expires December 31, 2010); city of Asheville: 2009-76, s. 1 (As to certain streets in area of Buncombe County jail annex; expires July 1, 2010); city of Belmont: 1967, c. 419; city of Gastonia: 1967, c. 392; city of Goldsboro: 1991, c. 555, s. 10; city of Lumberton: 1983 (Reg. Sess., 1984), c. 950; city of Marion: 1959, c. 553; city of Monroe: 1985, c. 128; 2000-35, s. 1; city of Wilmington Northeast Interceptor Sewer Force Main projects: 2007-135, s. 2 (expires December 31, 2009); city of Winston-Salem: (as to certain road and greenway projects) 2008-55, s. 1(a) (expires July 1, 2010); town of Boone: (as to Anne Marie Drive Park) 2005-197, s. 7; town of Booneville: 1993 (Reg. Sess., 1994), c. 667, s. 1; town of Chapel Hill: 2000-97, s. 1; town of Dallas: 2009-76, s. 2 (as to police department renovations; expires July 1, 2011); town of Wake Forest: 2003-32 (as to use of qualified labor on electrical distribution feeder circuits project for which construction on the first phase begins no later than December 31, 2003 and construction on the final phase commences no later than December 31, 2009, and as to use of qualified labor on Electrical Substation project for which construction on the first phase begins no later than December 31, 2006); town of Wilkesboro: 2007-44, s. 1 (as to the construction of a water pump station and the extension of a waterline to serve a Department of Transportation rest center to be built outside the corporate limits, and to the replacement of five sewer interceptor lines that will be installed, expires December 30, 2009); city of Fayetteville Public Works Commission: 2006-48, s. 1 (expires January 1, 2012); Macon County School Administrative Unit: 1983, c. 355.

**Editor's Note.** — Session Laws 2007-322, s. 13, provides: This act is effective when it becomes law [July 30, 2007]. Sections 1 through 4 of this act apply to construction projects for which bids or proposals are solicited on or after that date. Section 5 of this act applies to construction or repair work commenced on or after that date.

**Effect of Amendments.** — Session Laws 2007-322, s. 5, effective July 30, 2007, and applicable to construction or repair work commenced on or after July 30, 2007, added the proviso at the end of the first sentence.

## § 143-135.1. State buildings exempt from county and municipal building requirements; consideration of recommendations by counties and municipalities.

(a) Buildings constructed by the State of North Carolina or by any agency or institution of the State in accordance with plans and specifications approved by the Department of Administration or by The University of North Carolina or one of its affiliated or constituent institutions pursuant to G.S. 116-31.11 shall not be subject to inspection by any county or municipal authorities and shall not be subject to county or municipal building codes and requirements.

(b) Inspection fees fixed by counties and municipalities shall not be applicable to such construction by the State of North Carolina. County and municipal authorities may inspect any plans or specifications upon their request to the Department of Administration or, with respect to projects under G.S. 116-31.11, The University of North Carolina, and any and all recommendations made by them shall be given consideration. Requests by county and municipal authorities to inspect plans and specifications for State projects shall be on the basis of a specific project. Should any agency or institution of the State require the services of county or municipal authorities, notice shall be given for the need of such services, and appropriate fees for such services shall be paid to the county or municipality; provided, however, that the application for such services to be rendered by any county or municipality shall have prior written approval of the Department of Administration, or with respect to projects under G.S. 116-31.11, The University of North Carolina.

(c) Notwithstanding any law to the contrary, including any local act, no county or municipality may impose requirements that exceed the North Carolina State Building Code regarding the design or construction of buildings constructed by the State of North Carolina. (1951, c. 1104, s. 4; 1967, c. 860; 1971, c. 563; 1985, c. 757, s. 170(a); 1997-412, s. 10; 2001-496, s. 8(c); 2005-300, s. 1.)

**Editor's Note.** — Session Laws 1997-412, s. 10, which amended this section, was reenacted by Session Laws 2001-496, s. 8(c). Session Laws 2001-496, s. 14, which provided that the amendments would expire December 31, 2006, was subsequently amended by Session Laws 2005-300, s. 1, to delete the expiration clause.

CASE NOTES

**Applied** in Holcomb v. United States Fire Ins. Co., 52 N.C. App. 474, 279 S.E.2d 50 (1981).

## § 143-135.2. Contracts for restoration of historic buildings with private donations.

This Article shall not apply to building contracts let by a State agency for restoration of a historic building or structure where the funds for the restoration of such building or structure are provided entirely by funds donated from private sources. (1955, c. 27; 1967, c. 860.)

**Local Modification.** — Town of Farmville: 1987, c. 31.

## § 143-135.3. Adjustment and resolution of State board construction contract claim.

(a) The word "board" as used in this section shall mean the State of North Carolina or any board, bureau, commission, institution, or other agency of the State, as distinguished from a board or governing body of a subdivision of the State. "A contract for construction or repair work," as used in this section, is defined as any contract for the construction of buildings and appurtenances thereto, including, but not by way of limitation, utilities, plumbing, heating, electrical, air conditioning, elevator, excavation, grading, paving, roofing, masonry work, tile work and painting, and repair work as well as any contract for the construction of airport runways, taxiways and parking aprons, sewer and water mains, power lines, docks, wharves, dams, drainage canals, telephone lines, streets, site preparation, parking areas and other types of construction on which the Department of Administration or The University of North Carolina enters into contracts.

"Contractor" as used in this section includes any person, firm, association or corporation which has contracted with a State board for architectural, engineering or other professional services in connection with construction or repair work as well as those persons who have contracted to perform such construction or repair work.

(b) A contractor who has not completed a contract with a board for construction or repair work and who has not received the amount he claims is due under the contract may submit a verified written claim to the Director of the Office of State Construction of the Department of Administration for the amount the contractor claims is due. The Director may deny, allow, or compromise the claim, in whole or in part. A claim under this subsection is not a contested case under Chapter 150B of the General Statutes.

(c) A contractor who has completed a contract with a board for construction or repair work and who has not received the amount he claims is due under the contract may submit a verified written claim to the Director of the Office of State Construction of the Department of Administration for the amount the contractor claims is due. The claim shall be submitted within 60 days after the contractor receives a final statement of the board's disposition of his claim and shall state the factual basis for the claim.

The Director shall investigate a submitted claim within 90 days of receiving the claim, or within any longer time period upon which the Director and the contractor agree. The contractor may appear before the Director, either in person or through counsel, to present facts and arguments in support of his claim. The Director may allow, deny, or compromise the claim, in whole or in part. The Director shall give the contractor a written statement of the Director's decision on the contractor's claim.

A contractor who is dissatisfied with the Director's decision on a claim submitted under this subsection may commence a contested case on the claim under Chapter 150B of the General Statutes. The contested case shall be commenced within 60 days of receiving the Director's written statement of the decision.

(c1) A contractor who is dissatisfied with the Director's decision on a claim submitted under subsection (c) of this section may commence a contested case on the claim under Chapter 150B of the General Statutes. The contested case shall be commenced within 60 days of receiving the Director's written statement of the decision.

(d) As to any portion of a claim that is denied by the Director, the contractor may, in lieu of the procedures set forth in the preceding subsection of this section, within six months of receipt of the Director's final decision, institute a civil action for the sum he claims to be entitled to under the contract by filing a verified complaint and the issuance of a summons in the Superior Court of Wake County or in the superior court of any county where the work under the contract was performed. The procedure shall be the same as in all civil actions except that all issues shall be tried by the judge, without a jury.

(e) The provisions of this section are part of every contract for construction or repair work made by a board and a contractor. A provision in a contract that conflicts with this section is invalid. (1965, c. 1022; 1967, c. 860; 1969, c. 950, s. 1; 1973, c. 1423; 1975, c. 879, s. 46; 1981, c. 577; 1983, c. 761, s. 190; 1985, c. 746, s. 18; 1987, c. 847, s. 4; 1989, c. 40, s. 1; 1991, c. 103, s. 1; 1997-412, s. 7; 2001-496, s. 8(c); 2005-300, s. 1.)

**Editor's Note.** — Session Laws 1997-412, s. 7, which amended this section, was reenacted by Session Laws 2001-496, s. 8(c). Session Laws 2001-496, s. 14, which provided that the amendments would expire December 31, 2006, was subsequently amended by Session Laws 2005-300, s. 1, to delete the expiration clause.

Session Laws 1997-412, s. 14, provides that the amendments by that act expire July 1, 2001.

**Legal Periodicals.** — For note on abrogation of contractual sovereign immunity, see 12 Wake Forest L. Rev. 1082 (1976).

For 1997 legislative survey, see 20 Campbell L. Rev. 437.

For survey of North Carolina construction law, see 21 Wake Forest L. Rev. 633 (1986).

For article, "North Carolina Construction Law Survey II," see 22 Wake Forest L. Rev. 481 (1987).

## CASE NOTES

**Claims Held Barred.** — Prime contractor had no claim for breach of contract against university on subcontractor's behalf, where subcontractor had no contract with the university; as subcontractor had no contractual relationship with the State, its claim was barred by sovereign immunity, and since subcontractor had no claim, contractor had no claim on subcontractor's behalf. Bolton Corp. v. State, 95 N.C. App. 596, 383 S.E.2d 671 (1989), cert.

denied, 326 N.C. 47, 389 S.E.2d 85 (1990).

Where although language in contract imposed a duty on prime contractors to cooperate with each other in the full performance of their contracts, State's contract with general contractor was not entered into with the intention or purpose of benefitting prime contractors, prime contractor was not a third party beneficiary to the contract and sovereign immunity barred prime contractor's claim for costs due to delay. Bolton Corp. v. State, 95 N.C. App. 596, 383 S.E.2d 671 (1989), cert. denied, 326 N.C. 47, 389 S.E.2d 85 (1990).

Since prime contractor failed to allege or show a breach of the terms of its contract with the State and since the basis of its complaint was that various acts or omissions by the State, including the granting of change orders, delayed general contractor's work, which in turn delayed its work, prime contractor's claims were barred under this section and summary judgment was proper. Bolton Corp. v. State, 95 N.C. App. 596, 383 S.E.2d 671 (1989), cert. denied, 326 N.C. 47, 389 S.E.2d 85 (1990).

**Courts Are Not Powerless to Grant Relief.** — This section does not mean that the courts are powerless to grant relief to an aggrieved contractor for breach of the construction contract in the absence of a specific term of the contract allowing such relief. Davidson & Jones, Inc. v. North Carolina Dep't of Admin., 315 N.C. 144, 337 S.E.2d 463 (1985).

**This section requires simply that the contractor's claim arise out of a breach of the contract** or some provision thereof so as to entitle the contractor to some relief. Davidson & Jones, Inc. v. North Carolina Dep't of Admin., 315 N.C. 144, 337 S.E.2d 463 (1985).

**Failure to Complete Obligation Prohibits Relief.** — Failure by a party to complete its obligation under the terms of its contract prohibits that party from seeking the relief provided under this section. Nat Harrison Assocs. v. North Carolina State Ports Auth., 280 N.C. 251, 185 S.E.2d 793, rehearing denied, 281 N.C. 317, 188 S.E.2d 900 (1972).

**Recovery Limited to Terms of Contract.** — Under the provisions of this section a party is only entitled to recover such settlement as he claims to be entitled to under the terms of his contract. Nat Harrison Assocs. v. North Carolina State Ports Auth., 280 N.C. 251, 185 S.E.2d 793, rehearing denied, 281 N.C. 317, 188 S.E.2d 900 (1972).

**A contractor in a civil action brought pursuant to this section could recover duration-related costs** incurred as the direct result of an unexpected overrun exceeding 400% in the amount of rock to be excavated under a construction contract with the State, but could not recover extra home office expenses. Davidson & Jones, Inc. v. North Carolina Dep't of Admin., 315 N.C. 144, 337 S.E.2d 463 (1985).

**Contract action against the State Ports Authority should have been dismissed** where plaintiff had not completed a material part of its contract and had failed to comply with a contract requirement prior to filing a claim with the Director of the Department of Administration (now Secretary of Administration) and instituting the action in superior court. Nat Harrison Assocs. v. North Carolina State Ports Auth., 280 N.C. 251, 185 S.E.2d 793, rehearing denied, 281 N.C. 317, 188 S.E.2d 900 (1972).

**Summary Judgment in Favor of State Ports Authority Held Proper.** — Summary judgment was properly allowed in favor of the State Ports Authority as to counts in which a plaintiff sought to recover for losses where there was no provision in his contracts for recovery of the claimed damages, since the plaintiff was entitled to recover under this section only under the terms of his contract. Nat Harrison Assocs. v. North Carolina State Ports Auth., 280 N.C. 251, 185 S.E.2d 793, rehearing denied, 281 N.C. 317, 188 S.E.2d 900 (1972).

**Motion to Dismiss Action Properly Denied.** — In an action by a heating and air conditioning contractor to recover extra expenses and costs incurred in performing its contract with defendants, the trial court properly denied defendants' motion to dismiss for lack of subject matter and personal jurisdiction, since the provisions of this section clearly granted plaintiff the right to bring its action against the State. Stahl-Rider, Inc. v. State, 48 N.C. App. 380, 269 S.E.2d 217 (1980).

**The defendants' sovereign immunity was statutorily waived** where the plaintiff complied with the procedures outlined in this section; although it initially started the contested case hearing process, it never fully availed itself of any of those proceedings but, instead, decided to proceed in superior court before any hearing or other action had occurred before the OAH. RPR & Assocs. v. State, 139 N.C. App. 525, 534 S.E.2d 247, 2000 N.C. App. LEXIS 977 (2000), aff'd, 353 N.C. 543, 543 S.E.2d 480 (2001).

**For interpretation and interaction between this section and the rule enunciated in Smith v. State,** 289 N.C. 303, 222 S.E.2d 412 (1976), which abrogates the State's sovereign immunity in contract actions in which no remedy had been provided, see Middlesex Constr. Corp. v. State ex rel. State Art Museum Bldg. Comm'n, 307 N.C. 569, 299 S.E.2d 640 (1983), rehearing denied, 310 N.C. 150, 312 S.E.2d 648 (1984).

**Applied** in Middlesex Constr. Corp. v. State ex rel. State Art Museum Bldg. Comm'n, 312 N.C. 793, 325 S.E.2d 223 (1985).

**Cited** in Wilmington Shipyard, Inc. v. North Carolina State Hwy. Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969); Wood-Hopkins Contracting Co. v. North Carolina State Ports Auth., 284 N.C. 732, 202 S.E.2d 473 (1974); Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976); E.L. Scott Roofing Co. v. State, 82 N.C. App. 216, 346 S.E.2d 515 (1986); APAC-Carolina, Inc. v. Greensboro-High Point Airport Auth., 110 N.C. App. 664, 431 S.E.2d 508 (1993); State ex rel. State Art Museum Bldg. Comm'n v. Travelers Indem. Co., 111 N.C. App. 330, 432 S.E.2d 419 (1993); RPR & Assocs. v. O'Brien/Atkins Assocs., 921 F. Supp. 1457 (M.D.N.C. 1995); Aetna Cas. & Sur. Co. v. Ind-Com Elec. Co., 139 F.3d 419 (4th Cir. 1998); RPR & Assocs. v. Univ. of North Carolina-Chapel Hill, 153 N.C. App. 342, 570 S.E.2d 510, 2002 N.C. App. LEXIS 1191 (2002).

## § 143-135.4. Authority of Department of Administration not repealed.

Nothing contained in this Article shall be construed as contravening or repealing any authorities given by statute to the Department of Administration. (1967, c. 860; 1975, c. 879, s. 46.)

## § 143-135.5. State policy; cooperation in promoting the use of small, minority, physically handicapped and women contractors; purpose.

(a) It is the policy of this State to encourage and promote the use of small, minority, physically handicapped and women contractors in State construction projects. All State agencies, institutions and political subdivisions shall cooperate with the Department of Administration and all other State agencies, institutions and political subdivisions in efforts to encourage and promote the use of small, minority, physically handicapped and women contractors in achieving the purpose of this Article, which is the effective and economical construction of public buildings.

(b) It is the policy of this State not to accept bids or proposals from, nor to engage in business with, any business that, within the last two years, has been finally found by a court or an administrative agency of competent jurisdiction to have unlawfully discriminated on the basis of race, gender, religion, national origin, age, physical disability, or any other unlawful basis in its solicitation, selection, hiring, or treatment of another business. (1983, c. 692, s. 1; 2001-496, s. 5.2.)

## § 143-135.6. Adjustment and resolution of community college board construction contract claim.

(a) A contractor who has not completed a contract with a board of a community college for construction or repair work and who has not received the amount he claims is due under the contract may follow the claims procedure in G.S. 143-135.3(b) that is available to a contractor who has contracted with a State board.

(b) A contractor who has completed a contract with a board of a community college for construction or repair work and who has not received the amount he claims is due under the contract may follow the same claims procedure in G.S. 143-135.3(c) that is available to a contractor who has contracted with a State board.

(c) A contractor who is dissatisfied with the Director's decision on any portion of a claim submitted pursuant to subsection (b) of this section may, within six months of receipt of the Director's final decision, institute a civil action for the sum he claims to be entitled to under the contract in the Superior Court of Wake County or in the superior court of any county where the work under the contract was performed. The procedure shall be the same as in all civil actions except that all issues shall be tried by the judge, without a jury. A contractor may not commence an action under Chapter 150B of the General Statutes.

(d) The provisions of this section are part of every contract for construction or repair work made by a board of a community college and a contractor. A provision in a contract that conflicts with this section is invalid.

(e) For the purposes of this section, the following definitions shall apply, unless the context indicates otherwise:

(1) "Community college" has the same meaning as in G.S. 115D-2(2).
(2) "Contract for construction or repair work" has the same meaning as in G.S. 143-135.3(a).
(3) "Contractor" means any person, firm, association, or corporation which has contracted for architectural, engineering, or other professional services in connection with construction or repair work, as well as those persons who have contracted to perform the construction or repair work.

(f) The provisions of this section are applicable only to community college buildings subject to G.S. 143-341(3). (1989, c. 40, s. 2.)

## § 143-135.7. Safety officers.

Each contract for a State capital improvement project, as defined in Article 8B of this Chapter, shall require the contractor to designate a responsible person as safety officer to inspect the project site for unsafe health and safety hazards, to report these hazards to the contractor for correction, and to provide other safety and health measures on the project site as required by the terms and conditions of the contract. (1991 (Reg. Sess., 1992), c. 893, s. 3.)

## § 143-135.8. Prequalification.

Bidders may be prequalified for any public construction project. (1995, c. 367, s. 8.)

## § 143-135.9. Best Value procurements.

(a) Definitions. — The following definitions apply in this section:

(1) Best Value procurement. — The selection of a contractor based on a determination of which proposal offers the best trade-off between price and performance, where quality is considered an integral performance factor. The award decision is made based on multiple factors, including: total cost of ownership, meaning the cost of acquiring, operating, maintaining, and supporting a product or service over its projected lifetime; the evaluated technical merit of the vendor's proposal; the vendor's past performance; and the evaluated probability of performing the requirements stated in the solicitation on time, with high quality, and in a manner that accomplishes the stated business objectives and maintains industry standards compliance.
(2) Government-Vendor partnership. — A mutually beneficial contractual relationship between State government and a contractor, wherein the two share risk and reward, and value is added to the procurement of needed goods or services.
(3) Information technology. — Electronic data processing and telecommunications goods and services, microelectronics, software, information

processing, office systems, any services related to the foregoing, and consulting or other services for design and/or redesign of business processes.

(4) Solution-Based solicitation. — A solicitation in which the requirements are stated in terms of how the product or service being purchased should accomplish the business objectives, rather than in terms of the technical design of the product or service.

(b) Intent. — The intent of Best Value procurement is to enable contractors to offer and the agency to select the most appropriate solution to meet the business objectives defined in the solicitation and to keep all parties focused on the desired outcome of a procurement.

(c) Information Technology. — The acquisition of information technology by the State of North Carolina shall be conducted using the Best Value procurement method. For purposes of this section, business process reengineering, system design, and technology implementation may be combined into a single solicitation. For acquisitions which the procuring agency and the Division of Purchase and Contracts or the Office of Information Technology Services, as applicable, deem to be highly complex or determine that the optimal solution to the business problem at hand is not known, the use of Solution-Based Solicitation and Government-Vendor Partnership is authorized and encouraged. Any county, city, town, or subdivision of the State may acquire information technology pursuant to this section.

(d) Repealed by Session Laws 2009-320, s. 1, effective July 24, 2009.

(e) North Carolina Zoological Park. — The acquisition of goods and services under a contract entered pursuant to the exemption of G.S. 143-129.8A(a) by the Department of Environment and Natural Resources on behalf of the North Carolina Zoological Park may be conducted using the Best Value procurement method. For acquisitions which the procuring agency deems to be highly complex, the use of Government-Vendor partnership is authorized. (1998-189, s. 1; 1999-434, s. 15; 1999-456, s. 39; 2009-329, s. 1.2.)

**Editor's Note.** — The definitions in subsection (a) were placed in alphabetical order at the direction of the Revisor of Statutes.

**Effect of Amendments.** — Session Laws 2009-329, s. 1.2, effective July 24, 2009, rewrote the section catchline; in subsection (a), rewrote the introductory paragraph; in subdivision (a)(2), substituted "needed goods or services" for "complex technology" at the end; in subsection (b), added the subsection catchline, and deleted the former last sentence, which read: "Business process reengineering, system design, and technology implementation may be combined into a single solicitation."; in subsection (c), added the subsection catchline, and added the second and last sentences; deleted subsection (d), which read: "Any county, city, town or subdivision of the State may acquire information technology pursuant to this section."; and added subsection (e).

## ARTICLE 8A.

## *Board of State Contract Appeals.*

**§§ 143-135.10 through 143-135.24:** Repealed by Session Laws 1987, c. 847, s. 5.

**Cross References.** — As to adjustment and resolution of highway construction contract claims, see now G.S. 136-29, 143-135.3.

**Editor's Note.** — Former sections 143-135.21 through 143-135.24 had been reserved for future codification purposes.

## ARTICLE 8B.

## *State Building Commission.*

### § 143-135.25. State Building Commission — Creation; staff; membership; appointments; terms; vacancies; chairman; compensation.

(a) A State Building Commission is created within the Department of Administration to develop procedures to direct and guide the State's capital facilities development and management program and to perform the duties created under this Article.

(b) The State Construction Office of the Department of Administration shall provide staff to the State Building Commission. The chairman of the Commission shall provide direction to the State Construction Office on its work for the Commission.

The director of the State Construction Office shall be a registered engineer or licensed architect and shall be technically qualified by educational background and professional experience in building design, construction, or facilities management. The administrative head shall be appointed by the Secretary of the Department of Administration.

(c) The Commission shall consist of nine members qualified and appointed as follows:

(1) A licensed architect whose primary practice is or was in the design of buildings, chosen from among not more than three persons nominated by the North Carolina Chapter of the American Institute of Architects, appointed by the Governor.

(2) A registered engineer whose primary practice is or was in the design of engineering systems for buildings, chosen from among not more than three persons nominated by the Consulting Engineers Council and the Professional Engineers of North Carolina, appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121.

(3) A licensed building contractor whose primary business is or was in the construction of buildings, or an employee of a company holding a general contractor's license, chosen from among not more than three persons nominated by the Carolinas AGC (Associated General Contractors), appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121.

(4) A licensed electrical contractor whose primary business is or was in the installation of electrical systems for buildings, chosen from among not more than three persons nominated by the North Carolina Association of Electrical Contractors, and the Carolinas Electrical Contractors' Association, appointed by the Governor.

(5) A public member appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121.

(6) A licensed mechanical contractor whose primary business is or was in the installation of mechanical systems for buildings, chosen from among not more than three persons nominated by the North Carolina Association of Plumbing, Heating, Cooling Contractors, appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121.

(7) An employee of the university system currently involved in the capital facilities development process, chosen from among not more than

three persons nominated by the Board of Governors of The University of North Carolina, appointed by the Governor.

(8) A public member who is knowledgeable in the building construction or building maintenance area, appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121.

(9) A representative of local government, chosen from among not more than two persons nominated by the North Carolina Association of County Commissioners and two persons nominated by the North Carolina League of Municipalities, appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121.

The members shall be appointed for staggered three-year terms: The initial appointments to the Commission shall be made within 15 days of the effective date of this act [April 14, 1987]. The initial terms of members appointed pursuant to subdivisions (1), (2), and (3) shall expire June 30, 1990; the initial terms of members appointed pursuant to (4), (5), and (6) shall expire June 30, 1989; and the initial terms of members appointed pursuant to (7), (8), and (9) shall expire June 30, 1988. Members may serve no more than six consecutive years. In making new appointments or filling vacancies, the Governor shall ensure that minorities and women are represented on the Commission.

Vacancies in appointments made by the Governor shall be filled by the Governor for the remainder of the unexpired terms. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. Persons appointed to fill vacancies shall qualify in the same manner as persons appointed for full terms.

The chairman of the Commission shall be elected by the Commission. The Secretary of State shall serve as chairman until a chairman is elected.

(d) The Commission shall meet at least four times a year on or about January 15, April 15, July 15, and October 15. The Commission shall also meet upon the call of the chairman, or upon call of at least five members. The Secretary of State shall call the first meeting within 30 days of the effective date of this act; the first order of business at the first meeting shall be the election of a chairman by the Commission.

(e) Members of the Commission who are not State officers or employees shall receive per diem of one hundred dollars ($100.00) a day when the Commission meets and shall be reimbursed for travel and subsistence as provided in G.S. 138-5. Members who are State officers or employees shall be reimbursed for travel and subsistence as provided in G.S. 138-6. (1987, c. 71, s. 1; 1989, c. 42; 1991, c. 314, s. 1; 1991 (Reg. Sess., 1992), c. 893, s. 2; 1995, c. 367, s. 9; c. 490, s. 52; 1997-495, s. 85.1.)

**Editor's Note.** — Session Laws 1995, c. 490, which amended this section by adding "Pro Tempore" in subdivisions (c)(2), (c)(5), and (c)(8), in s. 65 provides: "This act applies with respect to terms beginning on or after January 1, 1997, and to vacancies occurring on or after that date regardless of the date the term began."

## § 143-135.26. Powers and duties of the Commission.

The State Building Commission shall have the following powers and duties with regard to the State's capital facilities development and management program:

(1) To adopt rules establishing standard procedures and criteria to assure that the designer selected for each State capital improvement project, the consultant selected for planning and studies of an architectural and engineering nature associated with a capital improvement project

or a future capital improvement project and a construction manager at risk selected for each capital improvement project has the qualifications and experience necessary for that capital improvement project or the proposed planning or study project. The rules shall provide that the State Building Commission, after consulting with the funded agency, is responsible and accountable for the final selection of the designer, consultant or construction manager at risk except when the General Assembly or The University of North Carolina is the funded agency. When the General Assembly is the funded agency, the Legislative Services Commission is responsible and accountable for the final selection of the designer, consultant, or the construction manager at risk and when the University is the funded agency, it shall be subject to the rules adopted hereunder, except it is responsible and accountable for the final selection of the designer, consultant, or construction manager at risk. All designers and consultants shall be selected within 60 days of the date funds are appropriated for a project by the General Assembly or the date of project authorization by the Director of the Budget; provided, however, the State Building Commission may grant an exception to this requirement upon written request of the funded agency if (i) no site was selected for the project before the funds were appropriated or (ii) funds were appropriated for advance planning only; provided, further, the Director of the Budget, after consultation with the State Construction Office, may waive the 60-day requirement for the purpose of minimizing project costs through increased competition and improvements in the market availability of qualified contractors to bid on State capital improvement projects. The Director of the Budget also may, after consultation with the State Construction Office, schedule the availability of design and construction funds for capital improvement projects for the purpose of minimizing project costs through increased competition and improvements in the market availability of qualified contractors to bid on State capital improvement projects.

The State Building Commission shall submit a written report to the Joint Legislative Commission on Governmental Operations on the Commission's selection of a designer for a project within 30 days of selecting the designer.

(2) To adopt rules for coordinating the plan review, approval, and permit process for State capital improvement and community college buildings, as defined in subdivision (4) of this section. The rules shall provide for a specific time frame for plan review and approval and permit issuance by each agency, consistent with applicable laws. The time frames shall be established to provide for expeditious review, approval, and permitting of State capital improvement projects and community college buildings. To further expedite the plan review, approval, and permit process, the State Building Commission shall develop a standard memorandum of understanding to be executed by the funded agency and all reviewing agencies for each State capital improvement project. The memorandum of understanding, at minimum, shall include provisions for establishing:

a. The type and frequency of plan reviews.

b. The submittal dates for each plan review.

c. The estimated plan review time for each review and reviewing agency.

d. A schedule of meeting dates.

(2a) To adopt rules exempting specified types of State capital improvement projects, including community college buildings as defined in subdivision (4) of this section, from plan review.

(3) To adopt rules for establishing a post-occupancy evaluation, annual inspection and preventive maintenance program for all State buildings.

(4) To develop procedures for evaluating the work performed by designers and contractors on State capital improvement projects and those community college buildings, as defined in G.S. 143-336, requiring the estimated expenditure for construction or repair work for which public bidding is required under G.S. 143-129, and for use of the evaluations as a factor affecting designer selections and determining qualification of contractors to bid on State capital improvement projects and community college buildings.

(5) To continuously study and recommend ways to improve the effectiveness and efficiency of the State's capital facilities development and management program.

(6) To request designers selected prior to April 14, 1987, whose plans for the projects have not been approved to report to the Commission on their progress on the projects. The Department of Administration shall provide the Commission with a list of all such projects.

(7) To appoint an advisory board, if the Commission deems it necessary, to assist the Commission in its work. No one other than the Commission may appoint an advisory board to assist or advise it in its work.

(8) To review the State's provisions for ensuring the safety and health of employees involved with State capital improvement projects, and to recommend to the appropriate agencies and to the General Assembly, after consultation with the Commissioner of Labor, changes in the terms and conditions of construction contracts, State regulations, or State laws that will enhance employee safety and health on these projects.

(9) To authorize a State agency, a local governmental unit, or any other entity subject to the provisions of G.S. 143-129 to use a method of contracting not authorized under G.S. 143-128. An authorization under this subdivision for an alternative contracting method shall be granted only under the following conditions:

a. An authorization shall apply only to a single project.

b. The entity seeking authorization must demonstrate to the Commission that the alternative contracting method is necessary because the project cannot be reasonably completed under the methods authorized under G.S. 143-128 or for such other reasons as the Commission, pursuant to its rules and criteria, deems appropriate and in the public's interest.

b1. The entity includes in its bid or proposal requirements that the contractor will file a plan for making a good faith effort to reach the minority participation goal set out in G.S. 143-128.2.

c. The authorization must be approved by a majority of the members of the Commission present and voting.

The Commission shall not waive the requirements of G.S. 143-129 or G.S. 143-132 for public contracts unless otherwise authorized by law.

(10) To adopt rules governing review and final approval of plans that are submitted to the State Construction Office pursuant to G.S. 58-31-40. The rules shall provide for the manner of submission of the plan by the owner, the type of structural work that may be completed by the owner pursuant to G.S. 58-31-40(c), and the expeditious review or

completion of review of the plan in a manner that ensures that the building will meet the fire safety requirements of G.S. 58-31-40(b).

(11) To develop dispute resolution procedures, including mediation, for subcontractors under any of the construction methods authorized under G.S. 143-128(a1) on State capital improvement projects, including building projects of The University of North Carolina, and community college buildings as defined in subdivision (4) of this section, for use by any public entity that has not developed its own dispute resolution process.

(12) To adopt rules governing the use of open-end design agreements for State capital improvement projects and community college buildings as defined in subdivision (4) of this section, where the expenditure of public money does not exceed the amount specified in G.S. 143-64.34(b) or (c).

(13) To submit an annual report of its activities to the Governor and the Joint Legislative Commission on Governmental Operations. (1987, c. 71, s. 1; c. 721, s. 2; c. 830, s. 79(a); 1989, c. 50; 1989 (Reg. Sess., 1990), c. 889; 1991 (Reg. Sess., 1992), c. 893, s. 1; 1993, c. 561, s. 29; 1995, c. 367, s. 10; 1996, 2nd Ex. Sess., c. 18, s. 10.1; 2001-496, s. 11; 2005-370, s. 2; 2007-446, s. 4.)

**Cross References.** — As to legislation regarding construction of juvenile facilities, see the editor's note under G.S. 7B-1500.

**Editor's Note.** — As to the design for construction of dormitories and the exemption of the Office of State Budget and Management from the requirements of G.S. 143-135.26(1), 143-128, 143-129, 143-132, 143-134, 143-131, 143-135.26, 143-64.10 through 143-64.13, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(b), and 133-1.1(g) and rules implementing those statutes for contracting and supervising the design, construction, or demolition of prison facilities, see Session laws 1987 (Reg. Sess., 1988), c. 1086, s. 123(b).

As to the exemption of the Office of State Budget and Management from the requirements of G.S. 143-135.26(1), 143-128, 143-129, 143-131, 143-132, 143-134, 143-135.26, 143-64.10 through 143-64.13, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(b), and 133-1.1(g) and rules implementing those statutes for the purpose of construction of prison facilities, see Session Laws 1989, c. 754, s. 28(a).

As to exemption of the Office of State Budget and Management from the requirements of this section in the administration and implementation of the Prison Facilities Legislative Bond Act of 1990, see Session Laws 1989 (Reg. Sess., 1990), c. 933, s. 6(4).

As to the exemption of the Office of State Budget and Management from the requirements of this section in providing prison facilities under the provisions of the State Prison and Youth Services Facilities Bond Act, see Session Laws 1989 (Reg. Sess., 1990), c. 935, s. 6(a)(4).

As to exemption of the Office of Management and Budget from the requirements of this section with respect to facilities authorized for the Department of Correction, see Session Laws 1991, c. 689, s. 239(f), as amended by 1991 Session Laws (Reg. Sess., 1992), c. 1044, s. 41(b), quoted under G.S. 143-64.10.

Session Laws 1993, c. 550, s. 6, effective July 1, 1993, provides that if the Secretary of Administration, after consultation with the Secretary of Correction, finds that the delivery of state prison and youth services facilities authorized to be constructed under that act must be expedited for good cause, the Office of State Construction of the Department of Administration may use alternative delivery systems and shall be exempt from several statutes, including this section, and rules implementing those statutes to the extent necessary to expedite delivery. Section 6 also sets out the provisions governing the exercise of the exemptions allowable and other relevant provisions.

As to the exemption of the Office of State Construction of the Department of Administration from the requirements of this section to the extent necessary to expedite delivery of certain prison facilities, see Session Laws 1994, Extra Session, c. 24, s. 67.

Session Laws 1995, c. 507, s. 27.10, provides that if the construction of prison facilities in Avery and Mitchell Counties must be expedited for good cause, as determined by the Secretary of Administration and Secretary of Correction, the Office of State Construction of the Department of Administration shall be exempt from the following statutes and rules to the extent necessary to expedite delivery: G.S. 143-135.26, 143-128, 143-129, 143-131, 143-132, 143-134, 113A-1 through 113A-10, 113A-50 through 113A-66, 133-1.1(g), and 143-408.1 through 143-408.7.

Session Laws 1996, Second Extra Session, c. 18, s. 23.4, provides: "(a) The Department of Justice, in consultation with the Office of State Construction of the Department of Administration, shall contract for and supervise all aspects of administration, technical assistance, design, construction, or demolition of facilities in order to implement the repairs and renovations of the Western Justice Academy under the provisions of this section without being subject to the following statutes and rules implementing those statutes: G.S. 143-135.26, 143-131, 143-132, 113A-1 through 113A-10, 113A-50 through 113A-66, and 133-1.1(g). The Department of Justice shall let contracts for all repairs and renovations of the Academy as soon as possible, but not later than December 1, 1996.

"The Department of Justice shall have a verifiable ten percent (10%) goal for participation by minority and women-owned businesses. All contracts for the design, construction, or demolition of facilities shall include a penalty for failure to complete the work by a specified date.

As to exemption of the Office of State Construction of the Department of Administration from this section and rules implementing this section, to the extent necessary to expedite delivery of juvenile facilities, see Session Laws 1998-202, s. 35(a), quoted under G.S. 143-128.

Session Laws 2001-496, s. 14(b), provides: "The State Building Commission shall adopt temporary rules to implement G.S. 143-135.26(10) and G.S. 143-135.26(11) as enacted by Section 11 of this act [s. 11 of Session Laws 2001-496] no later than 60 days following the effective date of Section 11 of this act [s. 11 of Session Laws 2001-496]. The Secretary of Administration shall adopt rules to implement G.S. 143-128.2(f) as enacted by Section 3.1 of this act [s. 3.1 of Session Laws 2001-496] no later than June 30, 2002. A bidder must show compliance with at least five of the 10 efforts, as set forth in G.S. 143-128.2(f) as enacted by Section 3.1 of this act [s. 3.1 of Session Laws 2001-496], until 60 days following the adoption of rules to implement G.S. 143-128.2(f) by the Secretary of Administration as required in this section [s. 14 of Session Laws 2001-491]."

Session Laws 2007-446, provides in its preamble: "Whereas, delays in the completion of State capital improvement projects that occur during designer selection, the construction plan review process, construction, and the construction inspection process can result in millions of dollars in increased construction costs due to inflation; and

"Whereas, the State Building Commission was created within the Department of Administration to direct and guide the State's capital facilities development and management program; and

"Whereas, the State Building Commission has the responsibility for establishing the criteria for and overseeing designer selection for State facilities, adopting rules, coordinating the plan review, approval, and permit process for State capital improvements, and studying and recommending ways to improve the effectiveness and efficiency of the State's capital facilities development and management program; and

"Whereas, greater clarity, coordination, and accountability among the agencies responsible for the examination of plans and specifications for the construction and renovation of State facilities and for the construction insp7ections of those facilities, the owning agencies/institutions as defined in the State Construction Manual, designers, and contractors could reduce these delays and facilitate the timely completion of such projects resulting in significant dollar savings to the State; and

"Whereas, the influx of project reviews occasioned by the 2000 Higher Education Bond Act created serious workload and resource issues for the State Construction Office and the Department of Insurance; and

"Whereas, costly delays in the plan review and inspections process for State construction projects are occurring in part due to the inability of the State to attract qualified architects and engineers to conduct such reviews and inspections, and there are no plans at this time for a State Personnel Office market study of architect and engineering positions; Now, therefore,

"The General Assembly of North Carolina enacts:"

Session Laws 2007-446, s. 1, provides: "The State Building Commission shall examine the State capital improvement process and shall establish or modify, as necessary, the guidelines for the selection of designers and the rules governing the design, plan review, and inspection of State building projects. In carrying out its examination and proposing and modifying its guidelines and rules, the Commission shall consult with all of the State departments involved in the capital improvement process, including (i) the agencies responsible for the examination of plans and specifications for the construction and renovation of State facilities and for the supervision and inspection of all work done and materials used in the construction or renovation of State facilities (review and inspection agencies), (ii) the owning agencies/institutions as defined in the State Construction Manual (owning agencies), (iii) the Board of Governors of The University of North Carolina, and (iv) the State Board of Community

Colleges. In carrying out the provisions of this section, the Commission shall:

"(1) Examine the State Construction Manual for opportunities to increase the accountability of all parties to the State capital improvement process.

"(2) Determine whether the review and inspection agencies have sufficiently formalized and documented their review standards and processes.

"(3) Oversee the proper documentation of review standards and processes where necessary.

"(4) Facilitate the establishment of clear expectations for all parties to the process, including the owning agencies, review and inspection agencies, designers, and contractors. The Commission shall work with owning agencies and review and inspection agencies to develop a standard set of time measurements for the design process and the construction process and shall consider the development of other standard measures of performance for all the parties to the design, review, inspection, and construction process.

"(5) Review the State's standard design contract for opportunities to strengthen the accountability of design firms to the owning agencies. In particular, the Commission shall consider the inclusion of a designer's e-mail address as a requirement of the standard design contract."

Session Laws 2007-446, s. 2, provides: "The State Building Commission shall file an interim report on or before April 30, 2008, and a final report on or before December 31, 2008, with the Joint Legislative Commission on Governmental Operations, the Joint Legislative Oversight Committee on Capital Improvements, the Appropriations Committees of the House of Representatives and Senate, and the Fiscal Research Division of the General Assembly. The report shall cover the activities of the Commission in implementing the provisions of Section 1 of this act and any recommendations to improve the coordination and efficacy of the design, review, inspection, and construction process. The report also shall cover the implementation of the recommendations from the Legislative Study Commission on State Construction Inspections, including:

"(1) Efforts to include owning agencies on all correspondence between review and inspection agencies, designers, and contractors.

"(2) Implementation of new services by review and inspection agencies, including the use of face-to-face meetings to expedite the review process and construction schedule.

"(3) The impact of any statutory changes providing State agencies with greater flexibility in design and construction contracts."

Session Laws 2007-446, s. 3, provides: "The State Personnel Office shall work with the Department of Administration, the Department of Insurance, and other State agencies employing architects and engineers to perform a market study of architect and engineer salaries and position classifications. The State Personnel Office shall complete the study as soon as possible, but in no event later than six months from the effective date of this section."

This section, as amended by Session Laws 2007-446, s. 4, effective August 23, 2007, which added the last two sentences in subsection (2), is applicable to projects that are funded on or after July 1, 2007.

Session Laws 2008-107, s. 27.7A, provides: "The Department of Administration shall contract with North Carolina Freedom Monument Project, Inc., a nonprofit corporation, for the design and construction of the North Carolina Freedom Project. Notwithstanding G.S. 143-64.31 through 143-64.34 and G.S. 143-135.26, North Carolina Freedom Monument Project, Inc., shall select the designer and consultant for the project."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Subsection (c) of G.S. 58-31-40, referred to in subdivision (10), was repealed by Session Laws 2009-474, s. 1, effective October 1, 2009.

## § 143-135.27. (Effective until October 1, 2011) Definition of capital improvement project.

As used in this Article, "State capital improvement project" means the construction of and any alteration, renovation, or addition to State buildings, as defined in G.S. 143-336, for which State funds, as defined in G.S. 143C-1-1, are used and which is required by G.S. 143-129 to be publicly advertised. "State capital improvement project" does not include a performance-based cleanup of environmental damage resulting from the discharge or release of a petroleum product from an underground storage tank pursuant to G.S. 143-215.94B(f) and G.S. 143-215.94D(f). (1987, c. 71, s. 1; 2001-442, s. 4; 2006-203, s. 87; 2008-195, s. 11.)

**Section Set Out Twice.** — The section above is effective until October 1, 2011. For the section as amended October 1, 2011, see the following section, also numbered G.S. 143-135.27.

**Editor's Note.** — Session Laws 2001-442, s. 8, provided that the amendment by Session Laws 2001-442, s. 4, which added the second sentence, would expire October 1, 2006. Session Laws 2008-195, s. 11, effective retroactively to October 1, 2006, amended Session Laws 2001-442, s. 8, to make the 2001 amendment expire October 1, 2011.

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 87, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "G.S. 143C-1-1" for "G.S. 143-1."

## § 143-135.27. (Effective October 1, 2011) Definition of capital improvement project.

As used in this Article, "State capital improvement project" means the construction of and any alteration, renovation, or addition to State buildings, as defined in G.S. 143-336, for which State funds, as defined in G.S. 143C-1-1, are used and which is required by G.S. 143-129 to be publicly advertised. (1987, c. 71, s. 1; 2001-442, s. 4; 2006-203, s. 87; 2008-195, s. 11.)

**Section Set Out Twice.** — The section above is effective October 1, 2011. For the section as in effect until October 1, 2011, see the preceding section, also numbered G.S. 143-135.27.

**Editor's Note.** — Session Laws 2001-442, s. 8, provided that the amendment by Session Laws 2001-442, s. 4, which added the second sentence, would expire October 1, 2006. Session Laws 2008-195, s. 11, effective retroactively to October 1, 2006, amended Session Laws 2001-442, s. 8, to make the 2001 amendment expire October 1, 2011. This section is set out above as it will appear following the expiration of the second sentence on October 1, 2011.

## § 143-135.28. Conflict of interest.

If any member of the Commission shall be interested either directly or indirectly, or shall be an officer or employee of or have an ownership interest in any firm or corporation interested directly or indirectly, in any contract authorized by the Commission, that interest shall be disclosed to the Commission and set forth in the minutes of the Commission, and the member having the interest may not participate on behalf of the Commission in the authorization of that contract. (1987, c. 71, s. 1.)

**§§ 143-135.29 through 143-135.34:** Reserved for future codification purposes.

## ARTICLE 8C.

## *Performance Standards for Sustainable, Energy-Efficient Public Buildings.*

### § 143-135.35. Findings; legislative intent.

The General Assembly finds that public buildings can be built and renovated using sustainable, energy-efficient methods that save money, reduce negative environmental impacts, improve employee and student performance, and make employees and students more productive. The main objectives of sustainable, energy-efficient design are to avoid resource depletion of energy, water, and raw materials; prevent environmental degradation caused by facilities and infrastructure throughout their life cycle; and create buildings that are livable, comfortable, safe, and productive. It is the intent of the General Assembly that State-owned buildings and buildings of The University of North Carolina and the North Carolina Community College System be improved by establishing specific performance standards for sustainable, energy-efficient public buildings. These performance standards should be based upon recognized, consensus standards that are supported by science and have a demonstrated performance record. The General Assembly also intends, in order to ensure that the economic and environmental objectives of this Article are achieved, that State agencies, The University of North Carolina, and the North Carolina Community College System determine whether the performance standards are met for major facility construction and renovation projects, measure utility and maintenance costs, and verify whether these standards result in savings. Also, it is the intent of the General Assembly to establish a priority to use North Carolina-based resources, building materials, products, industries, manufacturers, and businesses to provide economic development to North Carolina and to meet the objectives of this Article. (2008-203, s. 1.)

**Editor's Note.** — Session Laws 2008-203, s. 7, made this Article effective August 8, 2008, and applicable to every major facility construction project, as defined in G.S. 143-135.36, and every major facility renovation project, as defined in G.S. 143-135.36, of a public agency, as defined in G.S. 143-135.36, that has not entered the schematic design phase prior to August 8, 2008.

### § 143-135.36. Definitions.

As used in this section, the following definitions apply unless the context requires otherwise:

(1) "ASHRAE" means the American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc.

(2) "Commission" means to document and to verify throughout the construction process whether the performance of a building, a component of a building, a system of a building, or a component of a building system meets specified objectives, criteria, and agency project requirements.

(3) "Department" means the Department of Administration.

(4) "Institutions of higher education" means the constituent institutions of The University of North Carolina, the regional institutions as defined in G.S. 115D-2, and the community colleges as defined in G.S. 115D-2.

(5) "Major facility construction project" means a project to construct a building larger than 20,000 gross square feet of occupied or condi-

tioned space, as defined in the North Carolina State Building Code adopted under Article 9 of Chapter 143 of the General Statutes. "Major facility construction project" does not include a project to construct a transmitter building or a pumping station.

(6) "Major facility renovation project" means a project to renovate a building when the cost of the project is greater than fifty percent (50%) of the insurance value of the building prior to the renovation and the renovated portion of the building is larger than 20,000 gross square feet of occupied or conditioned space, as defined in the North Carolina State Building Code. "Major facility renovation project" does not include a project to renovate a transmitter building or a pumping station. "Major facility renovation project" does not include a project to renovate a building having historic, architectural, or cultural significance under Part 4 of Article 2 of Chapter 143B of the General Statutes.

(7) "Public agency" means every State office, officer, board, department, and commission and institutions of higher education. (2008-203, s. 1.)

## § 143-135.37. Energy and water use standards for public major facility construction and renovation projects; verification and reporting of energy and water use.

(a) Program Established. — The Sustainable Energy-Efficient Buildings Program is established within the Department to be administered by the Department. This program applies to any major facility construction or renovation project of a public agency that is funded in whole or in part from an appropriation in the State capital budget or through a financing contract as defined in G.S. 142-82.

(b) Energy-Efficiency Standard. — For every major facility construction project of a public agency, the building shall be designed and constructed so that the calculated energy consumption is at least thirty percent (30%) less than the energy consumption for the same building as calculated using the energy-efficiency standard in ASHRAE 90.1-2004. For every major facility renovation project of a public agency, the renovated building shall be designed and constructed so that the calculated energy consumption is at least twenty percent (20%) less than the energy consumption for the same renovated building as calculated using the energy-efficiency standard in ASHRAE 90.1-2004. For the purposes of this subsection, any exception or special standard for a specific type of building found in ASHRAE 90.1-2004 is included in the ASHRAE 90.1-2004 standard.

(c) Water Use Standard. — For every major facility construction or renovation project of a public agency, the water system shall be designed and constructed so that the calculated indoor potable water use is at least twenty percent (20%) less than the indoor potable water use for the same building as calculated using the fixture performance requirements related to plumbing under the 2006 North Carolina State Building Code. For every major facility construction project of a public agency, the water system shall be designed and constructed so that the calculated sum of the outdoor potable water use and the harvested stormwater use is at least fifty percent (50%) less than the sum of the outdoor potable water use and the harvested stormwater use for the same building as calculated using the performance requirements related to plumbing under the 2006 North Carolina State Building Code. For every major facility renovation project of a public agency, the Department shall determine on a project-by-project basis what reduced level of outdoor potable use or harvested stormwater use, if any, is a feasible requirement for the project, but the Department shall not require a greater reduction than is required under this subsection for a major facility construction project. To reduce the potable outdoor water use as required under this subsection, landscape materials that are water use efficient and irrigation strategies that include reuse and recycling of the water may be used.

(d) Performance Verification. — In order to be able to verify performance of a building component or an energy or water system component, the construction contract shall include provisions that require each building component and each energy and water system component to be commissioned, and these provisions shall be included at the earliest phase of the construction process as possible and in no case later than the schematic design phase of the project. Such commissioning shall continue through the initial operation of the building. The project design and construction teams and the public agency shall jointly determine what level of commissioning is appropriate for the size and complexity of the building or its energy and water system components.

(e) Separate Utility Meters. — In order to be able to monitor the initial cost and the continuing costs of the energy and water systems, a separate meter for each electricity, natural gas, fuel oil, and water utility shall be installed at each building undergoing a major facility construction or renovation project. Each meter shall be installed in accordance with the United States Department of Energy guidelines issued under section 103 of the Energy Policy Act of 2005 (Pub. L. 109-58, 119 Stat. 594 (2005)). Starting with the first month of facility operation, the public agency shall compare data obtained from each of these meters by month and by year with the applicable energy-efficiency standard under subsection (b) of this section and the applicable water use standard for the project under subsection (c) of this section and report annually no later than August 1 of each year to the Office of State Construction within the Department. If the average energy use or the average water use over the initial 12-month period of facility operation exceeds the applicable energy-efficiency standard under subsection (b) of this section or exceeds the applicable water use standard under subsection (c) of this section by fifteen percent (15%) or more, the public agency shall investigate the actual energy or water use, determine the cause of the discrepancy, and recommend corrections or modifications to meet the applicable standard. (2008-203, s. 1.)

**Editor's Note.** — Session Laws 2008-203, s. 4, provides: "The initial report under G.S. 143-135.37(e), the initial report under G.S. 143-135.39(f), and the initial report under G.S. 143-135.40 are due no later than August 1, 2009. The initial consolidated report required under G.S. 143-135.39(g) is due no later than October 1, 2009."

## § 143-135.38. Use of other standard when standard not practicable.

When the Department, public agency, and the design team determine that the energy-efficiency standard or the water use standard required under G.S. 143-135.37 is not practicable for a major facility construction or renovation project, then it must be determined by the State Building Commission if the standard is not practicable for the major facility construction or renovation project. If the State Building Commission determines the standard is not practicable for that project, the State Building Commission shall determine which standard is practicable for the design and construction for that major facility construction or renovation project. If a standard required under G.S. 143-135.37 is not followed for that project, the State Building Commission shall report this information and the reasons to the Department within 90 days of its determination. (2008-203, s. 1.)

## § 143-135.39. Guidelines for administering the Sustainable Energy-Efficient Buildings Program.

(a) Policies and Technical Guidelines. — The Department, in consultation with public agencies, shall develop and issue policies and technical guidelines to implement this Article for public agencies. The purpose of these policies and guidelines is to establish procedures and methods for complying with the energy-efficiency standard or the water use standard for major facility construction and renovation projects under G.S. 143-135.37.

(b) Preproposal Conference. — As provided in the request for proposals for construction services, the public agency may hold a preproposal conference for prospective bidders to discuss compliance with, and achievement of, the energy-efficiency standard or the water use standard required under G.S. 143-135.37 for prospective respondents.

(c) Advisory Committee. — The Department shall create a sustainable, energy-efficient buildings advisory committee comprised of representatives from the design and construction industry involved in public works contracting, personnel from the public agencies responsible for overseeing public works projects, and others at the Department's discretion to provide advice on implementing this Article. Among other duties, the advisory committee shall make recommendations regarding the education and training requirements under subsection (d) of this section, make recommendations regarding specific education and training criteria that are appropriate for the various roles with respect to, and levels of involvement in, a major facility construction or renovation project subject to this Article or the roles regarding the operation and maintenance of the facility, and make recommendations regarding developing a process whereby the Department receives ongoing evaluations and feedback to assist the Department in implementing this Article so as to effectuate the purpose of this Article. Further, the advisory committee may make recommendations to the Department regarding whether it is advisable to strengthen standards for energy efficiency or water use under this Article, whether it is advisable and feasible to add additional criteria to achieve greater sustainability in the construction and renovation of public buildings, or whether it is advisable and feasible to expand the scope of this Article to apply to additional types of publicly financed buildings or to smaller facility projects.

(d) Education and Training Requirements. — The Department shall review the advisory committee's recommendations under subsection (c) of this section regarding education and training. For each of the following, the Department shall develop education and training requirements that are consistent with the purpose of this Article and that are appropriate for the various roles with respect to, and level of involvement in, a major facility construction or renovation project or the roles regarding the operation and maintenance of the facility:

(1) The chief financial officers of public agencies.
(2) For each public agency that is responsible for the payment of the agency's utilities, the facility managers of these public agencies.
(3) The capital project coordinators of public agencies.
(4) Architects.
(5) Mechanical design engineers.

(e) Performance Review. — Annually the Department shall conduct a performance review of the Sustainable Energy-Efficient Buildings Program. The performance review shall include at least all of the following:

(1) Identification of the costs of implementing energy-efficiency and water use standards in the design and construction of major facility construction and renovation projects subject to this Article.
(2) Identification of operating savings attributable to the implementation of energy-efficiency and water use standards, including, but not limited to, savings in utility and maintenance costs.

(3) Identification of any impacts on employee productivity from using energy-efficiency and water use standards.
(4) Evaluation of the effectiveness of the energy-efficiency and water use standards established by this Article.
(5) Whether stricter standards or additional criteria for sustainable buildings should be used other than the standards under G.S. 143-135.37.
(6) Whether the Sustainable Energy-Efficient Buildings Program should be expanded to include additional public agencies, to include additional types of projects, or to include smaller major facility construction or renovation projects.
(7) Any recommendations for any other changes regarding sustainable, energy-efficient building standards that may be supported by the Department's findings.

(f) Report on Performance Review. — Each year, the Department shall include in its consolidated report under subsection (g) of this section a report of its findings under the performance review under subsection (e) of this section.

(g) Consolidated Report Required. — The Department shall consolidate the report required under subsection (f) of this section, the report under G.S. 143-135.37(e), the report, if any, from the State Building Commission under G.S. 143-135.38, and the report under G.S. 143-135.40 into one report. No later than October 1 of each year, this consolidated report shall be transmitted to the Chairs of the General Government Appropriations Subcommittees of both the Senate and the House of Representatives, the Environmental Review Commission, and the Joint Legislative Commission on Governmental Operations. The Department shall include any recommendations for administrative or legislative proposals that would better fulfill the legislative intent of this Article.

(h) Authority to Adopt Rules or Architectural or Engineering Standards. — The Department may adopt rules to implement this Article. The Department may adopt architectural or engineering standards as needed to implement this Article. (2008-203, s. 1.)

**Editor's Note.** — Session Laws 2008-203, s. 4, provides: "The initial report under G.S. 143-135.37(e), the initial report under G.S. 143-135.39(f), and the initial report under G.S. 143-135.40 are due no later than August 1, 2009. The initial consolidated report required under G.S. 143-135.39(g) is due no later than October 1, 2009."

## § 143-135.40. Monitor construction standards and sustainable building standards.

(a) The Department shall monitor the development of construction standards and sustainable building standards to determine whether there is any standard that the Department determines would better fulfill the intent of the Sustainable Energy-Efficient Buildings Program to achieve sustainable, energy-efficient public buildings than the standards under G.S. 143-135.37, and, if so, whether this Article should be amended to provide for the use of any different standards or the use of any additional standards to address additional aspects of sustainable, energy-efficient buildings. Additional standards monitored shall address consideration of site development, material and resource selection, and indoor environmental quality to enhance the health or productivity of building occupants. Also, the Department shall monitor the development of improved energy-efficiency standards developed by the American Society of Heating, Refrigerating and Air-Conditioning Engineers, the ASHRAE standards, shall monitor whether the State Building Code Council adopts any other energy-efficiency standards for inclusion in the State Building Code that result in greater energy efficiency and increased energy savings in major facility construction and renovation projects under this Article, and shall monitor other standards for sustainable, energy-efficient buildings that are based upon recognized, consensus standards based on science and demonstrated performance.

(b) Each year, the Department shall report the results of its monitoring under this section, including any recommendations for administrative or legislative proposals. (2008-203, s. 1.)

**Editor's Note.** — Session Laws 2008-203, s. 4, provides: "The initial report under G.S. 143-135.37(e), the initial report under G.S. 143-135.39(f), and the initial report under G.S. 143-135.40 are due no later than August 1, 2009. The initial consolidated report required under G.S. 143-135.39(g) is due no later than October 1, 2009."

## ARTICLE 9.

## *Building Code Council and Building Code.*

### § 143-136. Building Code Council created; membership.

(a) Creation; Membership; Terms. — There is hereby created a Building Code Council, which shall be composed of 17 members appointed by the Governor, consisting of two registered architects, one licensed general contractor, one licensed general contractor specializing in residential construction, one licensed general contractor specializing in coastal residential construction, one registered engineer practicing structural engineering, one registered engineer practicing mechanical engineering, one registered engineer practicing electrical engineering, one licensed plumbing and heating contractor, one municipal or county building inspector, one licensed liquid petroleum gas dealer/contractor involved in the design of natural and liquid petroleum gas systems who has expertise and experience in natural and liquid petroleum gas piping, venting and appliances, a representative of the public who is not a member of the building construction industry, a licensed electrical contractor, a registered engineer on the engineering staff of a State agency charged with approval of plans of State-owned buildings, a municipal elected official or city manager, a county commissioner or county manager, and an active member of the North Carolina fire service with expertise in fire safety. In selecting the municipal and county members, preference should be given to members who qualify as either a registered architect, registered engineer, or licensed general contractor. Of the members initially appointed by the Governor, three shall serve for terms of two years each, three shall serve for terms of four years each, and three shall serve for terms of six years each. Thereafter, all appointments shall be for terms of six years. The Governor may remove appointive members at any time. Neither the architect nor any of the above named engineers shall be engaged in the manufacture, promotion or sale of any building material, and any member who shall, during his term, cease to meet the qualifications for original appointment (through ceasing to be a practicing member of the profession indicated or otherwise) shall thereby forfeit his membership on the Council. In making new appointments or filling vacancies, the Governor shall ensure that minorities and women are represented on the Council.

The Governor may make appointments to fill the unexpired portions of any terms vacated by reason of death, resignation, or removal from office. In making such appointment, he shall preserve the composition of the Council required above.

(b) Compensation. — Members of the Building Code Council other than any who are employees of the State shall receive seven dollars ($7.00) per day, including necessary time spent in traveling to and from their place of residence within the State to any place of meeting or while traveling on official business of the Council. In addition, all members shall receive mileage and subsistence according to State practice while going to and from any place of meeting, or when on official business of the Council. (1957, c. 1138; 1965, c. 1145; 1969, c. 1229, s. 1; 1971, c. 323; 1979, c. 863; 1989, c. 25, s. 3; 1991 (Reg. Sess., 1992), c. 895, s. 2; 1998-57, s. 1.)

**Local Modification.** — Town of Nags Head: 1998-13, s. 1; town of Wrightsville Beach: 1989, c. 611, s. 1, as amended by 2005-265, s. 1.

**State Government Reorganization.** — The Building Code Council was transferred to the Department of Insurance by G.S. 143A-78, enacted by Session Laws 1971, c. 864.

**Editor's Note.** — Session Laws 1989, c. 25, s. 4 provides: "All statutory authority, powers, and duties, including rule making and the rendering of findings, orders, and adjudications, of the Department of Agriculture pertaining to the regulation of the design, construction, location, installation, or operation of equipment for storing, handling, transporting, and utilizing liquefied petroleum gases for fuel purposes, from the outlet of the first stage pressure regulator to and including each liquefied petroleum gas utilization device within a building or structure covered by the North Carolina Building Code are transferred to the Building Code Council.

"Until the Building Code Council adopts rules regarding the entry of liquefied petroleum gas service piping into a building, 2 NCAC 38.0701(2) shall remain in effect."

For provisions of the Permit Extension Act of 2009, Session Laws 2009-406, see the notes under G.S. 153A-344.1 and G.S. 160A-385.1.

## CASE NOTES

**Applicability of Building Code to Altered Buildings.** — Under rules and regulations of the Building Code Council, the Code applies to the design and construction of buildings that are altered. Olympic Prods. Co. v. Roof Sys., 88 N.C. App. 315, 363 S.E.2d 367 (1988).

**This section does not allow the building inspector to permit violations of the Building Code** where the Code is specific as to the materials or type of construction required. Lindstrom v. Chesnutt, 15 N.C. App. 15, 189 S.E.2d 749, cert. denied, 281 N.C. 757, 191 S.E.2d 361 (1972).

**Independent Judgment by Inspector Would Render Section Useless.** — If an inspector had the right under the Code to base his interpretations on independent judgment, this section, authorizing and establishing a Building Code Council empowered and directed to prepare and adopt a North Carolina State Building Code in accordance with legislative directives contained in this Article, would be a completely useless piece of legislation. Lindstrom v. Chesnutt, 15 N.C. App. 15, 189 S.E.2d 749, cert. denied, 281 N.C. 757, 191 S.E.2d 361 (1972).

**Liability for Code Violations.** — The Building Code imposes liability on any person who constructs, supervises the construction of, or designs a building or an alteration thereto, and violates the Code such that the violation proximately causes injury or damage. In addition, if a building owner knows or has reason to know of a Code violation and fails to take reasonable steps to remedy the violation, he may be found liable if the violation proximately causes injury or damage. Olympic Prods. Co. v. Roof Sys., 88 N.C. App. 315, 363 S.E.2d 367 (1988).

**Applied** in Holcomb v. United States Fire Ins. Co., 52 N.C. App. 474, 279 S.E.2d 50 (1981).

**Cited** in Jenkins v. Leftwich Elec. Co., 254 N.C. 553, 119 S.E.2d 767 (1961); Carolinas-Virginias Ass'n of Bldg. Owners & Managers v. Ingram, 39 N.C. App. 688, 251 S.E.2d 910 (1979).

## § 143-137. Organization of Council; rules; meetings; staff; fiscal affairs.

(a) First Meeting; Organization; Rules. — Within 30 days after its appointment, the Building Code Council shall meet on call of the Commissioner of Insurance. The Council shall elect from its appointive members a chairman and such other officers as it may choose, for such terms as it may designate in its rules. The Council shall adopt such rules not inconsistent herewith as it may deem necessary for the proper discharge of its duties. The chairman may appoint members to such committees as the work of the Council may require.

In addition, the chairman shall establish and appoint ad hoc code revision committees to consider and prepare revisions and amendments to the Code volumes. Each ad hoc committee shall consist of members of the Council, licensed contractors, and design professionals most affected by the Code volume for which the ad hoc committee is responsible, and members of the public. The subcommittees shall meet upon the call of their respective chairs and shall report their recommendations to the Council.

(b) Meetings. — The Council shall meet regularly, at least once every six months, at places and dates to be determined by the Council. Special meetings may be called by the chairman on his own initiative and must be called by him at the request of two or more members of the Council. All members shall be notified by the chairman in writing of the time and place of regular and special meetings at least seven days in advance of such meeting. Seven members shall constitute a quorum. All meetings shall be open to the public.

(c) Staff. — Personnel of the Division of Engineering of the Department of Insurance shall serve as a staff for the Council. Such staff shall have the duties of

(1) Keeping an accurate and complete record of all meetings, hearings, correspondence, laboratory studies, and technical work performed by or for the Council, and making these records available for public inspection at all reasonable times;

(2) Handling correspondence for the Council.

(d) Fiscal Affairs of the Council. — All funds for the operations of the Council and its staff shall be appropriated to the Department of Insurance for the use of the Council. All such funds shall be held in a separate or special account on the books of the Department of Insurance, with a separate financial designation or code number to be assigned by the Department of Administration or its agent. Expenditures for staff salaries and operating expenses shall be made in the same manner as the expenditure of any other Department of Insurance funds. The Department of Insurance may hire such additional personnel as may be necessary to handle the work of the Building Code Council, within the limits of funds appropriated for the Council and with the approval of the Council. (1957, c. 269, s. 1; c. 1138; 1987, c. 827, s. 219; 1987 (Reg. Sess., 1988), c. 975, s. 7; 1997-26, s. 4.)

**Legal Periodicals.** — For 1997 legislative survey, see 20 Campbell L. Rev. 413.

## § 143-138. North Carolina State Building Code.

(a) Preparation and Adoption. — The Building Code Council may prepare and adopt, in accordance with the provisions of this Article, a North Carolina State Building Code. Before the adoption of the Code, or any part of the Code, the Council shall hold at least one public hearing. A notice of the public hearing shall be published in the North Carolina Register at least 15 days before the date of the hearing. Notwithstanding G.S. 150B-2(8a)h., the North Carolina State Building Code as adopted by the Building Code Council is a rule within the meaning of G.S. 150B-2(8a) and shall be adopted in accordance with the procedural requirements of Article 2A of Chapter 150B of the General Statutes.

The Council shall request the Office of State Budget and Management to prepare a fiscal note for a proposed Code change that has a substantial economic impact, as defined in G.S. 150B-21.4(b1), or that increases the cost of residential housing by eighty dollars ($80.00) or more per housing unit. The change can become effective only in accordance with G.S. 143-138(d). Neither the Department of Insurance nor the Council shall be required to expend any monies to pay for the preparation of any fiscal note under this section by any person outside of the Department or Council unless the Department or Council contracts with a third-party vendor to prepare the fiscal note.

(b) Contents of the Code. — The North Carolina State Building Code, as adopted by the Building Code Council, may include reasonable and suitable classifications of buildings and structures, both as to use and occupancy; general building restrictions as to location, height, and floor areas; rules for the lighting and ventilation of buildings and structures; requirements concerning means of egress from buildings and structures; requirements concerning means of ingress in buildings and structures; rules governing construction and precautions to be taken during construction; rules as to permissible materials, loads, and stresses; rules governing chimneys, heating appliances, elevators, and other facilities connected with the buildings and structures; rules governing plumbing, heating, air conditioning for the purpose of comfort cooling by the lowering of temperature, and electrical systems; and such other reasonable rules pertaining to the construction of buildings and structures and the installation of particular facilities therein as may be found reasonably necessary for the protection of the occupants of the building or structure, its neighbors, and members of the public at large.

(b1) The Code may regulate activities and conditions in buildings, structures, and premises that pose dangers of fire, explosion, or related hazards. Such fire prevention code provisions shall be considered the minimum standards necessary to preserve and protect public health and safety, subject to approval by the Council of more stringent provisions proposed by a municipality or county as provided in G.S. 143-138(e). These provisions may include regulations requiring the installation of either battery-operated or electrical smoke detectors in every dwelling unit used as rental property, regardless of the date of construction of the rental property. For dwelling units used as rental property constructed prior to 1975, smoke detectors shall have an Underwriters' Laboratories, Inc., listing or other equivalent national testing laboratory approval, and shall be installed in accordance with either the standard of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the property owner shall retain or provide as proof of compliance.

(b2) The Code may contain provisions requiring the installation of either battery-operated or electrical carbon monoxide detectors in every dwelling unit having a fossil-fuel burning heater or appliance, fireplace, or an attached garage. Carbon monoxide detectors shall be those listed by a nationally recognized testing laboratory that is OSHA-approved to test and certify to American National Standards Institute/Underwriters Laboratories Standards ANSI/UL2034 or ANSI/UL2075 and shall be installed in accordance with either the standard of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the property owner shall retain or provide as proof of compliance. A carbon monoxide detector may be combined with smoke detectors if the combined detector does both of the following: (i) complies with ANSI/UL2034 or ANSI/UL2075 for carbon monoxide alarms and ANSI/UL217 for smoke detectors; and (ii) emits an alarm in a manner that clearly differentiates between detecting the presence of carbon monoxide and the presence of smoke.

(b3) Except as provided by subsection (c1) of this section, the Code may contain provisions regulating every type of building or structure, wherever it might be situated in the State.

(b4) Building rules do not apply to (i) farm buildings that are located outside the building-rules jurisdiction of any municipality, or (ii) farm buildings that are located inside the building-rules jurisdiction of any municipality if the farm buildings are greenhouses. For the purposes of this subsection:

(1) A "farm building" shall include any structure used or associated with equine activities, including, but not limited to, the care, management,

boarding, or training of horses and the instruction and training of riders. Structures that are associated with equine activities include, but are not limited to, free standing or attached sheds, barns, or other structures that are utilized to store any equipment, tools, commodities, or other items that are maintained or used in conjunction with equine activities. The specific types of equine activities, structures, and uses set forth in this subdivision are for illustrative purposes, and should not be construed to limit, in any manner, the types of activities, structures, or uses that may be considered under this subsection as exempted from building rules. A farm building that might otherwise qualify for exemption from building rules shall not be exempt if it is used for a spectator event and more than 10 members of the public are present at the farm building for the event.

(2) A "greenhouse" is a structure that has a glass or plastic roof, has one or more glass or plastic walls, has an area over ninety-five percent (95%) of which is used to grow or cultivate plants, is built in accordance with the National Greenhouse Manufacturers Association Structural Design manual, and is not used for retail sales. Additional provisions addressing distinct life safety hazards shall be approved by the local building-rules jurisdiction.

(b5) No building permit shall be required under the Code or any local variance thereof approved under subsection (e) for any construction, installation, repair, replacement, or alteration costing five thousand dollars ($5,000) or less in any single family residence or farm building unless the work involves: the addition, repair, or replacement of load bearing structures; the addition (excluding replacement of same capacity) or change in the design of plumbing; the addition, replacement or change in the design of heating, air conditioning, or electrical wiring, devices, fixtures (excluding repair or replacement of electrical lighting devices and fixtures of the same type), appliances (excluding replacement of water heaters, provided that the energy use rate or thermal input is not greater than that of the water heater which is being replaced, and there is no change in fuel, energy source, location, capacity, or routing or sizing of venting and piping), or equipment, the use of materials not permitted by the North Carolina Uniform Residential Building Code; or the addition (excluding replacement of like grade of fire resistance) of roofing. The exclusions from building permit requirements set forth in this paragraph for electrical lighting devices and fixtures and water heaters shall apply only to work performed on a one- or two-family dwelling. In addition, exclusions for electrical lighting devices and fixtures and electric water heaters shall apply only to work performed by a person licensed under G.S. 87-43 and exclusions for water heaters, generally, to work performed by a person licensed under G.S. 87-21.

(b6) No building permit shall be required under such Code from any State agency for the construction of any building or structure, the total cost of which is less than twenty thousand dollars ($20,000), except public or institutional buildings.

For the information of users thereof, the Code shall include as appendices the following:

(1) Any rules governing boilers adopted by the Board of Boiler and Pressure Vessels Rules,

(2) Any rules relating to the safe operation of elevators adopted by the Commissioner of Labor, and

(3) Any rules relating to sanitation adopted by the Commission for Public Health which the Building Code Council believes pertinent.

(b7) The Code may include references to such other rules of special types, such as those of the Medical Care Commission and the Department of Public Instruction as may be useful to persons using the Code. No rule issued by any agency other than the Building Code Council shall be construed as a part of the Code, nor supersede that Code, it being intended that they be presented with the Code for information only.

(b8) Nothing in this Article shall extend to or be construed as being applicable to the regulation of the design, construction, location, installation, or operation of (1) equipment for storing, handling, transporting, and utilizing liquefied petroleum gases for fuel purposes or anhydrous ammonia or other liquid fertilizers, except for liquefied petroleum gas from the outlet of the first stage pressure regulator to and including each liquefied petroleum gas utilization device within a building or structure covered by the Code, or (2) equipment or facilities, other than buildings, of a public utility, as defined in G.S. 62-3, or an electric or telephone membership corporation, including without limitation poles, towers, and other structures supporting electric or communication lines.

(b9) Nothing in this Article shall extend to or be construed as being applicable to the regulation of the design, construction, location, installation, or operation of industrial machinery. However, if during the building code inspection process, an electrical inspector has any concerns about the electrical safety of a piece of industrial machinery, the electrical inspector may refer that concern to the Occupational Safety and Health Division in the North Carolina Department of Labor but shall not withhold the certificate of occupancy nor mandate third-party testing of the industrial machinery based solely on this concern. For the purposes of this paragraph, “industrial machinery” means equipment and machinery used in a system of operations for the explicit purpose of producing a product. The term does not include equipment that is permanently attached to or a component part of a building and related to general building services such as ventilation, heating and cooling, plumbing, fire suppression or prevention, and general electrical transmission.

(b10) The Code may contain rules concerning minimum efficiency requirements for replacement water heaters, which shall consider reasonable availability from manufacturers to meet installation space requirements and may contain rules concerning energy efficiency that require all hot water plumbing pipes that are larger than one-fourth of an inch to be insulated.

(b11) No State, county, or local building code or regulation shall prohibit the use of special locking mechanisms for seclusion rooms in the public schools approved under G.S. 115C-391.1(e)(1)e., provided that the special locking mechanism shall be constructed so that it will engage only when a key, knob, handle, button, or other similar device is being held in position by a person, and provided further that, if the mechanism is electrically or electronically controlled, it automatically disengages when the building’s fire alarm is activated. Upon release of the locking mechanism by a supervising adult, the door must be able to be opened readily.

(b12) The Code may include rules pertaining to the construction or renovation of residential or commercial buildings and structures that permit the use of cisterns to provide water for flushing toilets and for outdoor irrigation. No State, county, or local building code or regulation shall prohibit the use of cisterns to provide water for flushing toilets and for outdoor irrigation. As used in this subsection, ‘cistern’ means a storage tank that is watertight; has smooth interior surfaces and enclosed lids; is fabricated from nonreactive materials such as reinforced concrete, galvanized steel, or plastic; is designed to collect rainfall from a catchment area; may be installed indoors or outdoors; and is located underground, at ground level, or on elevated stands.

(c) Standards to Be Followed in Adopting the Code. — All regulations contained in the North Carolina State Building Code shall have a reasonable and substantial connection with the public health, safety, morals, or general welfare, and their provisions shall be construed reasonably to those ends.

Requirements of the Code shall conform to good engineering practice. The Council may use as guidance, but is not required to adopt, the requirements of the International Building Code of the International Code Council, the Standard Building Code of the Southern Building Code Congress International, Inc., the Uniform Building Code of the International Conference of Building Officials, the National Building Code of the Building Officials and Code Administrators, Inc., the National Electric Code, the Life Safety Code, the National Fuel Gas Code, the Fire Prevention Code of the National Fire Protection Association, the Safety Code for Elevators and Escalators, and the Boiler and Pressure Vessel Code of the American Society of Mechanical Engineers, and standards promulgated by the American National Standards Institute, Standards Underwriters' Laboratories, Inc., and similar national or international agencies engaged in research concerning strength of materials, safe design, and other factors bearing upon health and safety.

(c1) Exemptions for Private Clubs and Religious Organizations. — The North Carolina State Building Code and the standards for the installation and maintenance of limited-use or limited-access hydraulic elevators under this Article shall not apply to private clubs or establishments exempted from coverage under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, et seq., or to religious organizations or entities controlled by religious organizations, including places of worship. A nonreligious organization or entity that leases space from a religious organization or entity is not exempt under this subsection.

(d) Amendments of the Code. — The Building Code Council may revise and amend the North Carolina State Building Code, either on its own motion or upon application from any citizen, State agency, or political subdivision of the State. In adopting any amendment, the Council shall comply with the same procedural requirements and the same standards set forth above for adoption of the Code.

(e) Effect upon Local Codes. — Except as otherwise provided in this section, the North Carolina State Building Code shall apply throughout the State, from the time of its adoption. Approved rules shall become effective in accordance with G.S. 150B-21.3. However, any political subdivision of the State may adopt a fire prevention code and floodplain management regulations within its jurisdiction. The territorial jurisdiction of any municipality or county for this purpose, unless otherwise specified by the General Assembly, shall be as follows: Municipal jurisdiction shall include all areas within the corporate limits of the municipality and extraterritorial jurisdiction areas established as provided in G.S. 160A-360 or a local act; county jurisdiction shall include all other areas of the county. No such code or regulations, other than floodplain management regulations and those permitted by G.S. 160A-436, shall be effective until they have been officially approved by the Building Code Council as providing adequate minimum standards to preserve and protect health and safety, in accordance with the provisions of subsection (c) above. Local floodplain regulations may regulate all types and uses of buildings or structures located in flood hazard areas identified by local, State, and federal agencies, and include provisions governing substantial improvements, substantial damage, cumulative substantial improvements, lowest floor elevation, protection of mechanical and electrical systems, foundation construction, anchorage, acceptable flood resistant materials, and other measures the political subdivision deems necessary considering the characteristics of its flood hazards and vulnerability. In the absence of approval by the Building Code Council, or in the event that approval is withdrawn, local fire prevention codes and regulations shall have no force and effect. Provided any local regulations approved by the local governing body which are found by the Council to be more stringent than the adopted statewide fire prevention code and which are found to regulate only activities and conditions in buildings, structures, and premises that pose dangers of fire, explosion or related hazards, and are not matters in conflict with the State Building Code, shall be approved. Local governments may enforce the fire prevention code of the State Building Code using civil remedies authorized under G.S. 143-139, 153A-123, and 160A-175. If the Commissioner of Insurance or other State official with responsibility for enforcement of the Code institutes a civil action pursuant to G.S. 143-139, a local government may not institute a civil action under G.S. 143-139, 153A-123, or 160A-175 based upon the same violation. Appeals from the assessment or imposition of such civil remedies shall be as provided in G.S. 160A-434.

A local government may not adopt any ordinance in conflict with the exemption provided by subsection (c1) of this section. No local ordinance or regulation shall be construed to limit the exemption provided by subsection (c1) of this section.

(f) Repealed by Session Laws 1989, c. 681, s. 3.

(g) Publication and Distribution of Code. — The Building Code Council shall cause to be printed, after adoption by the Council, the North Carolina State Building Code and each amendment thereto. It shall, at the State's expense, distribute copies of the Code and each amendment to State and local governmental officials, departments, agencies, and educational institutions, as is set out in the table below. (Those marked by an asterisk will receive copies only on written request to the Council.)

| OFFICIAL OR AGENCY | NUMBER OF COPIES |
|---|---|
| State Departments and Officials | |
| Governor | 1 |
| Lieutenant Governor | 1 |
| Auditor | 1 |
| Treasurer | 1 |
| Secretary of State | 1 |
| Superintendent of Public Instruction | 1 |
| Attorney General (Library) | 1 |
| Commissioner of Agriculture | 1 |
| Commissioner of Labor | 1 |
| Commissioner of Insurance | 1 |
| Department of Environment and Natural Resources | 1 |
| Department of Health and Human Services | 1 |
| Office of Juvenile Justice | 1 |
| Board of Transportation | 1 |
| Utilities Commission | 1 |
| Department of Administration | 1 |
| Clerk of the Supreme Court | 1 |
| Clerk of the Court of Appeals | 1 |
| Department of Cultural Resources [State Library] | 1 |
| Supreme Court Library | 1 |
| Legislative Library | 1 |
| Office of Administrative Hearings | 1 |
| Rules Review Commission | 1 |

| OFFICIAL OR AGENCY | NUMBER OF COPIES |
|---|---|
| Schools | |
| All state-supported colleges and universities in the State of North Carolina | * 1 each |
| Local Officials | |
| Clerks of the Superior Courts | 1 each |
| Chief Building Inspector of each incorporated municipality or county | 1 |

In addition, the Building Code Council shall make additional copies available at such price as it shall deem reasonable to members of the general public. The proceeds from sales of the Building Code shall be credited to the Insurance Regulatory Fund under G.S. 58-6-25.

(h) Violations. — Any person who shall be adjudged to have violated this Article or the North Carolina State Building Code, except for violations of occupancy limits established by either, shall be guilty of a Class 3 misdemeanor and shall upon conviction only be liable to a fine, not to exceed fifty dollars ($50.00), for each offense. Each 30 days that such violation continues shall constitute a separate and distinct offense. Violation of occupancy limits established pursuant to the North Carolina State Building Code shall be a Class 3 misdemeanor. Any violation incurred more than one year after another conviction for violation of the occupancy limits shall be treated as a first offense for purposes of establishing and imposing penalties.

(i) Section 1008 of Chapter X of Volume 1 of the North Carolina State Building Code, Title "Special Safety to Life Requirements Applicable to Existing High-Rise Buildings" as adopted by the North Carolina State Building Code Council on March 9, 1976, as ratified and adopted as follows:

## SECTION 1008-SPECIAL SAFETY TO LIFE REQUIREMENTS APPLICABLE TO EXISTING HIGH-RISE BUILDINGS

### 1008 — GENERAL.

*(a) Applicability.* — Within a reasonable time, as fixed by "written order" of the building official, and except as otherwise provided in subsection (j) of this section every building the [then] existing, that qualifies for classification under Table 1008.1 shall be considered to be a high-rise building and shall be provided with safety to life facilities as hereinafter specified. All other buildings shall be considered as low-rise. NOTE: The requirements of Section 1008 shall be considered as minimum requirements to provide for reasonable safety to life requirements for existing buildings and where possible, the owner and designer should consider the provisions of Section 506 applicable to new high-rise buildings.

*(b) Notification of Building Owner.* — The Department of Insurance will send copies of amendments adopted to all local building officials with the suggestion that all local building officials transmit to applicable building owners in their jurisdiction copies of adopted amendments, within six months from the date the amendments are adopted, with the request that each building owner respond to the local building official how he plans to comply with these requirements within a reasonable time.

NOTE: Suggested reasonable time and procedures for owners to respond to the building official's request is as follows:

(1) The building owner shall, upon receipt of written request from the building official on compliance procedures within a reasonable time, submit an overall plan required by 1008(c) below within one year and

within the time period specified in the approved overall plan, but not to exceed five years after the overall plan is approved, accomplish compliance with this section, as evidenced by completion of the work in accordance with approved working drawings and specifications and by issuance of a new Certificate of Compliance by the building official covering the work. Upon approval of building owner's overall plan, the building official shall issue a "written order", as per 1008(a) above, to comply with Section 1008 in accordance with the approved overall plan.

(2) The building official may permit time extensions beyond five years to accomplish compliance in accordance with the overall plan when the owner can show just cause for such extension of time at the time the overall plan is approved.

(3) The local building official shall send second request notices as per 1008(b) to building owners who have made no response to the request at the end of six months and a third request notice to no response building owners at the end of nine months.

(4) If the building owner makes no response to any of the three requests for information on how the owner plans to comply with Section 1008 within 12 months from the first request, the building official shall issue a "written order" to the building owner to provide his building with the safety to life facilities as required by this section and to submit an overall plan specified by (1) above within six months with the five-year time period starting on the date of the "written order".

(5) For purposes of this section, the Construction Section of the Division of Health Service Regulation, Department of Health and Human Services, will notify all non-State owned I-Institutional buildings requiring licensure by the Division of Health Service Regulation and coordinate compliance requirements with the Department of Insurance and the local building official.

*(c) Submission of Plans and Time Schedule for Completing Work.* — Plans and specifications, but not necessarily working drawings covering the work necessary to bring the building into compliance with this section shall be submitted to the building official within a reasonable time. (See suggested time in NOTE of Section 1008(b) above). A time schedule for accomplishing the work, including the preparation of working drawings and specifications shall be included. Some of the work may require longer periods of time to accomplish than others, and this shall be reflected in the plan and schedule.

NOTE: Suggested Time Period For Compliance:

## SUGGESTED TIME PERIOD FOR COMPLIANCE

| ITEM | CLASS I (SECTION) | CLASS II (SECTION) | CLASS III (SECTION) | TIME FOR COMPLETION |
|---|---|---|---|---|
| Signs in Elevator Lobbies and Elevator Cabs | 1008.2(h) | 1008.3(h) | 1008.4(h) | 180 days |
| Emergency Evacuation Plan | 1008(b) | NOTE: | | 180 days |
| Corridor Smoke Detectors (Includes alternative door closers) | 1008.2(c) | 1008.3(c) | 1008.4(c) | 1 year |
| Manual Fire Alarm | 1008.2(a) | 1008.3(a) | 1008.4(a) | 1 year |
| Voice Communication System Required | 1008.2(b) | 1008.3(b) | 1008.4(b) | 2 years |
| Smoke Detectors Required | 1008.2(c) | 1008.3(c) | 1008.4(c) | 1 year |

| ITEM | CLASS I (SECTION) | CLASS II (SECTION) | CLASS III (SECTION) | TIME FOR COMPLETION |
|---|---|---|---|---|
| Protection and Fire Stopping for Vertical Shafts | 1008.2(f) | 1008.3(f) | 1008.4(f) | 3 years |
| Special Exit Requirements-Number, Location and Illumination to be in accordance with Section 1007 | 1008.2(e) | 1008.3(e) | 1008.4(e) | 3 years |
| Emergency Electrical Power Supply | 1008.2(d) | 1008.3(d) | 1008.4(d) | 4 years |
| Special Exit Facilities Required | 1008.2(e) | 1008.3(e) | 1008.4(e) | 5 years |
| Compartmentation for Institutional Buildings | 1008.2(f) | 1008.3(f) | 1008.4(f) | 5 years |
| Emergency Elevator Requirements | 1008.2(h) | 1008.3(h) | 1008.4(h) | 5 years |
| Central Alarm Facility Required | | 1008.3(i) | 1008.4(i) | 5 years |
| Areas of Refuge Required on Every Eighth Floor | | | 1008.4(j) | 5 years |
| Smoke Venting | | | 1008.4(k) | 5 years |
| Fire Protection of Electrical Conductors | | | 1008.4(l) | 5 years |
| Sprinkler System Required | | | 1008.4(m) | 5 years |

(d) *Building Official Notification of Department of Insurance.* — The building official shall send copies of written notices he sends to building owners to the Engineering and Building Codes Division for their files and also shall file an annual report by August 15th of each year covering the past fiscal year setting forth the work accomplished under the provisions of this section.

(e) *Construction Changes and Design of Life Safety Equipment.* — Plans and specifications which contain construction changes and design of life safety equipment requirements to comply with provisions of this section shall be prepared by a registered architect in accordance with provisions of Chapter 83A of the General Statutes or by a registered engineer in accordance with provisions of Chapter 89C of the General Statutes or by both an architect and engineer particularly qualified by training and experience for the type of work involved. Such plans and specifications shall be submitted to the Engineering and Building Codes Division of the Department of Insurance for approval. Plans and specifications for I-Institutional buildings licensed by the Division of Health Service Regulation as noted in (b) above shall be submitted to the Construction Section of that Division for review and approval.

(f) *Filing of Test Reports and Maintenance on Life Safety Equipment.* — The engineer performing the design for the electrical and mechanical equipment, including sprinkler systems, must file the test results with the Engineering and Building Codes Division of the Department of Insurance, or to the agency designated by the Department of Insurance, that such systems have been tested to indicate that they function in accordance with the standards specified in this section and according to design criteria. These test results shall be a prerequisite for the Certificate of Compliance required by (b) above. Test results for I-Institutional shall be filed with the Construction Section, Division of Health Service Regulation. It shall be the duty and responsibility of the owners of Class I, II and III buildings to maintain smoke detection, fire detection, fire control, smoke removal and venting as required by this section and similar emergency systems in proper operating condition at all times. Certification of full tests and inspections of all emergency systems shall be provided by the owner annually to the fire department.

*(g) Applicability of Chapter X and Conflicts with Other Sections.* — The requirements of this section shall be in addition to those of Sections 1001 through 1007; and in case of conflict, the requirements affording the higher degree of safety to life shall apply, as determined by the building official.

*(h) Classes of Buildings and Occupancy Classifications.* — Buildings shall be classified as Class I, II or III according to Table 1008.1. In the case of mixed occupancies, for this purpose, the classification shall be the most restrictive one resulting from the application of the most prevalent occupancies to Table 1008.1.

FOOTNOTE: Emergency Plan. — Owners, operators, tenants, administrators or managers of high-rise buildings should consult with the fire authority having jurisdiction and establish procedures which shall include but not necessarily be limited to the following:

(1) Assignment of a responsible person to work with the fire authority in the establishment, implementation and maintenance of the emergency pre-fire plan.
(2) Emergency plan procedures shall be supplied to all tenants and shall be posted conspicuously in each hotel guest room, each office area, and each schoolroom.
(3) Submission to the local fire authority of an annual renewal or amended emergency plan.
(4) Plan should be completed as soon as possible.

1008.1 — ALL EXISTING BUILDINGS SHALL BE CLASSIFIED AS CLASS I, II AND III ACCORDING TO TABLE 1008.1.

TABLE 1008.1

Scope

| CLASS | OCCUPANCY GROUP (3)(4) | OCCUPIED FLOOR ABOVE AVERAGE GRADE EXCEEDING HEIGHT (2) |
|---|---|---|
| CLASS I | Group R-Residential<br>Group B-Business<br>Group E-Educational<br>Group A-Assembly<br>Group H-Hazardous<br>Group I-Institutional-Restrained 1 | 60′ but less than 120′ above average grade or 6 but less than 12 stories above average grade. |
| | Group I-Institutional-Unrestrained | 36′ but less than 60′ above average grade or 3 but less than 6 stories above average grade. |
| CLASS II | Group R-Residential<br>Group B-Business<br>Group E-Educational<br>Group A-Assembly<br>Group H-Hazardous<br>Group I-Institutional-Restrained | 120′ but less than 250′ above average grade or 12 but less than 25 stories above average grade. |
| | Group I-Institutional-Unrestrained | 60′ but less than 250′ above average grade or 6 but less than 25 stories above average grade. |

| CLASS | OCCUPANCY GROUP (3)(4) | OCCUPIED FLOOR ABOVE AVERAGE GRADE EXCEEDING HEIGHT (2) |
|---|---|---|
| CLASS III | Group R-Residential<br>Group B-Business<br>Group E-Educational<br>Group I-Institutional<br>Group A-Assembly<br>Group H-Hazardous | 250′ or 25 stories above average grade. |

NOTE 1: The entire building shall comply with this section when the building has an occupied floor above the height specified, except that portions of the buildings which do not exceed the height specified are exempt from this section, subject to the following provisions:

(a) Low-rise portions of Class I buildings must be separated from high-rise portions by one-hour construction.

(b) Low-rise portions of Class II and III buildings must be separated from high-rise portions by two-hour construction.

(c) Any required exit from the high-rise portion which passes through the low-rise portions must be separated from the low-rise portion by the two-hour construction.

NOTE 2: The height described in Table 1008.1 shall be measured between the average grade outside the building and the finished floor of the top occupied story.

NOTE 3: Public parking decks meeting the requirements of Section 412.7 and less than 75 feet in height are exempt from the requirements of this section when there is no other occupancy above or below such deck.

NOTE 4: Special purpose equipment buildings, such as telephone equipment buildings housing the equipment only, with personnel occupant load limited to persons required to maintain the equipment may be exempt from any or all of these requirements at the discretion of the Engineering and Building Codes Division provided such special purpose equipment building is separated from other portions of the building by two-hour fire rated construction.

1008.2—REQUIREMENTS FOR EXISTING CLASS I BUILDINGS.

All Class I buildings shall be provided with the following:

*(a)* An approved manual fire alarm system, meeting the requirements of Section 1125 and applicable portions of NFPA 71, 72A, 72B, 72C or 72D, shall be provided unless the building is fully sprinklered or equipped with an approved automatic fire detection system connected to the fire department.

*(b)* All Class I buildings shall meet the requirements of Sections 1001-1007.

*(c) Smoke Detectors Required.* — At least one approved listed smoke detector tested in accordance with UL-167, capable of detecting visible and invisible particles of combustion shall be installed as follows:

(1) All buildings classified as institutional, residential and assembly occupancies shall be provided with listed smoke detectors in all required exit corridors spaced no further than 60′ on center or more than 15′ from any wall. Exterior corridors open to the outside are not required to comply with this requirement. If the corridor walls have one-hour fire resistance rating with all openings protected with 1-3/4 inch solid wood core or hollow metal door or equivalent and all corridor doors are equipped with approved self-closing devices, the smoke detectors in the corridor may be omitted. Detectors in corridors may be omitted when each dwelling unit is equipped with smoke detectors which activate the alarm system.

(2) In every mechanical equipment, boiler, electrical equipment, elevator equipment or similar room unless the room is sprinklered or the room is separated from other areas by two-hour fire resistance construction

with all openings therein protected with approved fire dampers and Class B fire doors. (Approved listed fire (heat) detectors may be submitted for these rooms.)

(3) In the return air portion of every air conditioning and mechanical ventilation system that serves more than one floor.

(4) The activation of any detector shall activate the alarm system, and shall cause such other operations as required by this Code.

(5) The annunciator shall be located near the main entrance or in a central alarm and control facility.

NOTE 1: Limited area sprinklers may be supplied from the domestic water system provided the domestic water system is designed to support the design flow of the largest number of sprinklers in any one of the enclosed areas. When supplied by the domestic water system, the maximum number of sprinklers in any one enclosed room or area shall not exceed 20 sprinklers which must totally protect the room or area.

*(d) Emergency Electrical Power Supply.* — An emergency electrical power supply shall be provided to supply the following for a period of not less than two hours. An emergency electrical power supply may consist of generators, batteries, a minimum of two remote connections to the public utility grid supplied by multiple generating stations, a combination of the above.

(1) Emergency, exit and elevator cab lighting.

(2) Emergency illumination for corridors, stairs, etc.

(3) Emergency Alarms and Detection Systems. — Power supply for fire alarm and fire detection. Emergency power does not need to be connected to fire alarm or detection systems when they are equipped with their own emergency power supply from float or trickle charge battery in accordance with NFPA standards.

*(e) Special Exit Requirements.* — Exits and exitways shall meet the following requirements:

(1) Protection of Stairways Required. — All required exit stairways shall be enclosed with noncombustible one-hour fire rated construction with a minimum of 1¾ inch solid core wood door or hollow metal door or 20 minute UL listed doors as entrance thereto. (See Section 1007.5).

(2) Number and Location of Exits. — All required exit stairways shall meet the requirements of Section 1007 to provide for proper number and location and proper fire rated enclosures and illumination of and designation for means of egress.

(3) Exit Outlets. — Each required exit stair shall exit directly outside or through a separate one-hour fire rated corridor with no openings except the necessary openings to exit into the fire rated corridor and from the fire rated corridor and such openings shall be protected with 1¾ inch solid wood core or hollow metal door or equivalent unless the exit floor level and all floors below are equipped with an approved automatic sprinkler system meeting the requirements of NFPA No. 13.

*(f) Smoke Compartments Required for I-Institutional Buildings.* — Each occupied floor shall be divided into at least two compartments with each compartment containing not more than 30 institutional occupants. Such compartments shall be subdivided with one-half hour fire rated partitions which shall extend from outside wall to outside wall and from floor to and through any concealed space to the floor slab or roof above and meet the following requirements:

(1) Maximum area of any smoke compartment shall be not more than 22,500 square feet in area with both length and width limited to 150 feet.

(2) At least one smoke partition per floor regardless of building size forming two smoke zones of approximately equal size.

(3) All doors located in smoke partitions shall be properly gasketed to insure a substantial barrier to the passage of smoke and gases.

(4) All doors located in smoke partitions shall be no less than 1¾ inch thick solid core wood doors with UL, ¼ inch wire glass panel in metal frames. This glass panel shall be a minimum of 100 square inches and a maximum of 720 square inches.

(5) Every door located in a smoke partition shall be equipped with an automatic closer. Doors that are normally held in the open position shall be equipped with an electrical device that shall, upon actuation of the fire alarm or smoke detection system in an adjacent zone, close the doors in that smoke partition.

(6) Glass in all corridor walls shall be ¼″, UL approved, wire glass in metal frames in pieces not to exceed 1296 square inches.

(7) Doors to all patient rooms and treatment areas shall be a minimum of 1¾ inch solid core wood doors except in fully sprinklered buildings.

*(g) Protection and Fire Stopping for Vertical Shafts.* — All vertical shafts extending more than one floor including elevator shafts, plumbing shafts, electrical shafts and other vertical openings shall be protected with noncombustible one-hour fire rated construction with shaft wall openings protected with 1¾ inch solid core wood door or hollow metal door. Vertical shafts (such as electrical wiring shafts) which have openings such as ventilated doors on each floor must be fire stopped at the floor slab level with noncombustible materials having a fire resistance rating not less than one hour to provide an effective barrier to the passage of smoke, heat and gases from floor to floor through such shafts.

EXCEPTION: Shaft wall openings protected in accordance with NFPA No. 90A and openings connected to metal ducts equipped with approved fire dampers within the shaft wall openings do not need any additional protection.

*(h) Signs in Elevator Lobbies and Elevator Cabs.* — Each elevator lobby call station on each floor shall have an emergency sign located adjacent to the call button and each elevator cab shall have an emergency sign located adjacent to the floor status indicator. The required emergency sign shall be readable at all times and shall be a minimum of 1/2″ high block letters with the words: "IN CASE OF FIRE DO NOT USE ELEVATOR — USE THE EXIT STAIRS" or other words to this effect.

1008.3 — REQUIREMENTS FOR EXISTING CLASS II BUILDINGS.

All Class II buildings must meet the following requirements:

*(a) Manual Fire Alarm.* — Provide manual fire alarm system in accordance with Section 1008.2(a). In addition, buildings so equipped with sprinkler alarm system or automatic fire detection system must have at least one manual fire alarm station near an exit on each floor as a part of such sprinkler or automatic fire detection and alarm system. Such manual fire alarm systems shall report a fire by floor.

*(b) Voice Communication System Required.* — An approved voice communication system or systems operated from the central alarm and control facilities shall be provided and shall consist of the following:

(1) One-Way Voice Communication Public Address System Required. — A one-way voice communication system shall be established on a selective basis which can be heard clearly by all occupants in all exit stairways, elevators, elevator lobbies, corridors, assembly rooms and tenant spaces.

NOTE 1: This system shall function so that in the event of one circuit or speaker being damaged or out of service, the remainder of the system shall continue to be operable.

NOTE 2: This system shall include provisions for silencing the fire alarm devices when the loud speakers are in use, but only after the fire alarm devices have operated initially for not less than 15 seconds.

*(c) Smoke Detectors Required.* — Smoke detectors are required as per Section 1008.2(c). The following are additional requirements:

(1) Storage rooms larger than 24 square feet or having a maximum dimension of over eight feet shall be provided with approved fire detectors or smoke detectors installed in an approved manner unless the room is sprinklered.

(2) The actuation of any detectors shall activate the fire alarm system.

*(d) Emergency Electrical Power Supply.* — An emergency electrical power supply shall be provided to supply the following for a period of not less than two hours. An emergency electrical power supply may consist of generators, batteries, a minimum of two remote connections to the public utility grid supplied by multiple generating stations, a combination of the above. Power supply shall furnish power for items listed in Section 1008.2(d) and the following:

(1) Pressurization Fans. — Fans to provide required pressurization, smoke venting or smoke control for stairways.

(2) Elevators. — The designated emergency elevator.

*(e) Special Exit Facilities Required.* — The following exit facilities are required:

(1) The special exit facilities required in 1008.2(e) are required. All required exit stairways shall be enclosed with noncombustible two-hour fire rated construction with a minimum of 1½ hour Class B-labeled doors as entrance thereto: (See Section 1007.5).

(2) Smoke-Free Stairways Required. — At least one stairway shall be a smoke free stairway in accordance with Section 1104.2 or at least one stairway shall be pressurized to between 0.15 inch and 0.35 inch water column pressure with all doors closed. Smoke-free stairs and pressurized stairs shall be identified with signs containing letters a minimum of ½ inch high containing the words "PRIMARY EXIT STAIRS" unless all stairs are smoke free or pressurized. Approved exterior stairways meeting the requirements of Chapter XI or approved existing fire escapes meeting the requirements of Chapter X with all openings within 10 feet protected with wire glass or other properly designed stairs protected to assure similar smoke-free vertical egress may be permitted. All required exit stairways shall also meet the requirements of Section 1008.2(e).

(3) If stairway doors are locked from the stairway side, keys shall be provided to unlock all stairway doors on every eighth floor leading into the remainder of the building and the key shall be located in a glass enclosure adjacent to the door at each floor level (which may sound an alarm when the glass is broken). When the key unlocks the door, the hardware shall be of the type that remains unlocked after the key is removed. Other means, approved by the building official may be approved to enable occupants and fire fighters to readily unlock stairway doors on every eighth floor that may be locked from the stairwell side. The requirements of this section may be eliminated in smoke-free stairs and pressurized stairs provided fire department access keys are provided in locations acceptable to the local fire authority.

*(f) Compartmentation for I-Institutional Buildings Required.* — See Section 1008.2(f).

*(g) Protection and Fire Stopping for Vertical Shafts.* — All vertical shafts extending more than one floor including elevator shafts, plumbing shafts, electrical shafts and other vertical openings shall be protected with noncombustible two-hour fire rated construction with Class B-labeled door except for elevator doors which shall be hollow metal or equivalent. All vertical shafts

which are not so enclosed must be fire stopped at each floor slab with noncombustible materials having a fire resistance rating of not less than two hours to provide an effective barrier to the passage of smoke, heat and gases from floor to floor through such shaft.

EXCEPTION: Shaft wall openings protected in accordance with NFPA No. 90A and openings connected to metal ducts equipped with approved fire dampers within the shaft wall opening do not need any additional protection.

*(h) Emergency Elevator Requirements.*

(1) Elevator Recall. — Each elevator shall be provided with an approved manual return. When actuated, all cars taking a minimum of one car at a time, in each group of elevators having common lobby, shall return directly at normal car speed to the main floor lobby, or to a smoke-free lobby leading most directly to the outside. Cars that are out of service are exempt from this requirement. The manual return shall be located at the main floor lobby.

NOTE: Manually operated cars are considered to be in compliance with this provision if each car is equipped with an audible or visual alarm to signal the operator to return to the designated level.

(2) Identification of Emergency Elevator. — At least one elevator shall be identified as the emergency elevator and shall serve all floor levels.

NOTE: This elevator will have a manual control in the cab which will override all other controls including floor call buttons and door controls.

(3) Signs in Elevator Lobbies and Elevator Cabs. — Each elevator lobby call station on each floor shall have an emergency sign located adjacent to the call button and each elevator cab shall have an emergency sign located adjacent to the floor status indicator. These required emergency signs shall be readable at all times and shall be a minimum of ½ inch high block letters with the words: "IN CASE OF FIRE DO NOT USE ELEVATOR — USE THE EXIT STAIRS" or other words to this effect.

*(i) Central Alarm Facility Required.* — A central alarm facility accessible at all times to fire department personnel or attended 24 hours a day, shall be provided and shall contain the following:

(1) Facilities to automatically transmit manual and automatic alarm signals to the fire department either directly or through a signal monitoring service.

(2) Public service telephone.

(3) Fire detection and alarm systems annunciator panels to indicate the type of signal and the floor or zone from which the fire alarm is received. These signals shall be both audible and visual with a silence switch for the audible.

NOTE: Detectors in HVAC systems used for fan shut down need not be annunciated.

(4) Master keys for access from all stairways to all floors.

(5) One-way voice emergency communications system controls.

1008.4 — REQUIREMENTS FOR EXISTING CLASS III BUILDINGS.

All Class III Buildings shall be provided with the following:

*(a) Manual Fire Alarm System.* — A manual fire alarm system meeting the requirements of Section 1008.3(a).

*(b) Voice Communication System Required.* — An approved voice communication system or systems operated from the central alarm and control facilities shall be provided and shall consist of the following:

(1) One-Way Voice Communication Public Address System Required. — A one-way voice communication system shall be established on a selective or general basis which can be heard clearly by all occupants in all

elevators, elevator lobbies, corridors, and rooms or tenant spaces exceeding 1,000 sq. ft. in area.

NOTE 1: This system shall be designed so that in the event of one circuit or speaker being damaged or out of service the remainder of the system shall continue to be operable.

NOTE 2: This system shall include provisions for silencing the fire alarm devices when the loud speakers are in use, but only after the fire alarm devices have operated initially for not less than 15 seconds.

(2) Two-way system for use by both fire fighters and occupants at every fifth level in stairways and in all elevators.

(3) Within the stairs at levels not equipped with two-way voice communications, signs indicating the location of the nearest two-way device shall be provided.

NOTE: The one-way and two-way voice communication systems may be combined.

*(c) Smoke Detectors Required.* — Approved listed smoke detectors shall be installed in accordance with Section 1008.3(c) and in addition, such detectors shall terminate at the central alarm and control facility and be so designed that it will indicate the fire floor or the zone on the fire floor.

*(d) Emergency Electrical Power Supply.* — Emergency electrical power supply meeting the requirements of Section 1008.3(d) to supply all emergency equipment required by Section 1008.3(d) shall be provided and in addition, provisions shall be made for automatic transfer to emergency power in not more than ten seconds for emergency illumination, emergency lighting and emergency communication systems. Provisions shall be provided to transfer power to a second designated elevator located in a separate shaft from the primary emergency elevator. Any standpipe or sprinkler system serving occupied floor areas 400 feet or more above grade shall be provided with on-site generated power or diesel driven pump.

*(e) Special Exit Requirements.* — All exits and exitways shall meet the requirements of Section 1008.3(e).

*(f) Compartmentation of Institutional Buildings Required.* — See Section 1008.2(f).

*(g) Protection and Fire Stopping for Vertical Shafts.* — Same as Class II buildings. See Section 1008.3(g).

*(h) Emergency Elevator Requirements.*

(1) Primary Emergency Elevator. — At least one elevator serving all floors shall be identified as the emergency elevator with identification signs both outside and inside the elevator and shall be provided with emergency power to meet the requirements of Section 1008.3(c).

NOTE: This elevator will have a manual control in the cab which will override all other controls including floor call buttons and door controls.

(2) Elevator Recall. — Each elevator shall be provided with an approved manual return. When actuated, all cars taking a minimum of one car at a time, in each group of elevators having common lobby, shall return directly at normal car speed to the main floor lobby or to a smoke-free lobby leading most directly to the outside. Cars that are out of service are exempt from this requirement. The manual return shall be located at the main floor lobby.

NOTE: Manually operated cars are considered to be in compliance with this provision if each car is equipped with an audible or visual alarm to signal the operator to return to the designated level.

(3) Signs in Elevator Lobbies and Elevator Cabs. — Each elevator lobby call station on each floor shall have an emergency sign located adjacent to the call button and each elevator cab shall have an

emergency sign located adjacent to the floor status indicator. These required emergency signs shall be readable at all times and have a minimum of ½″ high block letters with the words: "IN CASE OF FIRE, UNLESS OTHERWISE INSTRUCTED, DO NOT USE THE ELEVATOR — USE THE EXIT STAIRS" or other words to this effect.

(4) Machine Room Protection. — When elevator equipment located above the hoistway is subject to damage from smoke particulate matter, cable slots entering the machine room shall be sleeved beneath the machine room floor to inhibit the passage of smoke into the machine room.

(5) Secondary Emergency Elevator. — At least one elevator located in separate shaft from the Primary Emergency Elevator shall be identified as the "Secondary Emergency Elevator" with identification signs both outside and inside the elevator. It will serve all occupied floors above 250 feet and shall have all the same facilities as the primary elevator and will be capable of being transferred to the emergency power system.
NOTE: Emergency power supply can be sized for nonsimultaneous use of the primary and secondary emergency elevators.

*(i) Central Alarm and Control Facilities Required.*

(1) A central alarm facility accessible at all times to Fire Department personnel or attended 24 hours a day, shall be provided. The facility shall be located on a completely sprinklered floor or shall be enclosed in two-hour fire resistive construction. Openings are permitted if protected by listed 1½ hour Class B-labeled closures or water curtain devices capable of a minimum discharge of three gpm per lineal foot of opening. The facility shall contain the following:
(i) Facilities to automatically transmit manual and automatic alarm signals to the fire department either directly or through a signal monitoring service.
(ii) Public service telephone.
(iii) Direct communication to the control facility.
(iv) Controls for the voice communication systems.
(v) Fire detection and alarm system annunciator panels to indicate the type of signal and the floor or zone from which the fire alarm is received, those signals, shall be both audible and visual with a silence switch for the audible.
NOTE: Detectors in HVAC systems used for fan shut down need not be annunciated.

(2) A control facility (fire department command station) shall be provided at or near the fire department response point and shall contain the following:
(i) Elevator status indicator.
NOTE: Not required in buildings where there is a status indicator at the main elevator lobby.
(ii) Master keys for access from all stairways to all floors.
(iii) Controls for the two-way communication system.
(iv) Fire detection and alarm system annunciator panels to indicate the type of signal and the floor or zone from which the fire alarm is received.
(v) Direct communication to the central alarm facility.

(3) The central alarm and control facilities may be combined in a single approved location. If combined, the duplication of facilities and the direct communication system between the two may be deleted.

*(j) Areas of Refuge Required.* — Class III buildings shall be provided with a designated "area of refuge" at the 250 ft. level and on at least every eighth floor

or fraction thereof above that level to be designed so that occupants above the 250 ft. level can enter at all times and be safely accommodated in floor areas meeting the following requirements unless the building is completely sprinklered:

(1) Identification and Size. — These areas of refuge shall be identified on the plans and in the building as necessary. The area of refuge shall provide not less than 3 sq. ft. per occupant for the total number of occupants served by the area based on the occupancy content calculated by Section 1105. A minimum of two percent (2%) of the number of occupants on each floor shall be assumed to be handicapped and no less than 16 sq. ft. per handicapped occupant shall be provided. Smoke proof stairways meeting the requirements of Section 1104.2 and pressurized stairways meeting the requirements of Section 1108.3(e)(2) may be used for ambulatory occupants at the rate of 3 sq. ft. of area of treads and landings per person, but in no case shall the stairs count for more than one-third of the total occupants. Doors leading to designated areas of refuge from stairways or other areas of the building shall not have locking hardware or shall be automatically unlocked upon receipt of any manual or automatic fire alarm signal.

(2) Pressurized. — The area of refuge shall be pressurized with 100% fresh air utilizing the maximum capacity of existing mechanical building air conditioning system without recirculation from other areas or other acceptable means of providing fresh air into the area.

(3) Fire Resistive Separation. — Walls, partitions, floor assemblies and roof assemblies separating the area of refuge from the remainder of the building shall be noncombustible and have a fire resistance rating of not less than one hour. Duct penetrations shall be protected as required for penetrations of shafts. Metallic piping and metallic conduit may penetrate or pass through the separation only if the openings around the piping or conduit are sealed on each side of the penetrations with impervious noncombustible materials to prevent the transfer of smoke or combustion gases from one side of the separation to the other. The fire door serving as a horizontal exit between compartments shall be so installed, fitted and gasketed to provide a barrier to the passage of smoke.

(4) Access Corridors. — Any corridor leading to each designated area of refuge shall be protected as required by Sections 1104 and 702. The capacity of an access corridor leading to an area of refuge shall be based on 150 persons per unit width as defined in Section 1105.2. An access corridor may not be less than 44 inches in width. The width shall be determined by the occupant content of the most densely populated floor served. Corridors with one-hour fire resistive separation may be utilized for area of refuge at the rate of three sq. ft. per ambulatory occupant provided a minimum of one cubic ft. per minute of outside air per square foot of floor area is introduced by the air conditioning system.

(5) Penetrations. — The continuity of the fire resistance at the juncture of exterior walls and floors must be maintained.

*(k) Smoke Venting.* — Smoke venting shall be accomplished by one of the following methods in nonsprinklered buildings:

(1) In a nonsprinklered building, the heating, ventilating and air conditioning system shall be arranged to exhaust the floor of alarm origin at its maximum exhausting capacity without recirculating air from the floor of alarm origin to any other floor. The system may be arranged to accomplish this either automatically or manually. If the air conditioning system is also used to pressurize the areas of refuge,

this function shall not be compromised by using the system for smoke removal.

(2) Venting facilities shall be provided at the rate of 20 square feet per 100 lineal feet or 10 square feet per 50 lineal feet of exterior wall in each story and distributed around the perimeter at not more than 50 or 100 foot intervals openable from within the fire floor. Such panels and their controls shall be clearly identified.

(3) Any combination of the above two methods or other approved designs which will produce equivalent results and which is acceptable to the building official.

*(l) Fire Protection of Electrical Conductors.* — New electrical conductors furnishing power for pressurization fans for stairways, power for emergency elevators and fire pumps required by Section 1008.4(d) shall be protected by a two-hour fire rated horizontal or vertical enclosure or structural element which does not contain any combustible materials. Such protection shall begin at the source of the electrical power and extend to the floor level on which the emergency equipment is located. It shall also extend to the emergency equipment to the extent that the construction of the building components on that floor permits. New electrical conductors in metal raceways located within a two-hour fire rated assembly without any combustible therein are exempt from this requirement.

*(m) Automatic Sprinkler Systems Required.*

(1) All areas which are classified as Group M-mercantile and Group H-hazardous shall be completely protected with an automatic sprinkler system.

(2) All areas used for commercial or institutional food preparation and storage facilities adjacent thereto shall be provided with an automatic sprinkler system.

(3) An area used for storage or handling of hazardous substances shall be provided with an automatic sprinkler system.

(4) All laboratories and vocational shops in Group E, Educational shall be provided with an automatic sprinkler system.

(5) Sprinkler systems shall be in strict accordance with NFPA No. 13 and the following requirements:

The sprinkler system must be equipped with a water flow and supervisory signal system that will transmit automatically a water flow signal directly to the fire department or to an independent signal monitoring service satisfactory to the fire department.

(j) Subsection (i) of this section does not apply to business occupancy buildings as defined in the North Carolina State Building Code except that evacuation plans as required on page 8, lines 2 through 16 [Section 1008, footnote following subsection (h)], and smoke detectors as required for Class I Buildings as required by Section 1008.2, page 11, lines 5 through 21 [Section 1008.2, subdivision (c)(1)]; Class II Buildings as required by Section 1008.3, page 17, lines 17 through 28 and page 18, lines 1 through 10 [Section 1008.3, subsections (c) and (d)]; and Class III Buildings, as required by Section 1008.4, lines 21 through 25 [Section 1008.4, subsection (c)] shall not be exempted from operation of this act as applied to business occupancy buildings, except that the Council shall adopt rules that allow a business occupancy building built prior to 1953 to have a single exit to remain if the building complies with the Building Code on or before December 31, 2006.

(j1) A nonbusiness occupancy building built prior to the adoption of the 1953 Building Code that is not in compliance with Section 402.1.3.5 of Volume IX of the Building Code or Section 3407.2.2 of Volume I of the Building Code must comply with the applicable sections by December 31, 2006.

(k) For purposes of use in the Code, the term "Family Care Home" shall mean an adult care home having two to six residents.

(*l*) When any question arises as to any provision of the Code, judicial notice shall be taken of that provision of the Code. (1957, c. 1138; 1969, c. 567; c. 1229, ss. 2-6; 1971, c. 1100, ss. 1, 2; 1973, c. 476, ss. 84, 128, 138, 152; c. 507, s. 5; 1981, c. 677, s. 3; c. 713, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1282, s. 20.2D; c. 1348, s. 1; 1983, c. 614, s. 3; 1985, c. 576, s. 1; c. 622, s. 2; c. 666, s. 39; 1989, c. 25, s. 2; c. 681, ss. 2, 3, 9, 10, 18, 19; c. 727, ss. 157, 158; 1991 (Reg. Sess., 1992), c. 895, s. 1; 1993, c. 329, ss. 1, 3; c. 539, s. 1009; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 111, s. 1; c. 242, s. 1; c. 507, s. 27.8(r); c. 535, s. 30; 1997-26, ss. 1-3, 5; 1997-443, ss. 11A.93, 11A.94, 11A.118(a), 11A.119(a); 1998-57, s. 2; 1998-172, s. 1; 1998-202, s. 4(u); 1999-456, s. 40; 2000-137, s. 4(x); 2000-140, s. 93.1(a); 2001-141, ss. 1, 2, 3, 4; 2001-421, ss. 1.1, 1.2, 1.5; 2001-424, s. 12.2(b); 2002-144, s. 5; 2003-221, s. 6; 2003-284, s. 22.2; 2004-124, ss. 21.1, 21.2; 2005-205, s. 6; 2007-182, ss. 1, 2; 2007-529, s. 1; 2007-542, s. 1; 2008-176, s. 2; 2008-219, s. 1; 2009-79, s. 1(a)-(c); 2009-243, s. 1; 2009-245, s. 1; 2009-532, s. 1; 2009-570, s. 18.)

**Local Modification.** — Towns of Boone and Blowing Rock: 1987, c. 226; town of Carrboro: 1995 (Reg. Sess., 1996), c. 571, s. 1; town of Chapel Hill: 1981, c. 911; 1987, c. 460, s. 3; 1995 (Reg. Sess., 1996), c. 571, s. 1; town of Edenton: 1989 (Reg. Sess., 1990), c. 829; towns of Kill Devil Hills and Nags Head: 1987 (Reg. Sess., 1988), c. 911, s. 1.

**Regulation of Hazardous Materials Facilities Task Force.** — Session Laws 2007-107, s. 4.1(a)-(k), as amended by Session Laws 2007-495, s. 15(f), provides: "(a) Task Force Established. — There is established the Regulation of Hazardous Materials Facilities Task Force.

"(b) Definitions. — As used in this section 'hazardous material' means hazardous materials, as defined in G.S. 166A-21, hazardous waste, as defined in G.S. 130A-290, hazardous substances, as defined in G.S. 143-215.77, and hazardous chemicals, as defined in G.S. 95-174.

"(c) Membership. — The Task Force shall consist of 15 members as follows:

"(1) The Secretary of Environment and Natural Resources or the Secretary's designee.

"(2) The Commissioner of Insurance or the Commissioner's designee.

"(3) Three persons appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives, one of whom shall be a member of the North Carolina Association of Fire Marshals and one of whom shall be a fire marshal or inspector from the western region of the State.

"(4) Three persons appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate, one of whom shall be a member of the North Carolina Fire Chiefs Association and one of whom shall be a fire marshal or inspector from the eastern region of the State.

"(5) A member from one of the seven North Carolina Regional Response Teams for Hazardous Materials Response appointed by the Governor.

"(6) A fire marshal or inspector from the central region of the State appointed by the Governor.

"(7) Two members of the Building Code Council appointed by the Chair of the Council.

"(8) A person who is engaged in an industrial manufacturing process that uses hazardous chemicals, hazardous materials, or hazardous substances, or that generates hazardous waste appointed by the President of the Manufacturers and Chemical Industry Council of North Carolina.

"(9) An owner or operator of a commercial hazardous waste facility appointed by the Governor.

"(10) A member of the general public appointed by the Governor.

"(d) Appointments. — Appointments to the Task Force shall be made no later than 1 September 2007. A vacancy in the Task Force or as chair of the Task Force resulting from the resignation of a member or otherwise shall be filled in the same manner in which the original appointment was made.

"(e) Chair; Quorum; Meetings. — The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall each designate one member to serve as cochair of the Task Force. The cochairs shall call the initial meeting of the Task Force on or before 1 October 2007. A majority of the members of the Task Force shall constitute a quorum. The Task Force may meet in the Legislative Building or the Legislative Office Building upon the approval of the Legislative Services Commission.

"(f) Duties of Task Force. — The Task Force shall study issues related to the treatment, storage, and disposal of hazardous materials and shall review all current fire code regulations regarding the commercial treatment, storage, and disposal of hazardous materials to ensure that the Code addresses the needs and safety of the citizens of the State. In particular, the Task Force shall:

"(1) Review the facts and issues related to the Environmental Quality Industrial Services facility fire in Apex, North Carolina, on 5 October 2006. The Task Force shall review the investigation report and determine whether the fire could have been prevented by additional, or more specific, State regulations.

"(2) Analyze all fire inspection or investigation reports of fires that have occurred at commercial facilities that treat, store, or dispose of hazardous materials within the past 10 years and determine if there is a trend in violations.

"(3) Review the current State Building Code with respect to allowable hazardous materials quantities and determine if the State Building Code should be amended to provide for an additional classification of mixed waste or unidentifiable materials.

"(4) Analyze the current definitions of high hazard facilities and high hazardous Group H classifications in the State Building Code and determine whether commercial facilities that treat, store, or dispose of hazardous materials should be classified so that mixed wastes and unidentifiable materials can be easily identified.

"(5) Review the current annual fire inspection process at permitted commercial hazardous waste facilities, as defined in G.S. 130A-295.01, that are treatment, storage, and disposal facilities to determine how the annual fire inspection can be conducted in collaboration with the inspection and permitting process of the Department of Environment and Natural Resources.

"(6) Review the sprinkler requirements for Hazardous Materials Facilities (Section 903.2.4) of the State Building Code and determine whether sprinkler design criteria and coverage should be amended.

"(7) Review the fire alarm requirements under Section 903.2.4 of the State Building Code and determine whether the facilities used to collect, store, process, treat, recycle, recover, or dispose of hazardous substance, as defined in 29 Code of Federal Regulations § 1910.120(a)(3) (1 July 2006 Edition), should have a full fire alarm system or, in the alternative, full staffing as recommended by the Department of Environment and Natural Resources. If the Task Force determines that relevant facilities should have full staffing, the Task Force shall recommend the level of knowledge and training that should be required of the staff.

"(8) Determine when any rules recommended by the Task Force should become effective for existing commercial hazardous waste facilities.

"(g) Expenses of Members. — Members of the Task Force shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate.

"(h) Staff. — Upon the prior approval of the Legislative Services Commission, the Legislative Services Officer may assign professional and clerical staff and other services and supplies, as needed, for the Task Force to carry out its duties in an effective manner.

"(i) Cooperation by Government Agencies. — The Task Force may call upon any department, agency, institution, or officer of the State or any political subdivision thereof for facilities, data, or other assistance.

"(j) Report. — The Task Force shall submit a report of its findings and recommendations, including legislative proposals, to the 2008 Regular Session of the 2007 General Assembly, the Governor, the North Carolina Building Code Council, and the Environmental Review Commission on or before 1 April 2008. The Task Force shall terminate upon filing its report.

"(k) North Carolina Building Code Council to Adopt Rules. — The North Carolina Building Code Council shall adopt rules or amend the State Building Code to implement the recommendations of the Regulation of Hazardous Materials Facilities Task Force. In particular, the Building Code Council shall adopt rules or amend the State Building Code to require that hazardous materials are classified and identified in a manner that provides State and local inspectors with sufficient information to identify all potential risks to the citizens of the State."

**Editor's Note.** — Session Laws 1971, c. 1100, which amended this section, provided in s. 3: "Provided that nothing in this act shall in any way apply to any type of farm building."

Session Laws 2008-65, s. 1, effective September 1, 2008, repealed Session Laws 1983, c. 614, s. 5, which had provided that the amendments by the 1983 act would not apply to Wilson, Nash and Edgecombe Counties.

Session Laws 1989, c. 681, s. 21 provides: "Section 10 [which amended subsection (e)] and Sections 14 through 17 shall become effective upon the adoption of fire protection code provisions by the North Carolina Building Code Council." Fire protection code provisions were adopted effective July 1, 1991.

Session Laws 1989, c. 25, s. 4 provides: "All statutory authority, powers, and duties, including rule making and the rendering of findings, orders, and adjudications, of the Department of Agriculture pertaining to the regulation of the design, construction, location, installation, or operation of equipment for storing, handling, transporting, and utilizing liquefied petroleum gases for fuel purposes, from the outlet of the first stage pressure regulator to and including each liquefied petroleum gas utilization device within a building or structure covered by the North Carolina Building Code are transferred to the Building Code Council.

Until the Building Code Council adopts rules regarding the entry of liquefied petroleum gas service piping into a building, 2 NCAC 38 .0701(2) shall remain in effect."

The references in brackets in subsection (j) have been inserted to guide the reader to what appear to be the general locations of the provisions referred to by the page and line references. The page and line references are printed just as they are set out in the ratified bill, Session Laws 1981, c. 713, but the line references in particular do not correspond to lines in the ratified bill, and their intention is not always clear.

Session Laws 1995, c. 111, s. 4, effective May 29, 1995, provides that the amendment made by section 1, which added the last two sentences of the second paragraph of subsection (b), shall not be construed to imply that the Building Code Council did not have the authority contained in that amendment prior to the effective date of the amendment.

Session Laws 1998-172, s. 2 provides that local floodplain management ordinances adopted as of the effective date of Section 5 of Session Laws 1997-26 (April 17, 1997) continue in effect until repealed.

Session Laws 2001-219, s. 1, provides: "Notwithstanding any provision of the State Building Code or any public or local law to the contrary, including Chapter 143 of the General Statutes, counties may establish by ordinance the requirements for bathroom facilities, including the number of toilets required, in buildings that are used primarily for outdoor school sporting events."

Session Laws 2001-219, s. 2, provides: "This act is effective when it becomes law, and only applies to counties that (i) have a population of 190,000 or more according to the most recent decennial federal census and (ii) border both another state and county with a population of 650,000 or more according to the most recent decennial federal census."

Session Laws 2001-372 establishes a pilot program to utilize building code standards to promote rehabilitation of existing buildings in participating jurisdictions. The act provides for "eligible local jurisdictions," "participating jurisdictions," and "lead local jurisdiction(s)." As part of the pilot program, the lead local jurisdiction, as described in Section 3 of the act, shall develop a pilot rehabilitation building code ("pilot code") based on the New Jersey Uniform Construction Code Rehabilitation Subcode ("New Jersey model code"), codified at Title 5, Chapter 23, Subchapter 6 of the New Jersey Administrative Code, (cited as N.J.A.C. 5: 23-6). The lead local jurisdiction shall develop the pilot code in consultation with the North Carolina Department of Insurance and in accordance with procedures established in this act. Within 180 days of the effective date of the act, the lead local jurisdiction shall cross-reference the pilot code to the North Carolina State Building Code (NCSBC), Volumes I, II, III, IV, V, VI, VII, IX, and I-C and deliver the cross-referenced pilot code to the Department for comment, and within 30 days thereafter, the Department shall submit its comments, if any, on the pilot code to the lead local jurisdiction. The comments, if any, shall address insuring proper coordination and cross-referencing of the pilot code to the existing NCSBC chapters but shall not include substantive changes to the standards established by the New Jersey model code. The lead local jurisdiction is to submit to the Building Code Council, the Department of Insurance, and the General Assembly an interim report on or before December 1, 2004, and a final report on or before April 1, 2006. The pilot program for each lead local jurisdiction and all participating jurisdictions shall expire on January 1, 2006.

Session Laws 2003-239, ss. 1 and 2, provide: "Notwithstanding any requirements for additional plumbing facilities imposed under Section 403.3.1.4, Table 403.1 and Table 403.4 of Chapter 4 of the North Carolina Plumbing Code, 2002 Edition, a public university, as part of its addition of bleachers to an existing softball field, shall not be required to provide facilities in addition to those facilities currently existing at the stadium.

"This act applies to public universities located in counties that (i) have a population of 160,000 or more according to the most recent decennial federal census; (ii) border the Atlantic Ocean; and (iii) border no more than two other counties that are a part of this State."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2005-205, s. 1, effective July 1, 2006, provides: "This act shall be known as the 'Deborah Greenblatt Act'".

This section has been set out to correct a publishing error which appeared in subsection (g).

This section was amended by Session Laws 2007-542, s. 1, in the coded bill drafting format provided by G.S. 120-20.1. The act failed to use underscoring to indicate the insertion of the words "the following" at the end of the seventh paragraph in subsection (b). Subsection (b) has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2007-542, s. 2, provides: "The North Carolina Building Code Council shall study the extent to which hot waterlines should be insulated to achieve greater energy efficiency and shall amend the North Carolina State Building Code as necessary to achieve those ends. The Council shall report its findings and actions to the Environmental Review Commission and the 2008 Regular Session of the General Assembly on or before 1 April 2008."

Session Laws 2008-219, s. 5, provides: "The amendment to G.S. 143-138(b) contained in Section 1 of this act shall not be construed to imply that the Building Code Council does not possess the authority contained in that amendment prior to the effective date of Section 1 of this act [August 16, 2008]."

Session Laws 2008-219, s. 7, provides: "The Building Code Council shall study the needs and benefits of carbon monoxide detectors as set forth in provisions in Section 1 of this act and report the results of its study to the General Assembly on or before July 1, 2009."

Session Laws 2009-79, s. 2, provides: "Nothing in this act shall be construed to limit the authority of the North Carolina Department of Labor to perform safety inspections of hydraulic elevators."

Session Laws 2009-79, s. 3, provides: "The Commissioner of Labor shall adopt rules pursuant to Article 14A of Chapter 95 of the General Statutes (Elevator Act of North Carolina) to require, in any building or structure having more than one elevator, the posting of a distinct number in plain view in the passenger cabin of each elevator for the purpose of identification of the elevator to facilitate extrication from any elevator that malfunctions while occupied."

Session Laws 2009-206, s. 2, provides: "Notwithstanding any established expiration date for the application of the 2006 North Carolina State Building Code occurring prior to August 1, 2009, a county may obtain a permit until August 1, 2009 under the 2006 North Carolina State Building Codes (Building, Energy Conservation, Fire, Fuel Gas, Mechanical, and Plumbing) for the construction of facilities to be used for administrative purposes."

**Effect of Amendments.** — Session Laws 2007-542, s. 1, effective January 1, 2008, and applicable to all new construction for which permits are issued on or after that date, added "and may contain rules concerning energy efficiency that require all hot water plumbing pipes that are larger than one-fourth of an inch to be insulated" at the end of the next-to-last paragraph of subsection (b).

Session Laws 2008-176, s. 2, effective August 4, 2008, rewrote the fifth paragraph of subsection (b).

Session Laws 2008-219, s. 1, effective August 16, 2008, added the third paragraph in subsection (b).

Session Laws 2009-79, s. 1(a)-(c), effective June 11, 2009, in subsection (b), added the exception at the beginning of the fourth paragraph; added subsection (c1); and in subsection (e), in the first paragraph, added the exception at the beginning, and added the last paragraph.

Session Laws 2009-243, s. 1, effective June 30, 2009, and applicable to any cistern, as defined in this section, installed on or after that date that is used to provide water for flushing toilets or for outdoor irrigation, added the language designated herein as subsection (b12).

Session Laws 2009-245, s. 1, effective June 30, 2009, and applicable to all farm buildings where construction either began or was completed prior to that date, designated former subsection (b) as subsections (b) through (b11); in subsections (b1), (b7), and (b10), in the first sentence, deleted "In addition" from the beginning; in subsection (b4), in the introductory language, deleted "Provided further, that" from the beginning, and added "For the purposes of this subsection:" at the end, and added subdivision (b4)(1); and, in subsections (b5) and (b6), deleted "Provided further, that" from the beginning.

Session Laws 2009-532, s. 1, effective October 1, 2009, rewrote subsection (b5).

Session Laws 2009-570, s. 18, effective August 28, 2009, added "the following:" in the second paragraph of subsection (b6).

**Legal Periodicals.** — For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

For 1997 legislative survey, see 20 Campbell L. Rev. 413.

## CASE NOTES

**Establishment of Standards for Buildings Within Police Power.** — It is within the police power of the General Assembly and of a city, when authorized, to establish minimum standards, materials, designs, and construction of buildings for the safety of the occupants, their neighbors, and the public at large. State v. Walker, 265 N.C. 482, 144 S.E.2d 419 (1965); Walker v. City of Charlotte, 276 N.C. 166, 171 S.E.2d 431 (1970).

For the purpose of protecting life, health, safety and welfare, the General Assembly has power to promulgate rules, fix minimum standards, and prescribe materials and designs for buildings and other structures, so long as they are not arbitrary, capricious or unreasonable and so long as they tend to promote health, safety and welfare. In these matters, property rights must yield to the proper exercise of the police power. Walker v. City of Charlotte, 276 N.C. 166, 171 S.E.2d 431 (1970).

**The legislative intent was to provide a complete and integrated regulatory scheme,** including regulations as to the installation of sprinkler systems, in all buildings and structures, wherever situate in North Carolina, except as expressly exempted by statute. Greene v. City of Winston-Salem, 287 N.C. 66, 213 S.E.2d 231 (1975).

**Legislative Intent to Protect the Health of the General Public.** — The legislature's directions for the creation of the State Building Code and the Building Code Council's stated purposes for the different inspections under the Code evince an intent to protect the health of the general public. City of New Bern v. New Bern-Craven County Bd. of Educ., 338 N.C. 430, 450 S.E.2d 735 (1994).

**For history of statutory provisions relating to the State Building Code,** see Lutz Indus., Inc. v. Dixie Home Stores, 242 N.C. 332, 88 S.E.2d 333 (1955); Pinnix v. Toomey, 242 N.C. 358, 87 S.E.2d 893 (1955); Jenkins v. Leftwich Elec. Co., 254 N.C. 553, 119 S.E.2d 767 (1961); Carolinas-Virginias Ass'n of Bldg. Owners & Managers v. Ingram, 39 N.C. App. 688, 251 S.E.2d 910, cert. denied, 297 N.C. 299, 254 S.E.2d 925 (1979).

**Building Code Given Force of Law.** — The 1936 North Carolina Building Code had the force of law. In re O'Neal, 243 N.C. 714, 92 S.E.2d 189 (1956); Lindstrom v. Chesnutt, 15 N.C. App. 15, 189 S.E.2d 749, cert. denied, 281 N.C. 757, 191 S.E.2d 361 (1972).

By virtue of subsection (f) of this section, on July 13, 1957, the North Carolina Building Code of 1953 had the force of law. Drum v. Bisaner, 252 N.C. 305, 113 S.E.2d 560 (1960).

**Acts Shifting Responsibility for Enforcement of Code Unconstitutional.** — Inspections pursuant to the State Building Code affect health and sanitation, thus, acts that altered the legislative directive of G.S. 160A-411, that the city shall determine who will perform the inspections under the Code, were local legislation that shifted responsibility for enforcement of laws affecting the health of the public and were barred under Art. II, § 24 of the Constitution. City of New Bern v. New Bern-Craven County Bd. of Educ., 338 N.C. 430, 450 S.E.2d 735 (1994).

**Building Code Council's Obligations Are Specifically Imposed by the Legislature.** — The legislature has specifically imposed on the Building Code Council the obligation to prepare, adopt and amend the Code and to interpret its provisions on appeal from enforcement agencies. In re Medical Ctr., 91 N.C. App. 107, 370 S.E.2d 597 (1988).

**Adoption of State Building Code Not a Waiver of Sovereign Immunity.** — Adoption of the State Building Code did not act as a waiver of a county's sovereign immunity in regards to a suit for negligent building inspections. Norton v. SMC Bldg., 156 N.C. App. 564, 577 S.E.2d 310, 2003 N.C. App. LEXIS 206 (2003).

**Applicability of Building Code to Altered Buildings.** — Under rules and regulations of the Building Code Council, the Code applies to the design and construction of buildings that are altered. Olympic Prods. Co. v. Roof Sys., 88 N.C. App. 315, 363 S.E.2d 367, cert. denied, 321 N.C. 744, 366 S.E.2d 862, 366 S.E.2d 863 (1988).

**The Supreme Court will take judicial notice of the Building Code** adopted, promulgated and published by the Building Code Council. Lutz Indus., Inc. v. Dixie Home Stores, 242 N.C. 332, 88 S.E.2d 333 (1955).

**Liability for Building Code Violations.** — The Building Code imposes liability on any person who constructs, supervises the construction of, or designs a building or an alteration thereto, and violates the Code such that the violation proximately causes injury or damage. In addition, if a building owner knows or has reason to know of a Code violation and fails to take reasonable steps to remedy the violation, he may be found liable if the violation proximately causes injury or damage. Olympic Prods. Co. v. Roof Sys., 88 N.C. App. 315, 363 S.E.2d 367, cert. denied, 321 N.C. 744, 366 S.E.2d 862, 366 S.E.2d 863 (1988).

**A violation of the Building Code is negligence per se.** Lindstrom v. Chesnutt, 15 N.C. App. 15, 189 S.E.2d 749, cert. denied, 281 N.C. 757, 191 S.E.2d 361 (1972).

**But Plaintiffs Must Be Within the Class Intended to Be Protected.** — Section 143-138(b) was intended for the protection of the occupants of the building or structure, its neighbors, and members of the public at large; where house was never finished and certified for occupancy, and plaintiffs did not assert that they were damaged as members of the general public, the plaintiffs could not benefit from negligence per se for a violation of this statute. Lassiter v. Cecil, 145 N.C. App. 679, 551 S.E.2d 220, 2001 N.C. App. LEXIS 729 (2001), cert. denied, 354 N.C. 363, 556 S.E.2d 302 (2001).

**Compliance with Code Standards as Evidence in Negligence Action.** — Whether or not building met the standards of the Building Code, though not determinative of the issue of negligence, had some probative value as to whether or not defendant failed to keep his store in a reasonably safe condition, and expert testimony on this issue could properly be introduced in a negligence action against store owner. Thomas v. Dixson, 88 N.C. App. 337, 363 S.E.2d 209 (1988).

**This section does not allow the building inspector to permit violations of the Building Code where the Code is specific** as to the materials or type of construction required. Lindstrom v. Chesnutt, 15 N.C. App. 15, 189 S.E.2d 749, cert. denied, 281 N.C. 757, 191 S.E.2d 361 (1972).

**As to use of National Electrical Code as statutory standard of care,** see Lutz Indus., Inc. v. Dixie Home Stores, 242 N.C. 332, 88 S.E.2d 333 (1955); Ward v. Thompson Heights Swimming Club, Inc., 27 N.C. App. 218, 219 S.E.2d 73 (1975).

**National Electrical Code Given Force of Law.** — On November 10, 1959, the National Electrical Code, as approved by the American Standards Association on August 5, 1959, which Code is filed in the office of the Secretary of State of North Carolina, by virtue of this section has the force and effect of law in North Carolina. Jenkins v. Leftwich Elec. Co., 254 N.C. 553, 119 S.E.2d 767 (1961).

The National Electrical Code, as approved and adopted by the State Building Code Council and on file with the Secretary of State, has the force and effect of law. Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972).

**And Criminal Sanctions Are Provided for Its Violation.** — The National Electrical Code has the force and effect of law and criminal sanctions are provided for its violation. Ward v. Thompson Heights Swimming Club, Inc., 27 N.C. App. 218, 219 S.E.2d 73 (1975).

**Violations of the National Electrical Code are negligence per se.** Jenkins v. Leftwich Elec. Co., 254 N.C. 553, 119 S.E.2d 767 (1961); Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972); Ward v. Thompson Heights Swimming Club, Inc., 27 N.C. App. 218, 219 S.E.2d 73 (1975).

Since article 300, sections 3008-3009, of the National Electrical Code has the force and effect of a statute, the failure to use a box or terminal fitting or bushing where the conductors left the electrical metal tubing on a kitchen exhaust fan was negligence per se. Drum v. Bisaner, 252 N.C. 305, 113 S.E.2d 560 (1960).

**Application of National Electrical Code Not Restricted to Fixtures to Real Property.** — The State Building Code does not restrict the application of the National Electrical Code to fixtures to real property. Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972).

**Neither the State Building Code nor the National Electrical Code precisely defines the class of persons** to which they are applicable. Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972).

**Grounding Provisions of National Electrical Code Held Applicable.** — The provisions of the National Electrical Code relating to equipment grounding were held applicable to the owner of an outdoor ice merchandiser installed to sell ice to the public. Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972).

**Imposition of More Stringent Requirements on Existing Buildings Meeting Prior Requirements Not Contemplated.** — There is in subsection (b) of this section no clearly expressed grant of power from the legislature to the Building Code Council to amend the State Building Code so as to impose new and more stringent requirements upon existing buildings which, prior to such amendment, fully complied with the Code and which are neither being altered or changed in use. Further, there is nothing in the wording of the statute evidencing a legislative intent that the grant of such a drastic power should be implied. Carolinas-Virginias Ass'n of Bldg. Owners & Managers v. Ingram, 39 N.C. App. 688, 251 S.E.2d 910, cert. denied, 297 N.C. 299, 254 S.E.2d 925 (1979).

**City Ordinance Requiring Sprinkler Systems.** — An interpretation of G.S. 160A-174 to allow a city ordinance requiring sprinkler systems, thus empowering a city to ignore explicit statewide legislative enactments, would, in effect, permit a city to amend the North Carolina Building Code by the simple expedient of codifying a contested ordinance as a part of its Fire Prevention Code, and thereby to evade the clear requirements of subsection (e) of this section. Greene v. City of Winston-Salem, 287 N.C. 66, 213 S.E.2d 231 (1975).

**Emergency Generator Power.** — For case upholding decision of the superior court which held that § 506.13(a)(1) of the North Carolina State Building Code did not require medical center's proposed Class III high-rise building to be provided with emergency generator power for fans that vented smoke in some areas of the building in addition to elevator shafts, stairways, and areas of refuge, see In re Appeal of Medical Center, 82 N.C. App. 414, 346 S.E.2d 193 (1986).

**Applied** in Swaney v. Peden Steel Co., 259 N.C. 531, 131 S.E.2d 601 (1963); Ponder v. Joslin, 262 N.C. 496, 138 S.E.2d 143 (1964).

**Cited** in Collingswood v. General Elec. Real Estate Equities, Inc., 324 N.C. 63, 376 S.E.2d 425 (1989); Lynn v. Overlook Dev., 328 N.C. 689, 403 S.E.2d 469 (1991); City of New Bern v. New Bern-Craven County Bd. of Educ., 113 N.C. App. 98, 437 S.E.2d 655 (1993); Angel v. Truitt, 108 N.C. App. 679, 424 S.E.2d 660 (1993); Petty v. Owen, 140 N.C. App. 494, 537 S.E.2d 216 (2000).

### OPINIONS OF ATTORNEY GENERAL

**Variations of the State Building Code by a municipality cannot become effective unless and until officially approved** by the State Building Code Council. See opinion of Attorney General to Mr. F.E. Wallace, Jr., Kinston City Attorney, 40 N.C.A.G. 458 (1969).

**Unattended Gasoline Pumps Are Not Within Regulation of State Building Code.** — See opinion of Attorney General to Mr. Thomas B. Griffin, 41 N.C.A.G. 282 (1971).

**County regulations requiring that carbon monoxide alarms be installed in new and existing residential dwelling units,** as well as other structures, were likely contrary to subsection (e) and unenforceable to the extent they applied to new construction; however, the regulations could be cured by making them applicable only to existing buildings. See opinion of Attorney General to Grover L. Sawyer, P.E., Deputy Commissioner, Department of Insurance, 2001 N.C. AG LEXIS 3 (2/5/2001).

## § 143-138.1. Introduction and instruction of the North Carolina Building Code.

Prior to the effective date of Code changes pursuant to G.S. 143-138, the State Building Code Council and Department of Insurance shall provide for instructional classes for the various trades affected by the Code. The Department of Insurance shall develop the curriculum for each class but shall consult the affected licensing boards and trade organizations. The curriculum shall include explanations of the rationale and need for each Code amendment or revision. Classes may also be conducted by, on behalf of, or in cooperation with licensing boards, trade associations, and professional societies. The Department of Insurance may charge fees sufficient to recover the costs it incurs under this section. The Council shall ensure that courses are accessible to persons throughout the State. (1997-26, s. 6.)

**Legal Periodicals.** — For 1997 legislative survey, see 20 Campbell L. Rev. 413.

## § 143-139. Enforcement of Building Code.

(a) Procedural Requirements. — Subject to the provisions set forth herein, the Building Code Council shall adopt such procedural requirements in the North Carolina State Building Code as shall appear reasonably necessary for adequate enforcement of the Code while safeguarding the rights of persons subject to the Code.

(b) General Building Regulations. — The Insurance Commissioner shall have general supervision, through the Division of Engineering of the Department of Insurance, of the administration and enforcement of all sections of the North Carolina State Building Code pertaining to plumbing, electrical systems, general building restrictions and regulations, heating and air conditioning, fire protection, and the construction of buildings generally, except those sections of the Code, the enforcement of which is specifically allocated to other agencies by subsections (c) through (e) below. The Insurance Commissioner, by means of the Division of Engineering, shall exercise his duties in the enforcement of the North Carolina State Building Code (including local building codes which have superseded the State Building Code in a particular political subdivision pursuant to G.S. 143-138(e)) in cooperation with local officials and local inspectors duly appointed by the governing body of any municipality or board of county commissioners pursuant to Part 5 of Article 19 of Chapter 160A of the General Statutes or Part 4 of Article 18 of Chapter 153A of the General Statutes, or any other applicable statutory authority.

(b1) Remedies. — In case any building or structure is maintained, erected, constructed, or reconstructed or its purpose altered, so that it becomes in violation of this Article or of the North Carolina State Building Code, either the local enforcement officer or the State Commissioner of Insurance or other State official with responsibility under this section may, in addition to other remedies, institute any appropriate action or proceeding to: (i) prevent the unlawful maintenance, erection, construction, or reconstruction or alteration of purpose, or overcrowding, (ii) restrain, correct, or abate the violation, or (iii) prevent the occupancy or use of the building, structure, or land until the violation is corrected. In addition to the civil remedies set out in G.S. 160A-175 and G.S. 153A-123, a county, city, or other political subdivision authorized to enforce the North Carolina State Building Code within its jurisdiction may, for the purposes stated in (i) through (iii) of this subsection, levy a civil penalty for violation of the fire prevention code of the North Carolina State Building Code, which penalty may be recovered in a civil action in the nature of debt if the offender does not pay the penalty within a prescribed period of time after the offender has been cited for the violation. If the Commissioner or other State official institutes an action or proceeding under this section, a county, city, or other political subdivision may not institute a civil action under this section based upon the same violation. Appeals from the imposition of any remedy set forth herein, including the imposition of a civil penalty by a county, city, or other political subdivision, shall be as provided in G.S. 160A-434.

(c) Boilers. — The Bureau of Boiler Inspection of the Department of Labor shall have general supervision of the administration and enforcement of those sections of the North Carolina State Building Code which pertain to boilers of the types enumerated in Article 7 of Chapter 95 of the General Statutes.

(d) Elevators. — The Department of Labor shall have general supervision of the administration and enforcement of those sections of the North Carolina State Building Code which pertain to elevators, moving stairways, and amusement devices such as merry-go-rounds, roller coasters, Ferris wheels, etc.

(e) State Buildings. — With respect to State buildings, the Department of Administration shall have general supervision, through the Office of State Construction, of the administration and enforcement of all sections of the North Carolina State Building Code pertaining to plumbing, electrical systems, general building restrictions and regulations, heating and air conditioning, fire protection, and the construction of buildings generally, except those sections of the Code the enforcement of which is specifically allocated to other agencies by subsections (c) and (d) of this section, and shall also exercise all remedies as provided in subsection (b1) of this section. The Department of Administration shall be the only agency with the authority to seek remedies pursuant to this section with respect to State buildings. Except as provided herein, nothing in this subsection shall be construed to abrogate the authority of the Commissioner of Insurance under G.S. 58-31-40 or any other provision of law. (1957, c. 1138; 1963, c. 811; 1989, c. 681, s. 11; 1993, c. 329, s. 2; 2009-474, ss. 3, 4.)

**Editor's Note.** — Article 7 of Chapter 95, referred to in this section, was repealed by Session Laws 1981 (Regular Session, 1982), c. 1187, s. 1.

**Effect of Amendments.** — Session Laws 2009-474, ss. 3 and 4, effective October 1, 2009, in subsection (b), substituted "(c) through (e)" for "(c) and (d)"; and added subsection (e).

## CASE NOTES

**Legislative Intent.** — The legislative intention to create a complete and integrated regulatory scheme is evidenced by the language of subsection (b) of this section, which delegates to the Commissioner of Insurance the responsibility of administering and enforcing the provisions of the North Carolina Building Code. Greene v. City of Winston-Salem, 287 N.C. 66, 213 S.E.2d 231 (1975).

**Cited** in Carolinas-Virginias Ass'n of Bldg. Owners & Managers v. Ingram, 39 N.C. App. 688, 251 S.E.2d 910 (1979).

OPINIONS OF ATTORNEY GENERAL

**This section is applicable to purchasers of electrical equipment.** See opinion of Attorney General to The Honorable Constance K. Wilson Representative 57th District, 1998 N.C.A.G. 57 (12/22/98).

## § 143-139.1. Certification of manufactured buildings, structures or components by recognized independent testing laboratory; minimum standards for modular homes.

(a) Certification. — The State Building Code may provide, in circumstances deemed appropriate by the Building Code Council, for testing, evaluation, inspection, and certification of buildings, structures or components manufactured off the site on which they are to be erected, by a recognized independent testing laboratory having follow-up inspection services approved by the Building Code Council. Approval of such buildings, structures or components shall be evidenced by labels or seals acceptable to the Council. All building units, structures or components bearing such labels or seals shall be deemed to meet the requirements of the State Building Code and this Article without further inspection or payment of fees, except as may be required for the enforcement of the Code relative to the connection of units and components and enforcement of local ordinances governing zoning, utility connections, and foundations permits. The Building Code Council shall adopt and may amend from time to time such reasonable and appropriate rules and regulations as it deems necessary for approval of agencies offering such testing, evaluation, inspection, and certification services and for overseeing their operations. Such rules and regulations shall include provisions to insure that such agencies are independent and free of any potential conflicts of interest which might influence their judgment in exercising their functions under the Code. Such rules and regulations may include a schedule of reasonable fees to cover administrative expenses in approving and overseeing operations of such agencies and may require the posting of a bond or other security satisfactory to the Council guaranteeing faithful performance of duties under the Code.

The Building Code Council may also adopt rules to insure that any person that is not licensed, in accordance with G.S. 87-1, and that undertakes to erect a North Carolina labeled manufactured modular building, meets the manufacturer's installation instructions and applicable provisions of the State Building Code. Any such person, before securing a permit to erect a modular building, shall provide the code enforcement official proof that he has in force for each modular building to be erected a $5,000 surety bond insuring compliance with the regulations of the State Building Code governing installation of modular buildings.

(b) Minimum Standards for Modular Homes. — To qualify for a label or seal under subsection (a) of this section, a single-family modular home must meet or exceed the following construction and design standards:

(1) Roof pitch. — For homes with a single predominant roofline, the pitch of the roof shall be no less than five feet rise for every 12 feet of run.

(2) Eave projection. — The eave projections of the roof shall be no less than 10 inches, which may not include a gutter around the perimeter of the home, unless the roof pitch is 8/12 or greater.

(3) Exterior wall. — The minimum height of the exterior wall shall be at least seven feet six inches for the first story.

(4) Siding and roofing materials. — The materials and texture for the exterior materials shall be compatible in composition, appearance, and durability to the exterior materials commonly used in standard residential construction.

(5) Foundations. — The home shall be designed to require foundation supports around the perimeter. The supports may be in the form of piers, pier and curtain wall, piling foundations, a perimeter wall, or other approved perimeter supports. (1971, c. 1099; 1989, c. 653, s. 2; 2003-400, s. 17.)

### CASE NOTES

**Construction with Other Law.** — This section and G.S. 87-1, when read together, evidence an intent to exempt a general contractor who erects modular buildings from having a license if the surety bond requirement is met. Petty v. Owen, 140 N.C. App. 494, 537 S.E.2d 216 (2000).

**This section was found to apply to a modular builder who was not licensed as a general contractor** and who erected plaintiffs's modular home was responsible for constructing a basement, attaching a garage, installing hardwood flooring, an HVAC system, and a septic system at a total cost exceeding $ 30,000. Petty v. Owen, 140 N.C. App. 494, 537 S.E.2d 216 (2000).

## § 143-139.2. Enforcement of insulation requirements; certificate for occupancy; no electric service without compliance.

(a) In addition to other enforcement provisions set forth in this Chapter, no single family or multi-unit residential building on which construction is begun in North Carolina on or after January 1, 1978, shall be occupied until it has been certified as being in compliance with the minimum insulation standards for residential construction, as prescribed in the North Carolina State Building Code or as approved by the Building Code Council as provided in G.S. 143-138(e).

(b) No public supplier of electric service, including regulated public utilities, municipal electric service and electric membership corporations, shall connect for electric service to an occupant any residential building on which construction is begun on or after January 1, 1978, unless said building complies with the insulation requirements of the North Carolina State Building Code or of local building codes approved by the Building Codes Council as provided in G.S. 143-138(e), and has been certified for occupancy in compliance with the minimum insulation standards of the North Carolina State Building Code or of any local modification approved as provided in G.S. 143-138(e), by a person designated as an inspector pursuant to subsection (a) of this section.

(c) This section shall apply only in any county or city that elects to enforce the insulation and energy utilization standards of the State Building Code pursuant to G.S. 143-151.27. (1977, c. 792, s. 7; 1983, c. 377, s. 1.)

## § 143-139.3. Inspection of liquified petroleum gas piping systems for residential structures.

If the test required under the North Carolina State Building Code for a liquified petroleum gas piping system serving a one or two-family residential dwelling is not performed by a qualified code enforcement official, as defined in G.S. 143-151.8(a)(5), the contractor who installed the system shall verify that the system complies with the test requirements and shall certify the results, in writing, to the code official. (1993, c. 356, s. 3.)

## § 143-140. Hearings before enforcement agencies as to questions under Building Code.

Any person desiring to raise any question under this Article or under the North Carolina State Building Code shall be entitled to a technical interpretation from the appropriate enforcement agency, as designated in the preceding section. Upon request in writing by any such person, the enforcement agency through an appropriate official shall within a reasonable time provide a written interpretation, setting forth the facts found, the decision reached, and the reasons therefor. In the event of dissatisfaction with such decision, the person affected shall have the options of:

(1) Appealing to the Building Code Council or

(2) Appealing directly to the Superior Court, as provided in G.S. 143-141. (1957, c. 1138; 1989, c. 681, s. 4.)

CASE NOTES

**Cited** in In re Appeal of Medical Center, 82 N.C. App. 414, 346 S.E.2d 193 (1986).

## § 143-140.1. Appeals of alternative design construction and methods.

Alternative designs and construction shall follow the State Building Code. In the event of a dispute between a local authority having jurisdiction and the designer or owner-representative regarding alternative designs and construction, and notwithstanding any other section within this Article, appeals by the designer or owner-representative on matters pertaining to alternative design construction or methods shall be heard by the Department of Insurance Engineering Division. The Department of Insurance Engineering Division shall issue its decision regarding an appeal filed under this section within 10 business days. The Commissioner of Insurance shall adopt rules in furtherance of this section. (2007-507, s. 18.)

**Editor's Note.** — Session Laws 2007-507, s. 19, made this section effective August 30, 2007, and applicable to matters pending before the Commissioner of Insurance or the Department of Insurance, on or after that date.

## § 143-141. Appeals to Building Code Council.

(a) Method of Appeal. — Whenever any person desires to take an appeal to the Building Code Council from the decision of a State enforcement agency relating to any matter under this Article or under the North Carolina State Building Code, he shall within 30 days after such decision give written notice to the Building Code Council through the Division of Engineering of the Department of Insurance that he desires to take an appeal. A copy of such notice shall be filed at the same time with the enforcement agency from which the appeal is taken. The chairman of the Building Code Council shall fix a reasonable time and place for a hearing, giving reasonable notice to the appellant and to the enforcement agency. Such hearing shall be not later than the next regular meeting of the Council. The Building Code Council shall thereupon conduct a full and complete hearing as to the matters in controversy, after which it shall within a reasonable time give a written decision setting forth its findings of fact and its conclusions.

(b) Interpretations of the Code. — The Building Code Council shall have the duty, in hearing appeals, to give interpretations of such provisions of the Building Code as shall be pertinent to the matter at issue. Where the Council finds that an enforcement agency was in error in its interpretation of the Code, it shall remand the case to the agency with instructions to take such action as it directs. Interpretations by the Council and local enforcement officials shall be based on a reasonable construction of the Code provisions.

(c) Variations of the Code. — Where the Building Code Council finds on appeal that materials or methods of construction proposed to be used are as good as those required by the Code, it shall remand the case to the enforcement agency with instructions to permit the use of such materials or methods of construction. The Council shall thereupon immediately initiate procedures for amending the Code as necessary to permit the use of such materials or methods of construction.

(d) Further Appeals to the Courts. — Whenever any person desires to take an appeal from a decision of the Building Code Council or from the decision of an enforcement agency (with or without an appeal to the Building Code Council), he may take an appeal either to the Wake County Superior Court or to the superior court of the county in which the proposed building is to be situated, in accordance with the provisions of Chapter 150B of the General Statutes. (1957, c. 1138; 1973, c. 1331, s. 3; 1987, c. 827, s. 1; 1997-26, s. 7.)

**Legal Periodicals.** — For 1997 legislative survey, see 20 Campbell L. Rev. 413.

CASE NOTES

**Building Code Council's Obligations Are Specifically Imposed by the Legislature.** — The legislature has specifically imposed on the Building Code Council the obligation to prepare, adopt and amend the Code and to interpret its provisions on appeal from enforcement agencies. In re Medical Ctr., 91 N.C. App. 107, 370 S.E.2d 597 (1988).

**Cited** in In re Appeal of Medical Center, 82 N.C. App. 414, 346 S.E.2d 193 (1986).

## § 143-142. Further duties of the Building Code Council.

(a) Recommended Statutory Changes. — It shall be the duty of the Building Code Council to make a thorough study of the building laws of the State, including both the statutes enacted by the General Assembly and the rules and regulations adopted by State and local agencies. On the basis of such study, the Council shall recommend to the 1959 and subsequent General Assemblies desirable statutory changes to simplify and improve such laws.

(b) Recommend Changes in Enforcement Procedures. — It shall be the duty of the Building Code Council to make a thorough and continuing study of the manner in which the building laws of the State are enforced by State, local, and private agencies. On the basis of such studies, the Council may recommend to the General Assembly any statutory changes necessary to improve and simplify the enforcement machinery. The Council may also advise State agencies as to any changes in administrative practices which could be made to improve the enforcement of building laws without statutory changes. (1957, c. 1138.)

## § 143-143. Effect on certain existing laws.

Nothing in this Article shall be construed as abrogating or otherwise affecting the power of any State department or agency to promulgate regulations, make inspections, or approve plans in accordance with any other applicable provisions of law not in conflict with the provisions herein. (1957, c. 1138.)

**§ 143-143.1:** Repealed by Session Laws 1971, c. 882, s. 1.

## § 143-143.2. Electric wiring of houses, buildings, and structures.

The electric wiring of houses or buildings for lighting or for other purposes shall conform to the requirements of the State Building Code, which includes the National Electric Code and any amendments and supplements thereto as adopted and approved by the State Building Code Council, and any other applicable State and local laws. In order to protect the property of citizens from the dangers incident to defective electric wiring of buildings, it shall be unlawful for any firm or corporation to allow any electric current for use in any newly erected building to be turned on without first having had an inspection made of the wiring by the appropriate official electrical inspector or inspection department and having received from that inspector or department a certificate approving the wiring of such building. It shall be unlawful for any person, firm, or corporation engaged in the business of selling electricity to furnish initially any electric current for use in any building, unless said building shall have first been inspected by the appropriate official electrical inspector or inspection department and a certificate given as above provided. In the event that there is no legally appointed inspector or inspection department with jurisdiction over the property involved, the two preceding sentences shall have no force or effect. As used in this section, "building" includes any structure. (1905, c. 506, s. 23; Rev., s. 3001; C.S., s. 2763; 1969, c. 1229, s. 7; 1989, c. 681, s. 20.)

## § 143-143.3. Temporary toilet facilities at construction sites.

(a) Suitable toilet facilities shall be provided and maintained in a sanitary condition during construction. An adequate number of facilities must be provided for the number of employees at the construction site. There shall be at least one facility for every two contiguous construction sites. Such facilities may be portable, enclosed, chemically treated, tank-tight units. Portable toilets shall be enclosed, screened, and weatherproofed with internal latches. Temporary toilet facilities need not be provided on-site for crews on a job site for no more than one working day and having transportation readily available to nearby toilet facilities.

(b) It shall be the duty of the Building Code Council to establish standards to carry out the provisions of subsection (a) of this section not inconsistent with the requirements for toilet facilities at construction sites established pursuant to federal occupational safety and health rules. (1993, c. 528, s. 1.)

## § 143-143.4. Door lock exemption for certain businesses.

(a) Notwithstanding this Article or any other law to the contrary, any business entity licensed to sell automatic weapons as a federal firearms dealer that is in the business of selling firearms or ammunition and that operates a firing range which rents firearms and sells ammunition shall be exempt from the door lock requirements of Chapter 10 of Volume 1 of the North Carolina State Building Code when issued a permit to that effect by the Department of Insurance in accordance with this section.

(b) The Department of Insurance shall issue a permit to a business entity specified in subsection (a) of this section for an exemption from the door lock requirements of Chapter 10 of Volume 1 of the North Carolina State Building Code if all of the following conditions are met:

(1) The building or facility in which business is conducted has a sales floor and customer occupancy space that is contained on one floor and is no

larger than 15,000 square feet of retail sales space. Retail sales space is that area where firearms or ammunition are displayed and merchandised for sale to the public.

(2) The building or facility in which business is conducted is equipped with an approved smoke, fire, and break-in alarm system installed and operated in accordance with rules adopted by the Department of Insurance. An approved smoke, fire, or break-in alarm system does not have to include an automatic door unlocking mechanism triggered when the smoke, fire, or break-in alarm system is triggered.

(3) The owner or operator of the business will provide to all applicable employees within 10 days of the issuance of the permit under this section or at the time the employee is hired, whichever time is later, a written facility locking plan applicable for the close of business each day.

(4) Each entrance to the building or facility in which business is conducted is posted with a sign conspicuously located that warns that the building is exempt from the door lock requirements of the State Building Code, and that after business hours the building or facility's doors will remain locked from the inside even in the case of fire.

(5) Payment of a permit fee of five hundred dollars ($500.00) to the Department of Insurance.

(c) The Department of Insurance shall file a copy of the permit issued in accordance with subsection (b) of this section with all local law enforcement and fire protection agencies that provide protection for the business entity.

(d) The Department of Insurance shall be responsible for any inspections necessary for the issuance of permits under this section and, in conjunction with local inspection departments, shall be responsible for periodic inspections to ensure compliance with the requirements of this section. The Department of Insurance may contract with local inspection departments to conduct inspections under this subsection.

(e) The Department of Insurance shall revoke a permit issued under this section upon a finding that the requirements for the original issuance of the permit are not being complied with.

(f) Appeals of decisions of the Department of Insurance regarding the issuance or revocation of permits under this section shall be in accordance with Chapter 150B of the General Statutes.

(g) For the purposes of this section, "business entity" has the same meaning as in G.S. 59-102.

(h) In addition to the provisions of G.S. 143-138(h), the owner or operator of any business entity who is issued a permit as a door lock exempt business in accordance with subsection (b) of this section who fails to comply with the permit requirements of subsection (b) of this section shall be subject to a civil penalty of five hundred dollars ($500.00) for the first offense, one thousand dollars ($1,000) for the second offense, and five thousand dollars ($5,000) for the third and subsequent offenses, except when the building or facility in which business is conducted is in compliance with the door lock requirements of Chapter 10 of Volume 1 of the North Carolina State Building Code. Penalties authorized in this subsection shall be imposed by the city or county in which the violation occurs. Each day the building or facility in which business is conducted is not in compliance with the provisions of this subsection constitutes a separate offense.

(i) The Department of Insurance shall adopt rules to implement this section. (2001-324, s. 1.)

### § 143-143.5. Access to toilets in shopping malls.

Notwithstanding any other law or rule, a horizontal travel distance of 300 feet for access to public use toilets in covered mall buildings shall be allowed. (2004-199, s. 37(a); 2005-289, s. 2.)

**§ 143-143.6:** Expired pursuant to Session Laws 2007-82, s. 2, effective July 1, 2009.

**Editor's Note.** — Session Laws 2007-82, s. 2, provided that the provisions of this section would expire on July 1, 2009.

**§ 143-143.7:** Reserved for future codification purposes.

## ARTICLE 9A.

## *North Carolina Manufactured Housing Board — Manufactured Home Warranties.*

## Part 1. Duties, Warranties, Purchase Transaction.

### § 143-143.8. Purpose.

The General Assembly finds that manufactured homes have become a primary housing resource for many of the citizens of North Carolina. The General Assembly finds further that it is the responsibility of the manufactured home industry to provide homes which are of reasonable quality and safety and to offer warranties to buyers that provide a means of remedying quality and safety defects in manufactured homes. The General Assembly also finds that it is in the public interest to provide a means for enforcing such warranties.

Consistent with these findings and with the legislative intent to promote the general welfare and safety of manufactured home residents in North Carolina, the General Assembly finds that the most efficient and economical way to assure safety, quality and responsibility is to require the licensing and bonding of all segments of the manufactured home industry. The General Assembly also finds that it is reasonable and proper for the manufactured home industry to cooperate with the Commissioner of Insurance, through the establishment of the North Carolina Manufactured Housing Board, to provide for a comprehensive framework for industry regulations. (1981, c. 952, s. 2; 1999-393, s. 1; 2005-451, s. 1.)

**Editor's Note.** — Session Laws 1987, c. 429, s. 1, effective June 19, 1987, redesignated G.S. 143-143.8 through 143-143.24, which had been headed "Article 9A, Manufactured Housing and Mobile Homes, Part I, North Carolina Manufactured Housing Board," as "Article 9A, North Carolina Manufactured Housing Board—Manufactured Home Warranties."

Session Laws 1999-393, s. 5, provides that structures built before the effective date of the Act shall not be affected by any changes made in this Article.

Session Laws 2005-451, s. 1, provides: "G.S. 143-143.8 through G.S. 143-143.25 of Article 9A of Chapter 143 of the General Statutes are redesignated as Part 1 of Article 9A of Chapter 143 of the General Statutes to be entitled 'Part 1. Duties, Warranties, Purchase Transaction.'. The Revisor of Statutes is authorized to make changes in the newly designated Part 1 that will reflect the results of the recodification."

**Legal Periodicals.** — For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

## § 143-143.9. Definitions.

The following definitions apply in this Part:

(1) Bank. — A federally insured financial institution including institutions defined under G.S. 53-1(1), savings and loan associations, credit unions, savings banks and other financial institutions chartered under this or any other state law or chartered under federal law.

(1a) Board. — The North Carolina Manufactured Housing Board.

(2) Buyer. — A person for whom a dealer performs, or is engaged to perform, any services or provides any products including the purchase and setup of a manufactured home for use as a residence or other related use.

(3) Code. — Engineering standards adopted by the Commissioner.

(4) Commissioner. — The Commissioner of Insurance of the State of North Carolina.

(5) Department. — The Department of Insurance of the State of North Carolina.

(5a) Deposit. — Any and all funds received by a dealer from a buyer or someone on behalf of a buyer for the performance of services or the provision of goods.

(5b) Escrow or trust account. — An account with a bank that is designated as an escrow account or as a trust account and that is maintained by a dealer for the deposit of buyers' funds.

(5c) Escrow or trust account funds. — Funds belonging to a person other than the dealer that are received by or placed under the control of the dealer in connection with the performance of services or the provision of products by a dealer for a buyer.

(5d) Funds. — Any form of money, including cash, payment instruments such as checks, money orders, or sales drafts, and receipts from electronic fund transfers. The term does not include letters of credit or promissory notes.

(5e) License. — A license issued under this Part.

(5f) Licensee. — A person who has been issued a license under this Part by the North Carolina Manufactured Housing Board.

(6) Manufactured home. — A structure, transportable in one or more sections, which, in the traveling mode, is eight feet or more in width or is 40 feet or more in length, or when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning and electrical systems contained therein.

(7) Manufactured home dealer or dealer. — Any person engaged in the business of buying or selling manufactured homes or offering or displaying manufactured homes for sale in North Carolina. Any person who buys or sells three or more manufactured homes in any 12-month period, or who offers or displays for sale three or more manufactured homes in any 12-month period shall be presumed to be a manufactured home dealer. The terms "selling" and "sale" include lease-purchase transactions. The term "manufactured home dealer" does not include banks and finance companies that acquire manufactured homes as an incident to their regular business.

(8) Manufactured home manufacturer or manufacturer. — Any person, resident or nonresident, who manufactures or assembles manufactured homes for sale to dealers in North Carolina.

(9) Manufactured home salesperson or salesperson. — Any person employed by a manufactured home dealer to sell manufactured homes to

buyers. Manufactured home salesperson or salesperson also includes sales managers, lot managers, general managers, or others who manage or supervise salespersons.

(10) Person. — Any individual, natural persons, firm, partnership, association, corporation, legal representative or other recognized legal entity.

(11) Responsible party. — A manufacturer, dealer, supplier, or set-up contractor.

(12) Setup. — The operations performed at the occupancy site which render a manufactured home fit for habitation.

(13) Set-up contractor. — A person who engages in the business of performing setups for compensation in North Carolina.

(14) Substantial defect. — Any substantial deficiency in or damage to materials or workmanship occurring in a manufactured home which has been reasonably maintained and cared for in normal use. The term also means any structural element, utility system or component part of the manufactured home which fails to comply with the Code.

(15) Supplier. — The original producer of completed components, including refrigerators, stoves, hot water heaters, dishwashers, cabinets, air conditioners, heating units, and similar components, and materials such as floor coverings, paneling, siding, trusses, and similar materials, which are furnished to a manufacturer or dealer for installation in the manufactured home prior to sale to a buyer. (1981, c. 952, s. 2; 1987, c. 429, ss. 4, 5, 19; 1999-393, s. 1; 2001-421, s. 2.1.; 2005-451, ss. 1, 2.)

### CASE NOTES

**Standing to Bring Action as "Buyer."** — Daughter had standing to maintain an unfair and deceptive trade practices claim under G.S. 75-16, 143-143.12(c), and 143-143.9(2) against a manufacturer as: (1) her father bought her a defective mobile home, (2) she was the person who selected the interior details for the home, who planned to live in the home, and who was going to make the monthly installment payments, (3) she was a consumer of the mobile home supplied by a manufacturer, and (4) when the manufacturer supplied a defective home, the daughter suffered a resulting injury. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393, 2007 N.C. LEXIS 1232 (2007).

## § 143-143.10. Manufactured Housing Board created; membership; terms; meetings.

(a) There is created the North Carolina Manufactured Housing Board within the Department. The Board shall be composed of 11 members as follows:

(1) The Commissioner of Insurance or the Commissioner's designee.
(2) A manufactured home manufacturer.
(3) A manufactured home dealer.
(4) A representative of the banking and finance industry.
(5) A representative of the insurance industry.
(6) A manufactured home supplier.
(7) A set-up contractor.
(8) Two representatives of the general public.
(9) A person who is employed with a HUD-approved housing counseling agency in the State.
(10) An accountant.

The Commissioner or the Commissioner's designee shall chair the Board. The Governor shall appoint to the Board the manufactured home manufacturer and the manufactured home dealer. The General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121 shall appoint to the Board the representative of the banking and finance industry, the employee of a HUD-approved housing counseling agency, and the representative of the insurance industry. The General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121 shall appoint to the Board the manufactured home supplier, the accountant, and the set-up contractor. The Commissioner shall appoint two representatives of the general public. Except for the representatives from the general public and the persons appointed by the General Assembly, each member of the Board shall be appointed by the appropriate appointing authority from a list of nominees submitted to the appropriate appointing authority by the Board of Directors of the North Carolina Manufactured Housing Institute. At least three nominations shall be submitted for each position on the Board. The members of the Board shall be residents of the State.

The members of the Board shall serve for terms of three years. In the event of any vacancy of a position appointed by the Governor or Commissioner, the appropriate appointing authority shall appoint a replacement in the same manner as provided for the original appointment to serve the remainder of the unexpired term. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. In the event of any vacancy, the appropriate appointing authority shall appoint a replacement to serve the remainder of the unexpired term. Such appointment shall be made in the same manner as provided for the original appointment. No member of the Board shall serve more than two consecutive, three-year terms.

The members of the Board designated in subdivisions (8), (9), and (10) of this subsection shall have no current or previous financial interest connected with the manufactured housing industry. No member of the Board shall participate in any proceeding before the Board involving that member's own business.

Each member of the Board, except the Commissioner and any other State employee, shall receive per diem and allowances as provided with respect to occupational licensing boards by G.S. 93B-5. All per diem and travel expenses shall be paid exclusively out of the fees received by the Board as authorized by this Part. In no case shall any salary, expense, or other obligation of the Board be charged against the General Fund of the State of North Carolina. All moneys and receipts shall be kept in a special fund by and for the use of the Board for the exclusive purpose of carrying out the provisions of this Part. At the end of the fiscal year, the Board shall retain fifteen percent (15%) of the unexpended funds collected and received during that year. The remaining eighty-five percent (85%) of these funds shall be credited to the General Fund.

(b) In accordance with the provisions of this Part, the Board shall have the following powers and duties:

(1) To issue licenses to manufacturers, dealers, salespersons, and set-up contractors.

(2) To require that an adequate bond or other security be posted by all licensees, except manufactured housing salespersons.

(3) To receive and resolve complaints from buyers of manufactured homes and from persons in the manufactured housing industry, in connection with the warranty, warranty service, licensing requirements or any other provision under this Part.

(4) To adopt rules in accordance with Chapter 150B of the General Statutes as are necessary to carry out the provisions of this Part.

(5) To file against the bond posted by a licensee for warranty repairs and service on behalf of a buyer.

(6) To request that the Department of Justice conduct criminal history checks of applicants for licensure pursuant to G.S. 114-19.13.

(7) To conduct random audits of dealer escrow or trust accounts. (1981, c. 952, s. 2; 1983, c. 717, ss. 107-109, 114; 1987, c. 429, ss. 6, 7, 19, c. 827, s. 1; 1999-393, s. 1; 2002-144, s. 4; 2003-221, s. 1; 2003-400, s. 9; 2005-451, ss. 1, 3.)

**Editor's Note.** — Session Laws 2002-144, s. 4, effective July 1, 2002 and expiring on June 30, 2004, amended G.S. 143-10 by rewriting the last paragraph in subsection (a). The apparent intent was to amend the last paragraph of G.S. 143-143.10(a). Session Laws 2003-221, s. 1, effective June 19, 2003, amended Session Laws 2002-144, s. 4, by substituting "G.S. 143-143.10(a)" for "G.S. 143-10(a)" in the introductory clause. Session Laws 2003-284, s. 22.2, effective July 1, 2004, amended Session Laws 2002-144 by changing the expiration date from June 30, 2003 to June 30, 2004.

## CASE NOTES

**Unfair and Deceptive Trade Practices.** — While a violation of G.S. 143-143.10 and G.S. 143-143.13 may be a violation of G.S. 75-1.1, it is not automatically an unfair and deceptive trade practice, and a violation of 11 N.C. Admin. Code 8.0907, which is based on these statutes, is not necessarily an unfair and deceptive trade practice as a matter of law; however, a manufacturer's violations of the regulation are potentially relevant to a claim under G.S. 75-1.1. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393, 2007 N.C. LEXIS 1232 (2007).

Manufacturer's violations of 11 N.C. Admin. Code 8.0907, which was based on G.S. 143-143.10 and G.S. 143-143.13, were not per se an unfair and deceptive trade practice under G.S. 75-1.1, although the violations of 11 N.C. Admin. Code 8.0907 were evidence of an unfair and deceptive trade practice. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393, 2007 N.C. LEXIS 1232 (2007).

## § 143-143.10A. Criminal history checks of applicants for licensure.

(a) Definitions. — The following definitions shall apply in this section:

(1) Applicant. — A person applying for licensure as a manufactured home manufacturer, dealer, salesperson, or set-up contractor.

(2) Criminal history. — A history of conviction of a state or federal crime, whether a misdemeanor or felony, that bears on an applicant's fitness for licensure under this Part. The crimes include the criminal offenses set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive and Legislative Officers; Article 6, Homicide; Article 7A, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots and Civil Disorders; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. The crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act in Article 5 of Chapter 90 of the General Statutes and alcohol-related offenses

including sale to underage persons in violation of G.S. 18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5. In addition to the North Carolina crimes listed in this subdivision, such crimes also include similar crimes under federal law or under the laws of other states.

(b) All applicants for licensure shall consent to a criminal history record check. Refusal to consent to a criminal history record check may constitute grounds for the Board to deny licensure to an applicant. The Board shall ensure that the State and national criminal history of an applicant is checked. Applicants shall obtain criminal record reports from one or more reporting services designated by the Board to provide criminal record reports. Each applicant is required to pay the designated service for the cost of the criminal record report. In the alternative, the Board may provide to the North Carolina Department of Justice the fingerprints of the applicant to be checked, a form signed by the applicant consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories of Criminal Histories, and any additional information required by the Department of Justice. The Board shall keep all information obtained pursuant to this section confidential.

(c) If an applicant's criminal history record check reveals one or more convictions listed under subdivision (a)(2) of this section, the conviction shall not automatically bar licensure. The Board shall consider all of the following factors regarding the conviction:

(1) The level of seriousness of the crime.
(2) The date of the crime.
(3) The age of the person at the time of the conviction.
(4) The circumstances surrounding the commission of the crime, if known.
(5) The nexus between the criminal conduct of the person and the job duties of the position to be filled.
(6) The person's prison, jail, probation, parole, rehabilitation, and employment records since the date the crime was committed.
(7) The subsequent commission by the person of a crime listed in subdivision (a)(2) of this section.

If, after reviewing these factors, the Board determines that the applicant's criminal history disqualifies the applicant for licensure, the Board may deny licensure of the applicant. The Board may disclose to the applicant information contained in the criminal history record check that is relevant to the denial. The Board shall not provide a copy of the criminal history record check to the applicant. The applicant shall have the right to appear before the Board to appeal the Board's decision. However, an appearance before the full Board shall constitute an exhaustion of administrative remedies in accordance with Chapter 150B of the General Statutes.

(d) Limited Immunity. — The Board, its officers, and employees, acting in good faith and in compliance with this section, shall be immune from civil liability for denying licensure to an applicant based on information provided in the applicant's criminal history record check. (2003-400, s. 8; 2005-451, s. 1; 2007-416, s. 1.)

## § 143-143.11. License required; application for license.

(a) It shall be unlawful for any manufactured home manufacturer, dealer, salesperson, or set-up contractor to engage in business as such in this State without first obtaining a license from the Board for each place of business operated by the licensee, as provided in this Part. The fact that a person is licensed by the Board as a set-up contractor or a dealer does not preempt any other licensing boards' applicable requirements for that person.

(b) Application for the license shall be made to the Board at such time, in such form, and contain information the Board requires, and shall be accompanied by the fee established by the Board. The fee shall not exceed three hundred fifty dollars ($350.00) for each license issued. In addition to the license fee, the Board may also charge an applicant a fee to cover the cost of the criminal history record check required by G.S. 143-143.10A.

(c) In the application, the Board shall require information relating to the matters set forth in G.S. 143-143.13 as grounds for refusal of a license, and information relating to other pertinent matters consistent with safeguarding the public interest. All of this information shall be considered by the Board in determining the fitness of the applicant. Once the Board has determined that an applicant is fit, the Board must provide the applicant a license for each place of business operated by the applicant.

(d) All licenses shall expire, unless revoked or suspended, on June 30 of each year following the date of issue.

(e) Every licensee shall, on or before the first day of July of each year, obtain a renewal of a license for the next year by applying to the Board, completing the necessary hours of continuing education required under G.S. 143-143.11B, and paying the required renewal fee for each place of business operated by the licensee. The renewal fee shall not exceed three hundred fifty dollars ($350.00) for each license issued. Upon failure to renew by the first day of July, a license automatically expires. The license may be renewed at any time within one year after its lapse upon payment of the renewal fee and a late filing fee. The late filing fee shall not exceed three hundred fifty dollars ($350.00).

(f) Repealed by Session Laws 2005-297, s. 1, effective August 22, 2005.

(g) Notwithstanding the provisions of subsection (a), the Board may provide by rule that a manufactured home salesperson will be allowed to engage in business during the time period after making application for a license but before such license is granted.

(h) As a prerequisite to obtaining a license under this Part, a person may be required to pass an examination prescribed by the Board that is based on the Code, this Part, and any other subject matter considered relevant by the Board. (1981, c. 952, s. 2; 1985, c. 487, s. 1; 1987, c. 429, s. 19; 1987 (Reg. Sess., 1988), c. 1039, ss. 2, 3; 1989, c. 485, s. 44; 1991, c. 644, s. 35; 1999-393, s. 1; 2003-400, s. 10; 2005-297, s. 1.; 2005-451, s. 1; 2009-451, s. 21.4.)

**Editor's Note.** — Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2009-451, s. 21.4, effective July 1, 2009, substituted "three hundred fifty dollars ($350.00)" for "three hundred dollars ($300.00)" in the second sentence of subsection (b), and in the second and last sentences of subsection (e).

### CASE NOTES

**Cited** in Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393, 2007 N.C. LEXIS 1232 (2007).

## § 143-143.11A. Notification of change of address, control of ownership, and bankruptcy.

(a) Every applicant for a license shall inform the Board of the applicant's business address. Every licensee shall give written notification to the Board of any change in the licensee's business address, for whatever reason, within 10 business days after the licensee moves to a new address or a change in the address takes place. A violation of this subsection shall not constitute grounds for revocation, suspension, or non-renewal of a license or for the imposition of any other penalty by the Board.

(b) Notwithstanding any other provision of law, whenever the Board is authorized or required to give notice to a licensee under this Part, the notice may be delivered personally to the licensee or sent by first-class mail to the licensee at the address provided to the Board under subsection (a) of this section. Notice shall be deemed given four days after mailing, and any Department employee may certify that notice has been given.

(c) Every person licensed under this Part, except for a person licensed as a manufactured home salesperson, shall give written notification to the Board of any change in ownership or control of the licensee's business within 30 business days after the change. A "change in ownership or control" means the sale or conveyance of the capital stock of the business or of an owner's interest in the business, which operates to place a person or group of persons, not previously in control of the business, in effective control of the business. A violation of this subsection shall not constitute grounds for revocation, suspension, or nonrenewal of a license or for the imposition of any other penalty by the Board.

(d) Upon the filing for protection under the United States Bankruptcy Code by any licensee, or by any business in which the licensee holds a position of employment, management or ownership, the licensee shall notify the Board of the filing of protection within three business days after the filing. Upon the appointment of a receiver by a court of this State for any licensee, or for any business in which the licensee holds a position of employment, management, or ownership the licensee shall notify the Board of the appointment within three business days after the appointment. (1999-393, s. 1; 2000-122, s. 9; 2005-451, s. 1.)

## § 143-143.11B. Continuing education.

(a) The Board may establish programs and requirements of continuing education for licensees, but shall not require licensees to complete more than eight credit hours of continuing education. Before the renewal of a license, a licensee shall present evidence to the Board that the licensee has completed the required number of continuing education hours in courses approved by the Board during the two months immediately preceding the expiration of the licensee's license. No member of the Board shall provide or sponsor a continuing education course under this section while that person is serving on the Board.

(b) The Board may establish nonrefundable fees for the purpose of providing staff and resources to administer continuing education programs, and may establish nonrefundable course application fees, not to exceed one hundred fifty dollars ($150.00), for the Board's review and approval of proposed continuing education courses. The Board may charge the sponsor of an approved course a nonrefundable fee not to exceed seventy-five dollars ($75.00) for the annual renewal of course approval. The Board may also require a course sponsor to pay a fee, not to exceed five dollars ($5.00) per credit hour per licensee, for each licensee completing an approved continuing education course conducted by the sponsor. The Board may award continuing education credit for a course that has not been approved by the Board or for related educational activity and may prescribe the procedures for a licensee to submit information on the course or related educational activity for continuing education credit. The Board may charge the licensee a fee not to exceed fifty dollars ($50.00) for each course or activity submitted.

(c) The Board may adopt any reasonable rules not inconsistent with this Part to give purpose and effect to the continuing education requirement, including rules that govern:

(1) The content and subject matter of continuing education courses.
(2) The criteria, standards, and procedures for the approval of courses, course sponsors, and course instructors.
(3) The methods of instruction.
(4) The computation of course credit.
(5) The ability to carry forward course credit from one year to another.
(6) The waiver of or variance from the continuing education requirement for hardship or other reasons.
(7) The procedures for compliance and sanctions for noncompliance.

(d) The license of any person who fails to comply with the continuing education requirements under this section shall lapse. The Board may, for good cause shown, grant extensions of time to licensees to comply with these requirements. Any licensee who, after obtaining an extension, offers evidence satisfactory to the Board that he or she has satisfactorily completed the required continuing education courses shall be deemed in compliance with this section.

(e) A manufactured home manufacturer or manufacturer is exempt from the requirements of this section. (1999-393, s. 1; 2001-421, s. 2.2; 2005-451, s. 1.)

## § 143-143.12. Bond required.

(a) A person licensed as a manufactured home salesperson shall not be required to furnish a bond, but each applicant approved by the Board for license as a manufacturer, dealer, or set-up contractor shall furnish a corporate surety bond, cash bond or fixed value equivalent in the following amounts:

(1) For a manufacturer, two thousand dollars ($2,000) per manufactured home manufactured in the prior license year, up to a maximum of one hundred thousand dollars ($100,000). When no manufactured homes were produced in the prior year, the amount required shall be based on the estimated number of manufactured homes to be produced during the current year.
(2) For a dealer who has one place of business, the amount shall be thirty-five thousand dollars ($35,000).
(3) For a dealer who has more than one place of business, the amount shall be twenty-five thousand dollars ($25,000) for each additional place of business.
(4) For a set-up contractor, the amount shall be ten thousand dollars ($10,000).

(b) A corporate surety bond shall be approved by the Board as to form and shall be conditioned upon the obligor faithfully conforming to and abiding by the provisions of this Part. A cash bond or fixed value equivalent shall be approved by the Board as to form and terms of deposits in order to secure the ultimate beneficiaries of the bond. A corporate surety bond shall be for a one-year period, and a new bond or a proper continuation certificate shall be delivered to the Board at the beginning of each subsequent one-year period.

(c) Any buyer of a manufactured home who suffers any loss or damage by any act of a licensee that constitutes a violation of this Part may institute an action to recover against the licensee and the surety.

(d) The Board may adopt rules to assure satisfaction of claims. (1981, c. 952, s. 2; 1985, c. 487, s. 2; 1987, c. 429, s. 19; c. 827, s. 223; 1999-393, s. 1; 2000-122, s. 8; 2005-451, s. 1.)

### CASE NOTES

**Standing to Bring Action Under Subsection (c).** — Daughter had standing to maintain an unfair and deceptive trade practices claim under G.S. 75-16, 143-143.12(c), and 143-

143.9(2) against a manufacturer as: (1) her father bought her a defective mobile home, (2) she was the person who selected the interior details for the home, who planned to live in the home, and who was going to make the monthly installment payments, (3) she was a consumer of the mobile home supplied by a manufacturer, and (4) when the manufacturer supplied a defective home, the daughter suffered a resulting injury. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393, 2007 N.C. LEXIS 1232 (2007).

**Cited** in Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 363 S.E.2d 642 (1988).

## § 143-143.13. Grounds for denying, suspending, or revoking licenses; civil penalties.

(a) A license may be denied, suspended or revoked by the Board on any one or more of the following grounds:

(1) Making a material misstatement in application for license.

(2) Failing to post an adequate corporate surety bond, cash bond or fixed value equivalent.

(3) Engaging in the business of manufactured home manufacturer, dealer, salesperson, or set-up contractor without first obtaining a license from the Board.

(4) Failing to comply with the warranty service obligations and claims procedure established by this Part.

(5) Failing to comply with the set-up requirements established by this Part.

(6) Failing or refusing to account for or to pay over moneys or other valuables belonging to others that have come into licensee's possession arising out of the sale of manufactured homes.

(6a) Failing to comply with the escrow or trust account provisions of Part 2 of this Article.

(7) Using unfair methods of competition or committing unfair or deceptive acts or practices.

(8) Failing to comply with any provision of this Part.

(9) Failing to appear for a hearing before the Board or for a prehearing conference with a person or persons designated by the Board after proper notice or failing to comply with orders of the Board issued pursuant to this Part.

(10) Employing unlicensed salespersons.

(11) Offering for sale manufactured homes manufactured or assembled by unlicensed manufacturers or selling manufactured homes to unlicensed dealers for sale to buyers in this State.

(12) Conviction of any crime listed in G.S. 143-143.10A.

(13) Having had a license revoked, suspended or denied by the Board; or having had a license revoked, suspended or denied by a similar entity in another state; or engaging in conduct in another state which conduct, if committed in this State, would have been a violation under this Part.

(14) Employing or contracting with any person to perform setups who is not licensed by the Board as a set-up contractor.

(b) Repealed by Session Laws 1985, c. 666, s. 38.

(c) In addition to the authority to deny, suspend, or revoke a license under this Part the Board may impose a civil penalty upon any person violating the provisions of this Part. Upon a finding by the Board of a violation of this Part, the Board shall order the payment of a penalty of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00). In determining the amount of the penalty, the Board shall consider the degree and extent of harm caused by the violation, the amount of money that inured to the benefit of the violator as a result of the violation, whether the violation was committed willfully, and the prior record of the violator in complying or failing to comply with laws, rules, or orders applicable to the violator. Each day during which a violation occurs shall constitute a separate offense. The penalty shall be payable to the Board. The Board shall remit the clear proceeds of penalties provided for in this subsection to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

Payment of the civil penalty under this section shall be in addition to payment of any other penalty for a violation of the criminal laws of this State. Nothing in this subsection shall prevent the Board from negotiating a mutually acceptable agreement with any person as to the status of the person's license or certificate or as to any civil penalty. (1981, c. 952, s. 2; 1985, c. 487, ss. 3 to 5; c. 666, s. 38; 1985 (Reg. Sess., 1986), c. 1027, s. 51; 1987, c. 429, s. 19; 1989, c. 485, s. 45; 1991, c. 644, s. 34; 1998-215, s. 92; 1999-393, s. 1; 2003-400, s. 11; 2005-451, ss. 1, 4.)

### CASE NOTES

**Unfair and Deceptive Trade Practices.** — Manufacturer's violations of 11 N.C. Admin. Code 8.0907, which was based on G.S. 143-143.10 and G.S. 143-143.13, were not per se an unfair and deceptive trade practice under G.S. 75-1.1, although the violations of 11 N.C. Admin. Code 8.0907 were evidence of an unfair and deceptive trade practice. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393, 2007 N.C. LEXIS 1232 (2007).

While a violation of G.S. 143-143.10 and G.S. 143-143.13 may be a violation of G.S. 75-1.1, it is not automatically an unfair and deceptive trade practice, and a violation of 11 N.C. Admin. Code 8.0907, which is based on these statutes, is not necessarily an unfair and deceptive trade practice as a matter of law; however, a manufacturer's violations of the regulation are potentially relevant to a claim under G.S. 75-1.1. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393, 2007 N.C. LEXIS 1232 (2007).

**Cited** in Pinewood Manor Mobile Homes, Inc. v. North Carolina Manufactured Hous. Bd., 84 N.C. App. 564, 353 S.E.2d 231 (1987).

## § 143-143.14. Hearings; rules.

(a) License suspensions, revocations, and renewal refusals are subject to the provisions of Chapter 150B of the General Statutes.

(b) If the Board finds that an applicant has not met the requirements for licensure, the Board shall refuse to issue the applicant a license and shall notify the applicant in writing of the denial and the grounds for the denial. The application may also be denied for any reason for which a license may be suspended or revoked or not renewed under G.S. 143-143.13. Within 30 days after receipt of a notification that an application for a license has been denied, the applicant may make a written request for a review by a member of the Department staff designated by the chair of the Board to determine the reasonableness of the Board's action. The review shall be completed without undue delay, and the applicant shall be notified promptly in writing as to the outcome of the review. Within 30 days after service of the notification as to the outcome, the applicant may make a written request for a hearing under Article 3A of Chapter 150B of the General Statutes if the applicant disagrees with the outcome.

(c) The Board may adopt rules for hearings and prehearing conferences under this Part, and the rules may include provisions for prefiled evidence, the use of evidence, testimony of parties, prehearing statements, prehearing conference procedures, settlement conference procedures, discovery, subpoenas, sanctions, motions, intervention, consolidation of cases, continuances, and the rights and responsibilities of parties and witnesses. (1981, c. 952, s. 2; 1987, c. 429, s. 19; 1993, c. 504, s. 34; 1993 (Reg. Sess., 1994), c. 678, s. 34; 1999-393, s. 1; 2005-451, s. 1.)

## § 143-143.15. Set-up requirements.

(a) Manufactured homes shall be set up in accordance with the standards adopted by the Commissioner.

(b) If a manufactured home is insured against damage caused by windstorm and subsequently sustains windstorm damage that indicates the manufactured home was not set up in the manner required by this section, the insurer issuing the insurance policy on the manufactured home shall not be relieved from meeting the obligations specified in the insurance policy with respect to such damage on the basis that the manufactured home was not properly set up. (1981, c. 952, s. 2; 1987, c. 429, s. 8; 1999-393, s. 1; 2005-451, s. 1.)

## § 143-143.16. Warranties.

Each manufacturer, dealer and supplier of manufactured homes shall warrant each new manufactured home sold in this State in accordance with the warranty requirements prescribed by this section for a period of at least 12 months, measured from the date of delivery of the manufactured home to the buyer. The warranty requirements for each manufacturer, dealer, supplier and set-up contractor of manufactured homes are as follows:

(1) The manufacturer warrants that all structural elements, plumbing systems, heating, cooling and fuel burning systems, electrical systems, and any other components included by the manufacturer are manufactured and installed free from substantial defects.

(2) The dealer warrants:

a. That any modifications or alterations made to the manufactured home by the dealer or authorized by the dealer are free from substantial defects. Alterations or modifications made by a dealer shall relieve the manufacturer of warranty responsibility as to the item altered or modified and any resulting damage.

b. That a setup performed by the dealer on the manufactured home is performed in compliance with the Code.

c. That the setup and transportation of the manufactured home by the dealer did not result in substantial defects.

(3) The supplier warrants that any warranties generally offered in the ordinary sale of his product to consumers shall be extended to buyers of manufactured homes. The manufacturer's warranty shall remain in effect notwithstanding the existence of a supplier's warranty.

(4) The set-up contractor warrants that the manufactured home is set up in compliance with the Code and that the setup did not result in any substantial defects. (1981, c. 952, s. 2; 1987, c. 429, s. 9; 1999-393, s. 1; 2005-451, s. 1.)

## § 143-143.17. Presenting claims for warranties and substantial defects.

(a) Whenever a claim for warranty service or about a substantial defect is made to a licensee, it shall be handled as provided in this Part. The licensee shall make a record of the name and address of each claimant and the date, substance, and disposition of each claim about a substantial defect. The licensee may request that a claim be in writing, but must nevertheless record it as provided above, and may not delay service pending receipt of the written claim.

(b) When the licensee notified is not the responsible party, he shall in writing immediately notify the claimant and the responsible party of the claim. When a responsible party is asked to remedy defects, it may not fail to remedy those defects because another party may also be responsible. Nothing in this section prevents a party from obtaining compensation by way of contribution or subrogation from another responsible party in accordance with any other provision of law or contract.

(c) Within the time limits provided in this Part, the licensee shall either resolve the claim or determine that it is not justified. At any time a licensee determines that a claim for warranty service is not justified in whole or in part he shall immediately notify the claimant in writing that the claim or part of the claim is rejected and why, and shall inform the claimant that he is entitled to complain to the Board, for which a complete mailing address shall be provided. (1981, c. 952, s. 2; 1987, c. 429, s. 19; 1999-393, s. 1; 2005-451, s. 1.)

## § 143-143.18. Warranty service.

(a) When a service agreement exists between or among a manufacturer, dealer and supplier to provide warranty service, the agreement shall specify which party is to remedy warranty defects. Every service agreement shall be in writing. Nothing contained in such an agreement shall relieve the responsible party, as provided by this Part, of responsibility to perform warranty service. However, any licensee undertaking by such agreement to perform the warranty service obligations of another shall thereby himself become responsible both to that other licensee and to the buyer for his failure adequately to perform as agreed.

(b) When no service agreement exists for warranty service, the responsible party as designated by this Part is responsible for remedying the warranty defect.

(c) A substantial defect shall be remedied within 45 days after the receipt of written notification from the claimant. If no written notification is given, the defect shall be remedied within 45 days after the mailing of notification by the Board, unless the claim is unreasonable or bona fide reasons exist for not remedying the defect within the 45-day period. The responsible party shall respond to the claimant in writing with a copy to the Board stating its reasons for not promptly remedying the defect and stating what further action is contemplated by the responsible party. Notwithstanding the foregoing provisions of this subsection, defects, which constitute an imminent safety hazard to life and health shall be remedied within five working days of receipt of the written notification of the warranty claim. An imminent safety hazard to life and health shall include but not be limited to (i) inadequate heating in freezing weather; (ii) failure of sanitary facilities; (iii) electrical shock, leaking gas; or (iv) major structural failure. The Board may suspend this five-day time period in the event of widespread defects or damage resulting from adverse weather conditions or other natural catastrophes.

(d) When the person remedying the defect is not the responsible party as designated by the provisions of this Part, he shall be entitled to reasonable compensation paid to him by the responsible party. Conduct that coerces or requires a nonresponsible party to perform warranty service is a violation of this Part.

(e) Warranty service shall be performed at the site at which the manufactured home is initially delivered to the buyer, except for components which can be removed for service without substantial expense or inconvenience to the buyer.

(f) Any dealer, manufacturer or supplier may complain to the Board when warranty service obligations under this Part are not being enforced. (1981, c. 952, s. 2; 1987, c. 429, ss. 17, 19; 1999-393, s. 1; 2005-451, s. 1.)

## § 143-143.19. Dealer alterations.

(a) No alteration or modification shall be made to a manufactured home by a dealer after shipment from the manufacturer's plant, unless such alteration or modification is authorized by this Part or the manufacturer. The dealer shall ensure that all authorized alterations and modifications are performed, if so required, by qualified persons as defined in subsection (d). An unauthorized alteration or modification performed by a dealer or his agent or employee shall place primary warranty responsibility for the altered or modified item upon the dealer. If the manufacturer fulfills or is required to fulfill the warranty on the altered or modified item, he shall be entitled to recover damages in the amount of his cost and attorney's fee from the dealer.

(b) An unauthorized alteration or modification of a manufactured home by the owner or his agent shall relieve the manufacturer of responsibility to remedy defects caused by such alteration or modification. A statement to this effect, together with a warning specifying those alterations or modifications which should be performed only by qualified personnel in order to preserve warranty protection, shall be displayed clearly and conspicuously on the face of the warranty. Failure to display such statement shall result in warranty responsibility on the manufacturer.

(c) The Board is authorized to adopt rules in accordance with Chapter 150B of the General Statutes that define the alterations or modifications which must be made by qualified personnel. The Board may require qualified personnel only for those alterations and modifications which could substantially impair the structural integrity or safety of the manufactured home.

(d) In order to be designated as a person qualified to alter or modify a manufactured home, a person must comply with State licensing or competency requirements in skills relevant to performing alterations or modifications on manufactured homes. (1981, c. 952, s. 2; 1987, c. 429, s. 19; c. 827, s. 1; 1999-393, s. 1; 2005-451, s. 1.)

## § 143-143.20. Disclosure of manner used in determining length of manufactured homes.

In any advertisement or other communication regarding the length of a manufactured home, a manufacturer or dealer shall not include the coupling mechanism in describing the length of the home. (1981, c. 952, s. 2; 2005-451, s. 1.)

### CASE NOTES

**Cited** in Pinewood Manor Mobile Homes, Inc. v. North Carolina Manufactured Hous. Bd., 84 N.C. App. 564, 353 S.E.2d 231 (1987).

## § 143-143.20A. Display of pricing on manufactured homes.

(a) If the manufacturer of a manufactured home publishes a manufacturer's suggested retail price, that price shall be displayed near the front entrance of the manufactured home.

(b) Each manufactured home dealer shall prominently display a sign and provide to each buyer a notice, developed by the North Carolina Manufactured Housing Board, containing information about the Board, including how to file a consumer complaint with the Board and the warranties and protections provided for each new manufactured home under federal and State law. (2003-400, s. 6; 2005-451, s. 1.)

**§ 143-143.21:** Repealed by Session Laws 1993, c. 409, s. 6.

**Cross References.** — For present provision concerning damages for cancellation of retail purchase agreement for a manufactured home, see G.S. 143-143.21A.

## § 143-143.21A. Purchase agreements; buyer cancellations.

(a) A purchase agreement for a manufactured home shall include all of the following:

(1) A description of the manufactured home and all accessories included in the purchase.
(2) The purchase price for the home and all accessories.
(3) The amount of deposit or other payment toward or payment of the purchase price of the manufactured home and accessories that is made by the buyer.
(4) The date the retail purchase agreement is signed.
(5) The estimated terms of financing the purchase, if any, including the estimated interest rate, number of years financed, and monthly payment.
(6) The buyer's signature.
(7) The dealer's signature.

(b) The purchase agreement shall contain, in immediate proximity to the space reserved for the signature of the buyer and in at least ten point, all upper-case Gothic type, the following statement:

"I UNDERSTAND THAT I HAVE THE RIGHT TO CANCEL THIS PURCHASE BEFORE MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE THAT I HAVE SIGNED THIS AGREEMENT. I UNDERSTAND THAT THIS CANCELLATION MUST BE IN WRITING. IF I CANCEL THE PURCHASE AFTER THE THREE-DAY PERIOD, I UNDERSTAND THAT THE DEALER MAY NOT HAVE ANY OBLIGATION TO GIVE ME BACK ALL OF THE MONEY THAT I PAID THE DEALER. I UNDERSTAND ANY CHANGE TO THE TERMS OF THE PURCHASE AGREEMENT BY THE DEALER WILL CANCEL THIS AGREEMENT."

(c) At the time the deposit or other payment toward or payment for the purchase price is received by the dealer, the dealer shall give the buyer a copy of the purchase agreement and a completed form in duplicate, captioned "Notice of Cancellation," which shall be attached to the purchase agreement, be easily detachable, and explain the buyer's right to cancel the purchase and how that right can be exercised.

(d) The dealer shall return the deposit or other payment toward or payment for the purchase price to the buyer if the buyer cancels the purchase before midnight of the third business day after the date the buyer signed the purchase agreement or if any of the material terms of the purchase agreement are changed by the dealer. To make the cancellation effective, the buyer shall give the dealer written notice of the buyer's cancellation of the purchase. The dealer shall return the deposit or other payment toward or payment for the purchase price to the buyer within seven business days, or 15 business days when payment is by personal check, after receipt of the notice of cancellation or within three business days of any change by the dealer of the purchase agreement. For purposes of this section, "business day" means any day except Sunday and legal holidays. Each time the dealer gives the buyer a new set of financing terms, unless the financing terms are more favorable to the buyer, the buyer shall be given another three-day cancellation period. The dealer shall not commence setup procedures until after the final three-day cancellation period has expired.

(e) If the buyer cancels the purchase after the three-day cancellation period, but before the sale is completed, and if:

(1) The manufactured home is in the dealer's inventory, the dealer may retain from the deposit or other payment received from the buyer actual damages up to a maximum of ten percent (10%) of the purchase price; or

(2) The manufactured home is specially ordered from the manufacturer for the buyer, the dealer may retain actual damages up to the full amount of the buyer's deposit or other payment received from the buyer.

(f) Repealed by Session Laws 2005-451, s. 5, effective April 1, 2006. (1993, c. 409, s. 7; 1999-393, s. 1; 2003-400, s. 7; 2005-451, ss. 1, 5; 2006-259, s. 24.5.)

CASE NOTES

***Editor's Note.** — The case cited below was decided under former G.S. 143-143.21.*

**Liquidated Damages.** — Since no adequate mathematical formula was present in contract to calculate a set amount of liquidated damages, and no sum certain was expressed otherwise, sales agreement could not be deemed a liquidated damages clause. First Value Homes, Inc. v. Morse, 86 N.C. App. 613, 359 S.E.2d 42 (1987).

## § 143-143.21B. Dealer cancellation; deposit refund.

A dealer shall refund to a buyer the full amount of a deposit on the purchase of a manufactured home if the buyer has fulfilled his obligations under the purchase agreement and the dealer cancels the purchase at any time. (1998-211, s. 37; 2005-451, s. 1.)

## § 143-143.22. Inspection of service records.

The Board may inspect the service records of a manufacturer, dealer, supplier or set-up contractor relating to a written warranty claim or complaint made to the Board against the manufacturer, dealer, supplier, or set-up contractor. Every licensee shall send to the Board upon request within 10 days a copy of every document or record pertinent to any complaint or claim for service. (1981, c. 952, s. 2; 1999-393, s. 1; 2005-451, s. 1.)

## § 143-143.23. Other remedies not excluded.

Nothing in this Part, rules adopted by the Board, or any action of the Board shall limit any right or remedy available to the buyer or any power or duty of the Attorney General. (1981, c. 952, s. 2; 1987, c. 429, s. 19; 1999-393, s. 1; 2005-451, s. 1.)

## § 143-143.24. Engaging in business without license a Class 1 misdemeanor.

If any person shall unlawfully act as a manufactured home manufacturer, dealer, salesperson, or set-up contractor without first obtaining a license from the Board, as provided in this Part, he shall be guilty of a Class 1 misdemeanor. (1985, c. 487, s. 6; 1987, c. 429, s. 19; 1993, c. 539, s. 1010; 1994, Ex. Sess., c. 24, s. 14(c); 1999-393, s. 1; 2005-451, s. 1.)

## § 143-143.25. Staff support for Board.

The Manufactured Building Division of the Department shall provide clerical and other staff services required by the Board; and shall administer and enforce all provisions of this Part and all rules adopted under this Part, subject to the direction of the Board; except for powers and duties delegated by this Part to local units of government, other State agencies, or to any persons. (1991, c. 644, s. 36; 1999-393, s. 1; 2005-451, s. 1.)

**§§ 143-143.26 through 143-143.49:** Reserved for future codification purposes. (2005-451, s. 6.)

## Part 2. Buyer Deposit, Escrow or Trust Accounts.

### § 143-143.50. Escrow or trust account required.

(a) Dealers shall maintain buyers' deposits in an escrow or trust account with a bank. A dealer shall not commingle any other funds with buyers' deposits in the escrow or trust account.

(b) Dealers shall notify the Board in writing when the escrow or trust account is established. The notification shall include the name and number of the account and the name and location of the bank holding the account.

(c) All buyer funds shall be placed in the escrow or trust account no later than the close of the third banking business day after receipt.

(d) Dealers shall provide buyers with a receipt for all buyer deposits received by the dealer. The receipt shall include the amount of the buyer deposit, the date the deposit was provided to the dealer, and the name and address of the bank where the buyer's funds will be deposited. (2005-451, s. 6.)

**Editor's Note.** — Session Laws 2005-451, s. 7, made this Part effective July 1, 2006.

### § 143-143.51. Use of escrow or trust funds; penalty for violations.

(a) Buyer funds in the dealer's escrow or trust account shall be held for the benefit of the buyer and may only be used for purposes authorized under the contractual obligations of the dealer to the buyer. No buyer funds in the dealer's escrow or trust account may be used by the dealer until after all the terms set forth in G.S. 143-143.21A are finalized and after the three-day right of cancellation period as set forth in G.S. 143-143.21A has expired. The dealer may use buyer funds to complete the steps necessary for site preparation of property, when approved in writing in advance by the buyer. Buyer funds in the dealer's escrow or trust account shall be promptly returned to the buyers when the buyer is entitled to return of the funds in accordance with G.S. 143-143.21A.

(b) Notwithstanding any other provision of law and in addition to any other sanction the Board may impose under this Article, if the Board finds that a dealer has used a buyer's funds for a purpose that is not authorized under subsection (a) of this section or if the Board finds that a dealer has failed to place deposits in the dealer's escrow or trust account, the Board may fine the dealer or order restitution to the buyer in an amount up to the amount that the dealer misappropriated or failed to place in the account. (2005-451, s. 6.)

### § 143-143.52. Minimum requirements for dealer records for escrow or trust accounts at banks.

The records required for escrow or trust accounts maintained at a bank shall consist of the following and be maintained for a period of five years from the date of purchase:

(1) All bank receipts or deposit slips listing the source and date of receipt of all funds deposited in the account and the name of the buyer to whom the funds belong.

(2) All cancelled checks or other instruments drawn on the account, or printed digital images thereof furnished by the bank, showing the amount, date, and recipient of the disbursement.

(3) All instructions or authorizations to transfer, disburse, or withdraw funds from the escrow or trust account.

(4) All bank statements and other documents received from the bank with respect to the escrow or trust account, including notices of return or dishonor of any instrument drawn on the account against insufficient funds.

(5) A ledger containing a record of receipts and disbursements for each buyer from whom and for whom funds are received and showing the current balance of funds held in the escrow or trust account for each buyer. (2005-451, s. 6.)

## § 143-143.53. Accountings for escrow or trust funds.

Upon the request of the buyer, the dealer shall provide to the buyer a written accounting of the receipts and disbursements of all escrow or trust funds upon the complete disbursement of the escrow or trust accounts. (2005-451, s. 6.)

## § 143-143.54. Audits and record inspection.

All financial records required by this Part shall be subject to audit for cause and to random audit at the discretion of and by the Board, the Commissioner, or the Attorney General. The Board may inspect these records periodically, without prior notice and may also inspect these records whenever the Board determines that the records are pertinent to an investigation of any complaint against a licensee. The dealer shall provide written authorization to the bank that holds the escrow or trust account to release any and all requested information relative to the account to the parties authorized under this section to inspect those records. (2005-451, s. 6.)

## ARTICLE 9B.

## *Uniform Standards Code For Manufactured Homes.*

## § 143-144. Short title.

This Article shall be known and may be cited as "The Uniform Standards for Manufactured Homes Act." (1969, c. 961, s. 1; 1985, c. 487, s. 7; 1987, c. 429, s. 19; 1999-393, s. 2.)

**Editor's Note.** — Session Laws 1987, c. 429, s. 2, effective June 19, 1987, redesignated G.S. 143-144 through 143-151.7, which had been known as Part 2 of Article 9A, as Article 9B.

Former G.S. 143-144 to 143-151 were repealed by Session Laws 1959, c. 683, s. 6.

Session Laws 1999-393, s. 5, provides that structures built before the effective date of the Act shall not be affected by any changes made in this Article.

**Legal Periodicals.** — For article on antitrust and unfair trade practice law in North Carolina, comparing federal law, see 50 N.C.L. Rev. 199 (1972).

For comment on the status of mobile homes as residences or vehicles and their regulation in North Carolina municipalities, see 50 N.C.L. Rev. 612 (1972).

CASE NOTES

**Cited** in Starr v. Thompson, 96 N.C. App. 369, 385 S.E.2d 535 (1989).

## § 143-145. Definitions.

The following definitions apply in this Article:

(1) Act. — The National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. § 5401, et seq., federal regulations adopted under the Act, and any laws enacted by the United States Congress that supersede or supplement the Act.

(2) Commissioner. — The Commissioner of Insurance of the State of North Carolina or an authorized designee of the Commissioner.

(3) Repealed by Session Laws 1999-393, s. 2, effective August 4, 1999.

(4) HUD. — The United States Department of Housing and Urban Development or any successor agency.

(5) Inspection department. — A North Carolina city or county building inspection department authorized by Chapter 160A or Chapter 153A of the General Statutes.

(6) Label. — The form of certification required by HUD to be permanently affixed to each transportable section of each manufactured home manufactured for sale to a purchaser in the United States to indicate that the manufactured home conforms to all applicable federal construction and safety standards.

(7) Manufactured home. — A structure, transportable in one or more sections, which in the traveling mode is eight body feet or more in width, or 40 body feet or more in length, or, when erected on site, is 320 or more square feet; and which is built on a permanent chassis and designed to be used as a dwelling, with or without permanent foundation when connected to the required utilities, including the plumbing, heating, air conditioning and electrical systems contained therein. "Manufactured home" includes any structure that meets all of the requirements of this subsection except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the Secretary of HUD and complies with the standards established under the Act.

For manufactured homes built before June 15, 1976, "manufactured home" means a portable manufactured housing unit designed for transportation on its own chassis and placement on a temporary or semipermanent foundation having a measurement of over 32 feet in length and over eight feet in width. "Manufactured home" also means a double-wide manufactured home, which is two or more portable manufactured housing units designed for transportation on their own chassis that connect on site for placement on a temporary or semipermanent foundation having a measurement of over 32 feet in length and over eight feet in width.

(8) Repealed by Session Laws 1999-393, s. 2, effective August 4, 1999.

(1969, c. 961, s. 2; 1971, c. 1172, s. 1; 1985, c. 487, s. 7; 1987, c. 429, ss. 10, 19; 1999-393, s. 2.)

CASE NOTES

**Cited** in Angel v. Truitt, 108 N.C. App. 679, 424 S.E.2d 660 (1993).

## § 143-146. Statement of policy; rule-making power.

(a) Manufactured homes, because of the manner of their construction, assembly and use and that of their systems, components and appliances (including heating, plumbing and electrical systems) like other finished products having concealed vital parts may present hazards to the health, life and safety of persons and to the safety of property unless properly manufactured. In the sale of manufactured homes, there is also the possibility of defects not readily ascertainable when inspected by purchasers. It is the policy and purpose of this State to provide protection to the public against those possible hazards, and for that purpose to forbid the manufacture and sale of new manufactured homes, which are not so constructed as to provide reasonable safety and protection to their owners and users. This Article provides to the Commissioner all necessary authority to enable the State to obtain approval as a State Administrative Agency under the provisions of the Act.

(b) to (d) Repealed by Session Laws 1999-393, s. 2, effective August 4, 1999.

(e) The Commissioner may adopt rules to carry out the provisions of the Act and this Article, including rules for consumer complaint procedures and rules for the enforcement of the standards and regulations established and adopted by HUD under the Act. (1969, c. 961, s. 3; 1971, c. 1172, s. 2; 1979, c. 558, ss. 5, 6; 1985, c. 487, s. 7; 1987, c. 429, ss. 11, 12, 18, 19; 1999-393, s. 2.)

## § 143-147. Structures built under previous standards.

The legal status of any structure built before the effective date of the Act shall not be affected by any changes made in this Article by the General Assembly. (1969, c. 961, s. 4; 1971, c. 1172, s. 3; 1985, c. 487, s. 7; 1987, c. 429, s. 19; 1999-393, s. 2.)

## § 143-148. Certain structures excluded from coverage.

The Commissioner may by rule provide for the exclusion of certain structures by certification in accordance with the Act. (1969, c. 961, s. 5; 1971, c. 1172, s. 4; 1979, c. 558, s. 3; 1987, c. 429, s. 13; 1999-393, s. 2.)

**Local Modification.** — Town of Chapel Hill: 1993, c. 358, s. 1.

**Editor's Note.** — Session Laws 2002-123, s. 5, provides: "The Department of Revenue may contract for supplies, materials, equipment, and contractual services related to the provision of notice, the creation of tax forms and instructions, and the development of computer software necessitated by the amendments in this act without begin subject to the requirements of Article 3 or Article 8 of Chapter 143 of the General Statutes."

## § 143-149. Necessity for obtaining label for purposes of sale.

No person shall sell or offer for sale any manufactured home in this State that does not have a label. It is a defense to any prosecution for a violation of this section if a person shows that a certificate of title for the manufactured home as required by G.S. 20-52 was obtained before June 15, 1976, or produces other satisfactory evidence on file with the North Carolina Division of Motor Vehicles that the manufactured home was manufactured before June 15, 1976. (1971, c. 1172, s. 5; 1985, c. 487, s. 7; 1999-393, s. 2.)

## § 143-150. No electricity to be furnished units not in compliance.

It is unlawful for any person to furnish electricity for use in any manufactured home without first ascertaining that the manufactured home and its electrical supply has been inspected pursuant to G.S. 143-139 by the inspection authority having jurisdiction and found to comply with the requirements of the State Electrical Code. The certificate of compliance issued by the inspection jurisdiction shall be accepted as evidence of compliance. (1971, c. 1172, s. 6; 1985, c. 487, s. 7; 1993, c. 504, s. 35; 1999-393, s. 2.)

## § 143-151. Penalties.

(a) Any person who is found by the Commissioner to have violated the provisions of the Act, this Article, or any rules adopted under this Article, shall be liable for a civil penalty not to exceed one thousand dollars ($1,000) for each violation. Each violation shall constitute a separate violation for each manufactured home or for each failure or refusal to allow or perform an act required by the Act, this Article, or any rules adopted under this Article. The maximum civil penalty may not exceed one million dollars ($1,000,000) for any related series of violations occurring within one year after the date of the first violation. In determining the amount of the penalty, the Commissioner shall consider the degree and extent of harm caused by the violation, the amount of money that inured to the benefit of the violator as a result of the violation, whether the violation was willful, and the prior record of the violator in complying or failing to comply with laws, rules, or orders applicable to the violator. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Any individual, or a director, officer or agent of a corporation who knowingly and willfully violates the Act, this Article, or any rules adopted under this Article in a manner that threatens the health or safety of any purchaser is guilty of a Class I felony. (1971, c. 1172, s. 7; 1979, c. 558, s. 1; 1985, c. 487, s. 7; 1987, c. 429, s. 19; 1993, c. 539, s. 1011; 1994, Ex. Sess., c. 24, s. 14(c); 1998-215, s. 93; 1999-393, s. 2.)

**Legal Periodicals.** — For note, "The Forty-Two Hundred Dollar Question: 'May State Agencies Have Discretion in Setting Civil Penalties Under the North Carolina Constitution?'," see 68 N.C.L. Rev. 1035 (1990).

## § 143-151.1. Enforcement.

The Commissioner may initiate any appropriate action or proceeding to prevent, restrain, or correct any violation of the Act, this Article, or any rules adopted under this Article. The Commissioner, or any of his deputies or employees, upon showing proper credentials and in the discharge of their duties under this Article, or the Act, is authorized at reasonable hours and without advance notice to enter and inspect all factories, warehouses, or establishments in this State in which manufactured homes are manufactured, stored or held for sale. (1971, c. 1172, s. 8; 1979, c. 558, s. 2; 1985, c. 487, s. 7; 1987, c. 429, ss. 15, 18, 19; 1999-393, s. 2.)

**Legal Periodicals.** — For article on antitrust and unfair trade practice law in North Carolina, comparing federal law, see 50 N.C.L. Rev. 199 (1972).

## § 143-151.2. Fees.

(a) The Commissioner shall establish a monitoring inspection fee in an amount required by the Secretary of HUD. This monitoring inspection fee shall be an amount paid by each manufactured home manufacturer in this State for each manufactured home produced by the manufacturer in this State.

(b) The monitoring inspection fee shall be paid by the manufacturer to the Secretary of HUD or the Secretary's agent. (1979, c. 558, s. 4; 1985, c. 487, s. 7; 1987, c. 429, s. 18; 1999-393, s. 2.)

**Editor's Note.** — Session Laws 1977, c. 792, s. 9, which was enacted as G.S. 143A-180.4 by the 1977 act, was erroneously codified as G.S. 143-151.2 in the 1977 Cumulative Supplement. It has been recodified as G.S. 143-151.42.

## § 143-151.3. Reports.

Each manufacturer, distributor, and dealer of manufactured homes shall establish and maintain such records, make such reports, and provide such information as the Commissioner or the Secretary of HUD may reasonably require to be able to determine whether the manufacturer, distributor, or dealer has acted or is acting in compliance with this Article, or the Act and shall, upon request of a person designated by the Commissioner or the Secretary of HUD, permit the person to inspect appropriate books, papers, records and documents relevant to determining whether the manufacturer, distributor, or dealer has acted or is acting in compliance with this Article or the Act, and any rules adopted by the Commissioner under this Article. (1979, c. 558, s. 4; 1985, c. 487, s. 7; 1987, c. 429, ss. 18, 19; 1999-393, s. 2.)

## § 143-151.4. Notification of defects and correction procedures.

Every manufacturer of manufactured homes shall provide for notification and correction procedures in any manufactured home produced by the manufacturer in accordance with the Act, this Article, and any rules adopted by the Commissioner. (1979, c. 558, s. 4; 1985, c. 487, s. 7; 1987, c. 429, s. 14; 1999-393, s. 2.)

## § 143-151.5. Prohibited acts.

(a) No person shall:

(1) Manufacture for sale, lease, sell, offer for sale or lease, or introduce or deliver, or import into the United States, any manufactured home that is manufactured on or after the effective date of any applicable manufactured home construction and safety standard under the Act or this Article and that does not comply with the standard, except as provided in subsections (b), (c), and (d) of this section.

(2) Fail or refuse to permit access to or copying of records, or fail to make reports or provide information, or fail or refuse to permit entry or inspection, as required under the Act or this Article.

(3) Fail to furnish notification of any defect as required by the Act or this Article.

(4) Fail to issue a label or issue a label if the person in the exercise of due care has reason to know that the label is false or misleading in a material respect.

(5) Fail to comply with a rule adopted or an order issued by the Commissioner under this Article.

(6) Issue a certification pursuant to G.S. 143-148 if the person in the exercise of due care has reason to know that the certification is false or misleading in a material respect.

(b)(1) Subdivision (a)(1) of this section does not apply to the sale, the offer for sale, or the introduction or delivery of any manufactured home after the first purchase of it in good faith for purposes other than resale.

(2) Subdivision (a)(1) of this section does not apply to any person who establishes that he did not have reason to know in the exercise of due care that the manufactured home was not in conformity with applicable manufactured home construction and safety standards.

(c) Subdivision (a)(1) of this section shall not apply to any person who, before the first purchase, holds a certificate of compliance issued by the manufacturer or importer of the manufactured home to the effect that the manufactured home conforms to all applicable manufactured home construction and safety standards, unless the person knows that the manufactured home does not so conform. (1979, c. 558, s. 4; 1985, c. 487, s. 7; 1987, c. 429, ss. 16, 19; 1999-393, s. 2.)

## §§ 143-151.6, 143-151.7: Reserved for future codification purposes.

## ARTICLE 9C.

## *North Carolina Code Officials Qualification Board.*

## § 143-151.8. Definitions.

(a) As used in this Article, unless the context otherwise requires:

(1) "Board" means the North Carolina Code Officials Qualification Board.

(2) "Code" means the North Carolina State Building Code and related local building rules approved by the Building Code Council enacted, adopted or approved under G.S. 143-138, any resolution adopted by a federally recognized Indian Tribe under G.S. 153A-350.1 in which the Tribe adopts the North Carolina State Building Code and related local building rules, and the standards adopted by the Commissioner of Insurance under G.S. 143-143.15(a).

(3) "Code enforcement" means the examination and approval of plans and specifications, or the inspection of the manner of construction, workmanship, and materials for construction of buildings and structures and components thereof, or the enforcement of fire code regulations as an employee of the State or local government or as an employee of a federally recognized Indian Tribe employed to perform inspections on tribal lands under G.S. 153A-350.1, as an individual contracting with the State or a local government or a federally recognized Indian Tribe who performs inspections on tribal lands under G.S. 153A-350.1 to conduct inspections, or as an individual who is employed by a company contracting with a county or a city to conduct inspections, except an employee of the State Department of Labor engaged in the administration and enforcement of those sections of the Code which pertain to boilers and elevators, to assure compliance with the State Building Code and related local building rules.

(4) "Local inspection department" means the agency or agencies of local government, or any government agency of a federally recognized Indian Tribe under G.S. 153A-350.1, with authority to make inspections of buildings and to enforce the Code and other laws, ordinances,

and rules enacted by the State and the local government or a federally recognized Indian Tribe under G.S. 153A-350.1, which establish standards and requirements applicable to the construction, alteration, repair, or demolition of buildings, and conditions that may create hazards of fire, explosion, or related hazards.

(5) "Qualified Code-enforcement official" means a person qualified under this Article to engage in the practice of Code enforcement.

(b) For purposes of this Article, the population of a city or county shall be determined according to the most current federal census, unless otherwise specified. (1977, c. 531, s. 1; 1987, c. 827, ss. 224, 225; 1989, c. 681, s. 15; 1993, c. 232, s. 4.1; 1999-78, s. 2; 1999-372, s. 5; 2001-421, s. 2.4.)

**Local Modification.** — Town of Wrightsville Beach: 1989, c. 611, s. 1, as amended by 2005-265, s. 1.

**Editor's Note.** — Session Laws 1987, c. 429, s. 3, effective June 19, 1987, redesignated this Article, which had been numbered Article 9B, as Article 9C.

Session Laws 1989, c. 681, which amended this section, provided in s. 21: "Section 10 and Sections 14 through 17 shall become effective upon the adoption of fire protection code provisions by the North Carolina Building Code Council." Fire protection code provisions were adopted July 1, 1991.

## § 143-151.9. North Carolina Code Officials Qualification Board established; members; terms; vacancies.

(a) There is hereby established the North Carolina Code Officials Qualification Board in the Department of Insurance. The Board shall be composed of 20 members appointed as follows:

(1) One member who is a city or county manager;

(2) Two members, one of whom is an elected official representing a city over 5,000 population and one of whom is an elected official representing a city under 5,000 population;

(3) Two members, one of whom is an elected official representing a county over 40,000 population and one of whom is an elected official representing a county under 40,000 population;

(4) Two members serving as building officials with the responsibility for administering building, plumbing, electrical and heating codes, one of whom serves a county and one of whom serves a city;

(5) One member who is a registered architect;

(6) One member who is a registered engineer;

(7) Two members who are licensed general contractors, at least one of whom specializes in residential construction;

(8) One member who is a licensed electrical contractor;

(9) One member who is a licensed plumbing or heating contractor;

(10) One member selected from the faculty of the North Carolina State University School of Engineering and one member selected from the faculty of the School of Engineering of the North Carolina Agricultural and Technical State University;

(11) One member selected from the faculty of the School of Government at the University of North Carolina at Chapel Hill;

(12) One member selected from the Community Colleges System Office;

(13) One member selected from the Division of Engineering and Building Codes in the Department of Insurance; and,

(14) One member who is a local government fire prevention inspector and one member who is a citizen of the State.

The various categories shall be appointed as follows: (1), (2), (3), and (14) by the Governor; (4), (5), and (6) by the General Assembly upon the recommendation of the President Pro Tempore in accordance with G.S. 120-121; (7), (8), and (9) by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121; (10) by the deans of the respective schools of engineering of the named universities; (11) by the Dean of the School of Government at the University of North Carolina at Chapel Hill; (12) by the President of the Community Colleges System; and (13) by the Commissioner of Insurance.

(b) The members shall be appointed for staggered terms and the initial appointments shall be made prior to September 1, 1977, and the appointees shall hold office until July 1 of the year in which their respective terms expire and until their successors are appointed and qualified as provided hereafter:

For the terms of one year: the members from subdivisions (1), (6) and (10) of subsection (a), and one member from subdivision (3).

For the terms of two years: the member from subdivision (11) of subsection (a), one member from subdivision (2), one member from subdivision (4), one member from subdivision (7), and one member from subdivision (14).

For the terms of three years: the members from subdivisions (8) and (12) of subsection (a), one member from subdivision (2), one member from subdivision (4), and one member from subdivision (14).

For the terms of four years: the members from subdivision (5), (9) and (13) of subsection (a), one member from subdivision (3), and one member from subdivision (7).

Thereafter, as the term of each member expires, his successor shall be appointed for a term of four years. Notwithstanding the appointments for a term of years, each member shall serve at the will of the Governor.

Members of the Board who are public officers shall serve ex officio and shall perform their duties on the Board in addition to the duties of their office.

(c) Vacancies in the Board occurring for any reason shall be filled for the unexpired term by the person making the appointment. (1977, c. 531, s. 1; 1987, c. 564, s. 28; 1989, c. 681, s. 16; 1995, c. 490, s. 12(a); 1999-84, s. 22; 2006-264, s. 29(m).)

**Editor's Note.** — Session Laws 1989, c. 681, which amended this section, provided in s. 21: "Section 10 and Sections 14 through 17 shall become effective upon the adoption of fire protection code provisions by the North Carolina Building Code Council." Fire protection code provisions were adopted July 1, 1991.

## § 143-151.10. Compensation.

Members of the Board who are State officers or employees shall receive no salary for serving on the Board, but shall be reimbursed for their expenses in accordance with G.S. 138-6. Members of the Board who are full-time salaried public officers or employees other than State officers or employees shall receive no salary for serving on the Board, but shall be reimbursed for subsistence and travel expenses in accordance with G.S. 138-5(a)(2) and (3). All other members of the Board shall receive compensation and reimbursement for expenses in accordance with G.S. 138-5(a). (1977, c. 531, s. 1.)

## § 143-151.11. Chairman; vice-chairman; other officers; meetings; reports.

(a) The members of the Board shall select one of their members as chairman upon its creation, and shall select the chairman each July 1 thereafter.

(b) The Board shall select a vice-chairman and such other officers and committee chairmen from among its members, as it deems desirable, at the first regular meeting of the Board after its creation and at the first regular meeting after July 1 of each year thereafter. Provided, nothing in this subsection shall prevent the creation or abolition of committees or offices of the

Board, other than the office of vice-chairman, as the need may arise at any time during the year.

(c) The Board shall hold at least four regular meetings per year upon the call of the chairman. Special meetings shall be held upon the call of the chairman or the vice-chairman, or upon the written request of four members of the Board.

(d) The activities and recommendations of the Board with respect to standards for Code officials training and certification shall be set forth in regular and special reports made by the Board. Additionally, the Board shall present special reports and recommendations to the Governor or the General Assembly, or both, as the need may arise or as the Governor or the General Assembly may request. (1977, c. 531, s. 1.)

## § 143-151.12. Powers.

In addition to powers conferred upon the Board elsewhere in this Article, the Board shall have the power to:

(1) Adopt rules necessary to administer this Article;

(1a) Require State agencies, local inspection departments, and local governing bodies to submit reports and information about the employment, education, and training of Code-enforcement officials;

(2) Establish minimum standards for employment as a Code-enforcement official: (i) in probationary or temporary status, and (ii) in permanent positions;

(3) Certify persons as being qualified under the provisions of this Article to be Code-enforcement officials, including persons employed by a federally recognized Indian Tribe to perform inspections on tribal lands under G.S. 153A-350.1;

(4) Consult and cooperate with counties, municipalities, agencies of this State, other governmental agencies, and with universities, colleges, junior colleges, community colleges and other institutions concerning the development of Code-enforcement training schools and programs or courses of instruction;

(5) Establish minimum standards and levels of education or equivalent experience for all Code-enforcement instructors, teachers or professors;

(6) Conduct and encourage research by public and private agencies which shall be designed to improve education and training in the administration of Code enforcement;

(7) Adopt and amend bylaws, consistent with law, for its internal management and control; appoint such advisory committees as it may deem necessary; and enter into contracts and do such other things as may be necessary and incidental to the exercise of its authority pursuant to this Article; and,

(8) Make recommendations concerning any matters within its purview pursuant to this Article. (1977, c. 531, s. 1; 1987, c. 564, s. 15; c. 827, s. 226; 1999-78, s. 3.)

## § 143-151.13. Required standards and certificates for Code-enforcement officials.

(a) No person shall engage in Code enforcement under this Article unless that person possesses one of the following types of certificates, currently valid, issued by the Board attesting to that person's qualifications to engage in Code enforcement: (i) a standard certificate; (ii) a limited certificate provided for in subsection (c) of this section; or (iii) a probationary certificate provided for in subsection (d) of this section. To obtain a standard certificate, a person must pass an examination, as prescribed by the Board or by a contracting party under G.S. 143-151.16(d), that is based on the North Carolina State Building Code and administrative procedures required for Code enforcement. The Board may issue a standard certificate of qualification to each person who successfully completes the examination. The certificate authorizes that person to engage in Code enforcement and to practice as a qualified Code-enforcement official in North Carolina. The certificate of qualification shall bear the signatures of the chairman and secretary of the Board.

(b) The Board shall issue one or more standard certificates to each Code-enforcement official demonstrating the qualifications set forth in subsection (b1) of this section. Standard certificates are available for each of the following types of qualified Code-enforcement officials:

(1) Building inspector.
(2) Electrical inspector.
(3) Mechanical inspector.
(4) Plumbing inspector.
(5) Fire inspector.

(b1) The holder of a standard certificate may practice Code enforcement only within the inspection area and level described upon the certificate issued by the Board. A Code-enforcement official may qualify and hold one or more certificates. These certificates may be for different levels in different types of positions as defined in this section and in rules adopted by the Board.

(b2) A Code-enforcement official holding a certificate indicating a specified level of proficiency in a particular type of position may hold a position calling for that type of qualification anywhere in the State. With respect to all types of Code-enforcement officials, those with Level I, Level II, or Level III certificates shall be qualified to inspect and approve only those types and sizes of buildings as specified in rules adopted by the Board.

(c) A Code-enforcement official holding office as of the date specified in this subsection for the county or municipality by which he is employed, shall not be required to possess a standard certificate as a condition of tenure or continued employment but shall be required to complete such in-service training as may be prescribed by the Board. At the earliest practicable date, such official shall receive from the Board a limited certificate qualifying him to engage in Code enforcement at the level, in the particular type of position, and within the governmental jurisdiction in which he is employed. The limited certificate shall be valid only as an authorization for the official to continue in the position he held on the applicable date and shall become invalid if he does not complete in-service training within two years following the applicable date in the schedule below, according to the governmental jurisdiction's population as published in the 1970 U.S. Census:

Counties and Municipalities over 75,000 population — July 1, 1979
Counties and Municipalities between 50,001 and 75,000 — July 1, 1981
Counties and Municipalities between 25,001 and 50,000 — July 1, 1983
Counties and Municipalities 25,000 and under — July 1, 1985
All fire prevention inspectors holding office — July 1, 1989. Fire prevention inspectors have until July 1, 1993, to complete in-service training.

An official holding a limited certificate can be promoted to a position requiring a higher level certificate only upon issuance by the Board of a standard certificate or probationary certificate appropriate for such new position.

(d) The Board may provide for the issuance of probationary or temporary certificates valid for such period (not less than one year nor more than three years) as specified by the Board's rules, or until June 30, 1983, whichever is later, to any Code-enforcement official newly employed or newly promoted who lacks the qualifications prescribed by the Board as prerequisite to applying for a standard certificate under subsection (a). No official may have a probationary or temporary certificate extended beyond the specified period by renewal or otherwise. The Board may provide for appropriate levels of probationary or temporary certificates and may issue these certificates with such special conditions or requirements relating to the place of employment of the person holding the certificate, his supervision on a consulting or advisory basis, or other matters as the Board may deem necessary to protect the public safety and health.

(e) The Board shall, without requiring an examination, issue a standard certificate to any person who is currently certified as a county electrical inspector pursuant to G.S. 153A-351. The certificate issued by the Board shall authorize the person to serve at the electrical inspector level approved by the Commissioner of Insurance in G.S. 153A-351.

(f) The Board shall issue a standard certificate to any person who is currently licensed to practice as a(n):

(1) Architect, registered pursuant to Chapter 83A;
(2) General contractor, licensed pursuant to Article 1 of Chapter 87;
(3) Plumbing or heating contractor, licensed pursuant to Article 2 of Chapter 87;
(4) Electrical contractor, licensed pursuant to Article 4 of Chapter 87; or,
(5) Professional engineer, registered pursuant to Chapter 89C;

provided the person successfully completes a short course, as prescribed by the Board, relating to the State Building Code regulations and Code-enforcement administration. The standard certificate shall authorize the person to practice as a qualified Code-enforcement official in a particular type of position at the level determined by the Board, based on the type of license or registration held in any profession specified above. (1977, c. 531, s. 1; 1979, cc. 521, 829; 1983, c. 90; 1987, c. 827, ss. 225, 227; 1989, c. 681, s. 17; 1989 (Reg. Sess., 1990), c. 1021, s. 5; 1991, c. 133, s. 1; 2007-120, s. 1; 2008-124, s. 8.1.)

**Editor's Note.** — Session Laws 1989, c. 681, which amended this section, provided in s. 21: "Section 10 and Sections 14 through 17 shall become effective upon the adoption of fire protection code provisions by the North Carolina Building Code Council." Fire protection code provisions were adopted July 1, 1991.

Session Laws 2008-124, s. 11.1 is a severability clause.

Session Laws 2009-474, s. 6, provides: "The North Carolina Code Officials Qualification Board shall issue a Level III standard certificate for the exercise of duties pursuant to G.S. 143-341(3) to any person who (i) was employed by the Department of Administration on the day this act became effective; (ii) successfully completes a course, developed pursuant to this section, relating to the State Building Code regulations and Code-enforcement administration; (iii) successfully completes all examinations required by the North Carolina Code Officials Qualification Board; and (iv) possesses a valid license to practice as an architect, registered pursuant to Chapter 83A of the General Statutes, or a professional engineer, registered pursuant to Chapter 89C of the General Statutes. The North Carolina Code Officials Qualification Board, in consultation with the Departments of Administration and Insurance, shall develop an expedited course of training on State Building Code regulations and Code-enforcement administration to facilitate persons obtaining Level III standard certification in accordance with this section."

**Effect of Amendments.** — Session Laws 2008-124, s. 8.1, effective July 28, 2008, rewrote subsection (a).

## CASE NOTES

**To the extent that various levels or classes of work such as building, electrical, mechanical, and plumbing are referenced as part of the certificates issued,** there is no statutory authority to allow the revocation of separate selected certificates dealing with those specific levels or classes of work; the standard certificate and the limited certificate are all that this section authorizes to be issued and thus all that are subject to revocation. Bunch v. North Carolina Code Officials Qualifications Bd., 343 N.C. 97, 468 S.E.2d 55 (1996).

## § 143-151.13A. Professional development program for officials.

(a) As used in this section, "official" means a qualified Code-enforcement official as that term is defined in G.S. 143-151.8.

(b) The Board may establish professional development requirements for officials as a condition of the renewal or reactivation of their certificates. The purposes of these professional development requirements are to assist officials in maintaining professional competence in their enforcement of the Code and to assure the health, safety, and welfare of the citizens of North Carolina. An official subject to this section shall present evidence to the Board at each certificate renewal after initial certification, that during the 12 months before the certificate expiration date, the official has completed the required number of credit hours in courses approved by the Board. Annual continuing education hour requirements shall be determined by the Board but shall not be more than six credit hours.

(c) The Board may require an individual who earns a certificate under programs established in G.S. 143-151.13 to complete professional development courses, not to exceed six hours in each technical area of certification, within one year after that individual is first employed by a city or county inspection department.

(d) As a condition of reactivating a standard or limited certificate, the Board may require the completion of professional development courses within one year after reemployment as an official as follows:

(1) An individual who has been on inactive status for more than two years and who has not been continuously employed by a city or county inspection department during the period of inactive status shall complete professional development courses not to exceed 12 hours for each technical area in which the individual is certified.

(2) An individual who has been on inactive status for more than two years and who has been continuously employed by a city or county inspection department during the period of inactive status shall complete professional development courses not to exceed six hours for each technical area in which the individual is certified.

(3) An individual who has been on inactive status for two years or less shall complete professional development courses not to exceed four hours for each technical area in which the individual is certified.

(e) The Board may, for good cause shown, grant extensions of time to officials to comply with these requirements. An official who, after obtaining an extension under this subsection, offers evidence satisfactory to the Board that the official has satisfactorily completed the required professional development courses, is in compliance with this section.

(f) The Board may adopt rules to implement this section, including rules that govern:

(1) The content and subject matter of professional development courses.

(2) The criteria, standards, and procedures for the approval of courses, course sponsors, and course instructors.

(3) The methods of instruction.

(4) The computation of course credit.

(5) The ability to carry-forward course credit from one year to another.

(6) The waiver of or variance from the professional development required for hardship or other reasons.

(7) The procedures for compliance and sanctions for noncompliance. (2005-102, s. 1.)

**Editor's Note.** — Session Laws 2005-102, s. 2, provides: "The Code Officials Qualification Board shall initiate development of the Code officials' professional development program established pursuant to this act no later than October 1, 2005. The program shall be developed for implementation no later than January 1, 2006."

Session Laws 2005-102, s. 3, made this section effective June 21, 2005, and applicable to certificates issued or renewed on or after January 1, 2006.

## § 143-151.14. Comity.

The Board may, without requiring an examination, grant a standard certificate as a qualified Code-enforcement official for a particular type of position and level to any person who, at the time of application, is certified as a qualified Code-enforcement official by a similar board of another state, district or territory where standards are acceptable to the Board and not lower than those required by this Article. A fee of not more than twenty dollars ($20.00), as determined by the Board, must be paid by the applicant to the Board for the issuance of a certificate under the provisions of this section. The provisions of G.S. 143-151.16(b) relating to renewal fees and late renewals shall apply to every person granted a standard certificate in accordance with this section. (1977, c. 531, s. 1; 2007-120, s. 2.)

## § 143-151.15. Return of certificate to Board; reissuance by Board.

A certificate issued by the Board under this Article is valid as long as the person certified is employed by the State of North Carolina or any political subdivision thereof as a Code-enforcement official, or is employed by a federally recognized Indian Tribe to perform inspections on tribal lands under G.S. 153A-350.1 as a Code-enforcement official. When the person certified leaves that employment for any reason, he shall return the certificate to the Board. If the person subsequently obtains employment as a Code-enforcement official in any governmental jurisdiction described above, the Board may reissue the certificate to him. The provisions of G.S. 143-151.16(b) relating to renewal fees and late renewals shall apply, if appropriate. The provisions of G.S. 143-151.16(c) shall not apply. This section does not affect the Board's powers under G.S. 143-151.17. (1977, c. 531, s. 1; 1993 (Reg. Sess., 1994), c. 678, s. 35; 1999-78, s. 4.)

## § 143-151.16. Certification fees; renewal of certificates; examination fees.

(a) The Board shall establish a schedule of fees to be paid by each applicant for certification as a qualified Code-enforcement official. Such fee shall not exceed twenty dollars ($20.00) for each applicant.

(b) A certificate, other than a probationary certificate, as a qualified Code-enforcement official issued pursuant to the provisions of this Article must be renewed annually on or before the first day of July. Each application for renewal must be accompanied by a renewal fee to be determined by the Board, but not to exceed ten dollars ($10.00). The Board is authorized to charge an extra four dollar ($4.00) late renewal fee for renewals made after the first day of July each year.

(c) Any person who fails to renew his certificate for a period of two consecutive years may be required by the Board to take and pass the same examination as unlicensed applicants before allowing such person to renew his certificate.

(d) The Board may contract with persons for the development and administration of the examinations required by G.S. 143-151.13(a), for course development related to the examinations, for review of a particular applicant's examination, and for other related services. The person with whom the Board contracts may charge applicants a reasonable fee for the costs associated with the development and administration of the examinations, for course development related to the examinations, for review of the applicant's examinations, and for other related services. The fee shall be agreed to by the Board and the other contracting party. The amount of the fee under this subsection shall not exceed one hundred seventy-five dollars ($175.00). Contracts for the development and administration of the examinations, for course development related to the examinations, and for review of examinations shall not be subject to Article 3, 3C, or 8 of Chapter 143 of the General Statutes or to Article 3D of Chapter 147 of the General Statutes. (1977, c. 531, s. 1; 2005-289, s. 1; 2008-124, s. 8.2; 2009-451, s. 21.3.)

**Editor's Note.** — Session Laws 2008-124, s. 11.1 is a severability clause.

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2008-124, s. 8.2, effective July 28, 2008, rewrote subsection (d).

Session Laws 2009-451, s. 21.3, effective July 1, 2009, substituted "four dollar ($4.00)" for "two dollar ($2.00)" in the last sentence of subsection (b).

## § 143-151.17. Grounds for disciplinary actions; investigation; administrative procedures.

(a) The Board shall have the power to suspend any or all certificates, revoke any or all certificates, demote any or all certificates to a lower level, or refuse to grant any certificate issued under the provisions of this Article to any person who:

(1) Has been convicted of a felony against this State or the United States, or convicted of a felony in another state that would also be a felony if it had been committed in this State;

(2) Has obtained certification through fraud, deceit, or perjury;

(3) Has knowingly aided or abetted any person practicing contrary to the provisions of this Article or the State Building Code or any building codes adopted by a federally recognized Indian Tribe under G.S. 153A-350.1;

(4) Has defrauded the public or attempted to do so;

(5) Has affixed his signature to a report of inspection or other instrument of service if no inspection has been made by him or under his immediate and responsible direction; or,

(6) Has been guilty of willful misconduct, gross negligence or gross incompetence.

(b) The Board may investigate the actions of any qualified Code-enforcement official or applicant upon the verified complaint in writing of any person alleging a violation of subsection (a) of this section. The Board may suspend, revoke, or demote to a lower level any certificate of any qualified Code-enforcement official and refuse to grant a certificate to any applicant, whom it finds to have been guilty of one or more of the actions set out in subsection (a) as grounds for disciplinary action.

(c) A denial, suspension, revocation, or demotion to a lower level of a certificate issued under this Article shall be made in accordance with Chapter 150B of the General Statutes.

(d) The Board may deny an application for a certificate for any of the grounds that are described in subsection (a) of this section. Within 30 days after receipt of a notification that an application for a certificate has been denied, the applicant may make a written request for a review by a committee designated by the chairman of the Board to determine the reasonableness of the Board's action. The review shall be completed without undue delay, and the applicant shall be notified promptly in writing as to the outcome of the review. Within 30 days after service of the notification as to the outcome, the applicant may make a written request for a hearing under Article 3A of Chapter 150B of the General Statutes if the applicant disagrees with the outcome.

(e) The provisions of this section shall apply to Code-enforcement officials and applicants who are employed or seek to be employed by a federally recognized Indian Tribe to perform inspections on tribal lands under G.S. 153A-350.1. (1977, c. 531, s. 1; 1987, c. 827, s. 228; 1993, c. 504, s. 36; 1993 (Reg. Sess., 1994), c. 678, s. 36; 1999-78, s. 5; 2007-120, s. 3.)

## § 143-151.18. Violations; penalty; injunction.

On and after July 1, 1979, it shall be unlawful for any person to represent himself as a qualified Code-enforcement official who does not hold a currently valid certificate of qualification issued by the Board. Further, it shall be unlawful for any person to practice Code enforcement except as allowed by any currently valid certificate issued to that person by the Board. Any person violating any of the provisions of this Article shall be guilty of a Class 1 misdemeanor. The Board is authorized to apply to any judge of the superior court for an injunction in order to prevent any violation or threatened violation of the provisions of this Article. (1977, c. 531, s. 1; 1993, c. 539, s. 1012; 1994, Ex. Sess., c. 24, s. 14(c); 2007-120, s. 4.)

## § 143-151.19. Administration.

(a) The Division of Engineering and Building Codes in the Department of Insurance shall provide clerical and other staff services required by the Board, and shall administer and enforce all provisions of this Article and all rules promulgated pursuant to this Article, subject to the direction of the Board, except as delegated by this Article to local units of government, other State agencies, corporations, or individuals.

(b) The Board shall make copies of this Article and the rules adopted under this Article available to the public at a price determined by the Board.

(c) The Board shall keep current a record of the names and addresses of all qualified Code-enforcement officials and additional personal data as the Board deems necessary. The Board annually shall publish a list of all currently certified Code-enforcement officials.

(d) Each certificate issued by the Board shall contain such identifying information as the Board requires.

(e) The Board shall issue a duplicate certificate to practice as a qualified Code-enforcement official in place of one which has been lost, destroyed, or mutilated upon proper application and payment of a fee to be determined by the Board. (1977, c. 531, s. 1; 1987, c. 827, ss. 224, 229.)

## § 143-151.20. Donations and appropriations.

(a) In addition to appropriations made by the General Assembly, the Board may accept for any of its purposes and functions under this Article any and all donations, both real and personal, and grants of money from any governmental unit or public agency, or from any institution, person, firm or corporation, and may receive, utilize, disburse and transfer the same, subject to the approval of the Council of State. Any arrangements pursuant to this section shall be detailed in the next regular report of the Board. Such report shall include the identity of the donor, the nature of the transaction, and the conditions, if any. Any moneys received by the Board pursuant to this section shall be deposited in the State treasury to the account of the Board.

(b) The Board may provide grants as a reimbursement for actual expenses incurred by the State or political subdivision thereof for the provisions of training programs of officials from other jurisdictions within the State. The Board, by rules, shall provide for the administration of the grant program authorized herein. In promulgating such rules, the Board shall promote the most efficient and economical program of Code-enforcement training, including the maximum utilization of existing facilities and programs for the purpose of avoiding duplication. (1977, c. 531, s. 1; 1987, c. 827, s. 224.)

### § 143-151.21. Disposition of fees.

Fees collected by the Commissioner under this Article shall be credited to the Insurance Regulatory Fund created under G.S. 58-6-25. (1991, c. 689, s. 295; 2003-221, s. 10.)

### §§ 143-151.22 through 143-151.25: Reserved for future codification purposes.

## Article 9D.

## *Enforcement of Building Code Insulation and Energy Utilization Standards.*

### §§ 143-151.26 through 143-151.41: Repealed by Session Laws 1999-393, s. 3, effective August 4, 1999.

**Editor's Note.** — Session Laws 1999-393, s.3, repealed Article 9D of Chapter 143, as indicated above. Sections 143-151.37 through 143-151.41 had been reserved for future codification purposes.

Session Laws 1999-393, s. 5, provides that structures built before the effective date of the Act shall not be affected by any changes made in this Article.

## Article 9E.

## *Master Electrical and Natural Gas Meters Prohibited.*

### § 143-151.42. Prohibition of master meters for electric and natural gas service.

From and after September 1, 1977, in order that each occupant of an apartment or other individual dwelling unit may be responsible for his own conservation of electricity and gas, it shall be unlawful for any new residential building, as hereinafter defined, to be served by a master meter for electric service or natural gas service. Each individual dwelling unit shall have individual electric service with a separate electric meter and, if it has natural gas, individual natural gas service with a separate natural gas meter, which service and meters shall be in the name of the tenant or other occupant of said apartment or other dwelling unit. No electric supplier or natural gas supplier, whether regulated public utility or municipal corporation or electric membership corporation supplying said utility service, shall connect any residential building for electric service or natural gas service through a master meter, and said electric or natural gas supplier shall serve each said apartment or dwelling unit by separate service and separate meter and shall bill and charge each individual occupant of said separate apartment or dwelling unit for said electric or natural gas service. A new residential building is hereby defined for the purposes of this section as any building for which a building permit is issued on or after September 1, 1977, which includes two or more apartments or other family dwelling units. Provided, however, that any owner or builder of a multi-unit residential building who desires to provide central heat or air conditioning or central hot water from a central furnace, air conditioner or hot water heater which incorporates solar assistance or other designs which accomplish greater energy conservation than separate heat, hot water, or air conditioning for each dwelling unit, may apply to the North Carolina Utilities Commission for approval of said central heat, air conditioning or hot water system, which may include a central meter for electricity or gas used in said central system, and the Utilities Commission shall promptly consider said application and approve it for such central meters if energy is conserved by said design. This section shall apply to any dwelling unit normally rented or leased for a minimum period of one month or longer, including apartments, condominiums and townhouses, but shall not apply to hotels, motels, hotels or motels that have been converted into condominiums, dormitories, rooming houses or nursing homes, or homes for the elderly. (1977, c. 792, s. 9; 2007-98, s. 1.)

**Editor's Note.** — Session Laws 1987, c. 429, s. 3 redesignated this Article, which had been numbered Article 9D, as Article 9E.

## Article 9F.

## *North Carolina Home Inspector Licensure Board.*

### § 143-151.43. Short title.

This Article is the Home Inspector Licensure Act and may be cited by that name. (1993 (Reg. Sess., 1994), c. 724, s. 1.)

### § 143-151.44. Purpose.

This Article safeguards the public health, safety, and welfare and protects the public from being harmed by unqualified persons by regulating the use of the title "Licensed Home Inspector" and by providing for the licensure and regulation of those who perform home inspections for compensation. (1993 (Reg. Sess., 1994), c. 724, s. 1.)

### § 143-151.45. Definitions.

The following definitions apply in this Article:

(1) **(Effective until October 1, 2013)** Associate home inspector. — An individual who is affiliated with or employed by a licensed home inspector to conduct a home inspection of a residential building on behalf of the licensed home inspector.

(2) Board. — The North Carolina Home Inspector Licensure Board.
(3) Compensation. — A fee or anything else of value.
(4) Home inspection. — A written evaluation of two or more of the following components of a residential building: heating system, cooling system, plumbing system, electrical system, structural components, foundation, roof, masonry structure, exterior and interior components, or any other related residential housing component.
(5) Home inspector. — An individual who engages in the business of performing home inspections for compensation.
(6) Residential building. — A structure intended to be, or that is in fact, used as a residence by one or more individuals. (1993 (Reg. Sess., 1994), c. 724, s. 1; 1998-211, s. 33; 2009-509, s. 3.3.)

**Effect of Amendments.** — Session Laws 2009-509, s. 3.3, effective October 1, 2013, repealed subdivision (1) pertaining to associate home inspectors.

## § 143-151.46. North Carolina Home Inspector Licensure Board established; members; terms; vacancies.

(a) Membership. — The North Carolina Home Inspector Licensure Board is established in the Department of Insurance. The Board shall be composed of the Commissioner of Insurance or the Commissioner's designee and seven additional members appointed as follows:

(1) A public member who is not in one of the professional categories in subdivisions (2) through (4) of this subsection, appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.
(2) Four home inspectors, two of whom shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, one of whom shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, and one of whom shall be appointed by the Governor.
(3) A licensed general contractor appointed by the Governor upon the recommendation of the North Carolina Home Builders Association.
(4) A licensed real estate broker appointed by the Governor upon the recommendation of the North Carolina Association of Realtors.

All members of the Board must be citizens of the State. Appointments by the General Assembly must be made in accordance with G.S. 120-121.

(b) Terms. — The members shall be appointed for staggered terms and the initial appointments shall be made prior to August 1, 1995. The appointees shall hold office until July 1 of the year in which their respective terms expire and until their successors are appointed and qualified.

Of the members initially appointed, the home inspector appointed by the Governor shall serve a one-year term. The home inspector appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives and the licensed real estate broker shall serve two-year terms. One home inspector appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate and the licensed contractor shall serve three-year terms. The remaining home inspector appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate and the citizen of the State shall serve four-year terms.

Thereafter, as the term of each member expires, a successor shall be appointed for a term of four years.

(c) Vacancies. — Vacancies in the Board occurring for any reason shall be filled for the unexpired term by the appointing official making the original appointment. Vacancies in positions appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate or the Speaker of the House of Representatives shall be filled in accordance with G.S. 120-122. (1993 (Reg. Sess., 1994), c. 724, s. 1.)

## § 143-151.47. Compensation of Board members.

Members of the Board shall receive no salary for serving on the Board. Members may be reimbursed for their travel and other expenses in accordance with G.S. 93B-5 but may not receive the per diem authorized by that statute. (1993 (Reg. Sess., 1994), c. 724, s. 1.)

## § 143-151.48. Election of officers; meetings of Board.

(a) Officers. — Within 30 days after making appointments to the Board, the Governor shall call the first meeting of the Board. The Board shall elect a chair and a vice-chair who shall hold office according to rules adopted by the Board.

(b) Meetings. — The Board shall hold at least two regular meetings each year as provided by rules adopted by the Board. The Board may hold additional meetings upon the call of the chair or any two Board members. A majority of the Board membership constitutes a quorum. (1993 (Reg. Sess., 1994), c. 724, s. 1.)

## § 143-151.49. (Effective until October 1, 2011) Powers and responsibilities of Board.

(a) General. — The Board has the power to do all of the following:

(1) Determine the qualifications and fitness of applicants for a new or renewed license.

(2) Adopt and publish a code of ethics and standard of practice for persons licensed under this Article.

(3) Issue, renew, deny, revoke, and suspend licenses under this Article.

(4) Conduct investigations, subpoena individuals and records, and do all other things necessary and proper to discipline persons licensed under this Article and to enforce this Article.

(5) Employ professional, clerical, investigative, or special personnel necessary to carry out the provisions of this Article.

(6) Purchase or rent office space, equipment, and supplies necessary to carry out the provisions of this Article.

(7) Adopt a seal by which it shall authenticate its proceedings, official records, and licenses.

(8) Conduct administrative hearings in accordance with Article 3A of Chapter 150B of the General Statutes.

(9) Establish fees as allowed by this Article.

(10) Publish and make available upon request the licensure standards prescribed under this Article and all rules adopted by the Board.

(11) Request and receive the assistance of State educational institutions or other State agencies.

(12) Establish continuing education requirements for persons licensed under this Article.

(13) Adopt rules necessary to implement this Article.

**G.S. 143-151.49 is set out twice. See notes.**

---

(b) Exam. — In developing a licensing examination to determine the knowledge of an applicant, the Board must emphasize knowledge gained through experience. (1993 (Reg. Sess., 1994), c. 724, s. 1.)

**Section Set Out Twice.** — The section above is effective until October 1, 2011. For the section as amended October 1, 2011, see the following section, also numbered G.S. 143-151.49.

## § 143-151.49. (Effective October 1, 2011) Powers and responsibilities of Board.

(a) General. — The Board has the power to do all of the following:

(1) Examine and determine the qualifications and fitness of applicants for a new or renewed license.

(2) Adopt and publish a code of ethics and standard of practice for persons licensed under this Article.

(3) Issue, renew, deny, revoke, and suspend licenses under this Article.

(4) Conduct investigations, subpoena individuals and records, and do all other things necessary and proper to discipline persons licensed under this Article and to enforce this Article.

(5) Employ professional, clerical, investigative, or special personnel necessary to carry out the provisions of this Article.

(6) Purchase or rent office space, equipment, and supplies necessary to carry out the provisions of this Article.

(7) Adopt a seal by which it shall authenticate its proceedings, official records, and licenses.

(8) Conduct administrative hearings in accordance with Article 3A of Chapter 150B of the General Statutes.

(9) Establish fees as allowed by this Article.

(10) Publish and make available upon request the licensure standards prescribed under this Article and all rules adopted by the Board.

(11) Request and receive the assistance of State educational institutions or other State agencies.

(11a) Establish education requirements for licensure.

(12) Establish continuing education requirements for persons licensed under this Article.

(13) Adopt rules necessary to implement this Article.

(b) Education Requirements. — The education program adopted by the Board may not consist of more than 200 hours of instruction. The instruction may include field training, classroom instruction, distance learning, peer review, and any other educational format approved by the Board. (1993 (Reg. Sess., 1994), c. 724, s. 1; 2009-509, s. 2.1.)

**Section Set Out Twice.** — The section above is effective October 1, 2011. For the section as in effect until October 1, 2011, see the preceding section, also numbered G.S. 143-151.49.

**Editor's Note.** — Session Laws 2009-509, s. 1.2, provides: "The North Carolina Home Inspector Licensure Board has the authority under G.S. 143-151.49(a)(12) and G.S. 143-151.55(a) to establish continuing education requirements as a condition of licensure renewal. Under that authority, the Board must require home inspectors and associate home inspectors licensed on or before September 30, 2011, to complete a continuing education program that focuses on inspection techniques and reporting requirements. The program must consist of 48 hours of instruction, composed of three separate 16-hour segments. A separate segment must be offered each renewal period. A licensee must complete one segment of the program for each of the three license renewal periods beginning with the license renewal period that starts on October 1, 2011. A licensee must complete the three-year program by October 1, 2014. Completion of each program segment satisfies the continuing education requirements under G.S. 143-151.64 for the renewal period in which it is completed. The Board may not allow continuing education credit for an unapproved course under G.S. 143-151.64(c) to be substituted for the continuing education requirements of this section."

**Effect of Amendments.** — Session Laws 2009-509, s. 2.1, effective October 1, 2011, added "Examine and" at the beginning of subdivision (a)(1); added subdivision (a)(11a); and rewrote subsection (b) pertaining to development of a licensing examination.

## § 143-151.50. (Effective until October 1, 2013) License required to perform home inspections for compensation or to claim to be a "licensed home inspector".

(a) Requirement. — To perform a home inspection for compensation on or after October 1, 1996, or to claim to be a licensed home inspector or a licensed associate home inspector on or after that date, an individual must be licensed by the Board. An individual who is not licensed by the Board may perform a home inspection without compensation.

(b) Form of License. — The Board may issue a license only to an individual and may not issue a license to a partnership, an association, a corporation, a firm, or another group. A licensed home inspector or licensed associate home inspector, however, may perform home inspections for or on behalf of a partnership, an association, a corporation, a firm, or another group, may conduct business as one of these entities, and may enter into and enforce contracts as one of these entities. (1993 (Reg. Sess., 1994), c. 724, s. 1.)

**Section Set Out Twice.** — The section above is effective until October 1, 2013. For the section as amended October 1, 2013, see the following section, also numbered G.S. 143-151.50.

## § 143-151.50. (Effective October 1, 2013) License required to perform home inspections for compensation or to claim to be a "licensed home inspector".

(a) Requirement. — To perform a home inspection for compensation or to claim to be a licensed home inspector, an individual must be licensed by the Board. An individual who is not licensed by the Board may perform a home inspection without compensation.

(b) Form of License. — The Board may issue a license only to an individual and may not issue a license to a partnership, an association, a corporation, a firm, or another group. A licensed home inspector, however, may perform home inspections for or on behalf of a partnership, an association, a corporation, a firm, or another group, may conduct business as one of these entities, and may enter into and enforce contracts as one of these entities. (1993 (Reg. Sess., 1994), c. 724, s. 1; 2009-509, s. 3.4.)

**Section Set Out Twice.** — The section above is effective October 1, 2013. For the section as in effect until October 1, 2013, see the preceding section, also numbered G.S. 143-151.50.

**Effect of Amendments.** — Session Laws 2009-509, s. 3.4, effective October 1, 2013, substituted "compensation or to claim to be a licensed home inspector" for "compensation on or after October 1, 1996, or to claim to be a licensed home inspector or a licensed associate home inspector on or after that date" in the first sentence of subsection (a); and deleted "or licensed associate home inspector" following "licensed home inspector" in the second sentence of subsection (b).

## § 143-151.51. (Effective until October 1, 2011) Requirements to be licensed as a home inspector.

To be licensed as a home inspector, an applicant must do all of the following:

(1) Submit a completed application to the Board upon a form provided by the Board.

(2) Pass a licensing examination prescribed by the Board.

(3) Have minimum net assets or a bond in an amount determined by the Board. The amount may not be less than five thousand dollars ($5,000) nor more than ten thousand dollars ($10,000).

(4) Pay the applicable fees.

(5) Meet one of the following three conditions:

a. Have a high school diploma or its equivalent, have been engaged as a licensed associate home inspector for at least one year, and have completed 100 home inspections for compensation.

b. Have education and experience the Board considers to be equivalent to that required by subpart a. of this subdivision.

c. Be licensed as a general contractor under Article 1 of Chapter 87 of the General Statutes, as an architect under Chapter 83A of the General Statutes, or as a professional engineer under Chapter 89C of the General Statutes. (1993 (Reg. Sess., 1994), c. 724, s. 1.)

**Section Set Out Twice.** — The section above is effective until October 1, 2011. For the section as amended October 1, 2011, see the following section, also numbered G.S. 143-151.51.

## § 143-151.51. (Effective October 1, 2011) Requirements to be licensed as a home inspector.

(a) Licensure Eligibility. — To be eligible to be licensed as a home inspector, an applicant must do all of the following:

(1) Submit a completed application to the Board upon a form provided by the Board.

(2) Pass a licensing examination prescribed by the Board.

(3) Repealed by Session Laws 2009-509, s. 2.2, effective October 1, 2011.

(4) Pay the applicable fees.

(5) Meet one of the following three conditions:

a. Have a high school diploma or its equivalent and satisfactorily complete an education program approved by the Board. The program must be completed within three years of the date the applicant submits an application for licensure under this section.

b. Have education and experience the Board considers to be equivalent to that required by sub-subdivision a. of this subdivision.

c. Be licensed for at least six months as a general contractor under Article 1 of Chapter 87 of the General Statutes, as an architect under Chapter 83A of the General Statutes, or as a professional engineer under Chapter 89C of the General Statutes. A person qualifying under this sub-subdivision on or after October 1, 2011, must remain in good standing with the person's respective licensing board.

(b) License. — Upon compliance with the conditions of licensure under subsection (a) of this section, to be eligible to be licensed as a home inspector, an applicant must meet all of the insurance requirements of this subsection.

(1) General liability insurance in the amount of two hundred fifty thousand dollars ($250,000), which insurance may be individual coverage or coverage under an employer policy, with coverage parameters established by the Board.

**G.S. 143-151.51 is set out twice. See notes.**

(2) One of the following:
- a. Minimum net assets in an amount determined by the Board, which amount may not be less than five thousand dollars ($5,000) nor more than ten thousand dollars ($10,000).
- b. A bond in an amount determined by the Board, which amount may not be less than five thousand dollars ($5,000) nor more than ten thousand dollars ($10,000).
- c. Errors and omissions insurance in the amount of two hundred fifty thousand dollars ($250,000), which insurance may be individual coverage or coverage under an employer policy, with coverage parameters established by the Board. (1993 (Reg. Sess., 1994), c. 724, s. 1; 2009-509, s. 2.2.)

**Section Set Out Twice.** — The section above is effective October 1, 2011. For the section as in effect until October 1, 2011, see the preceding section, also numbered G.S. 143-151.51.

**Editor's Note.** — Session Laws 2009-509, s. 1.2, provides: "The North Carolina Home Inspector Licensure Board has the authority under G.S. 143-151.49(a)(12) and G.S. 143-151.55(a) to establish continuing education requirements as a condition of licensure renewal. Under that authority, the Board must require home inspectors and associate home inspectors licensed on or before September 30, 2011, to complete a continuing education program that focuses on inspection techniques and reporting requirements. The program must consist of 48 hours of instruction, composed of three separate 16-hour segments. A separate segment must be offered each renewal period. A licensee must complete one segment of the program for each of the three license renewal periods beginning with the license renewal period that starts on October 1, 2011. A licensee must complete the three-year program by October 1, 2014. Completion of each program segment satisfies the continuing education requirements under G.S. 143-151.64 for the renewal period in which it is completed. The Board may not allow continuing education credit for an unapproved course under G.S. 143-151.6 4(c) to be substituted for the continuing education requirements of this section."

Session Laws 2009-509, s. 3.1, provides: "The Board may not accept an application for licensure as an associate home inspector after April 1, 2011. The Board may not issue a license for an associate home inspector on or after October 1, 2011. The Board may not renew an associate home inspector license on or after October 1, 2013."

Session Laws 2009-509, s. 3.2, provides: "Notwithstanding G.S. 143-151.51, as rewritten by Section 2.2 of this act, a person who holds a license as an associate home inspector on October 1, 2011, may satisfy the education program requirement for licensure as a home inspector by being engaged as a licensed associate home inspector for one year and completing 100 home inspections for compensation. A person licensed as a home inspector under this section must complete the continuing education requirements of Section 1.2 of this act. An associate home inspector may take one or more of the program segments required under Section 1.2 of this act while licensed as an associate home inspector."

**Effect of Amendments.** — Session Laws 2009-509, s. 2.2, effective October 1, 2011, redesignated the former section as subsection (a) and added subsection (b); and, in present subsection (a), inserted the subsection heading, inserted "eligible to be" in the introductory language, deleted subdivision (a)(3) which read: "Have minimum net assets or a bond in an amount determined by the Board. The amount may not be less than five thousand dollars ($5,000) nor more than ten thousand dollars ($10,000)", substituted "equivalent and satisfactorily complete an education program approved by the Board" for "have been engaged as a licensed associate home inspector for at least one year, and have completed 100 home inspections for compensation" in the first sentence and added the second sentence in subdivision (a)(5)a., substituted "sub-subdivision a. of this subdivision" for "subpart a. of this subdivision" at the end of subdivision (a)(5)b., and inserted "for at least six months" in the first sentence and added the second sentence in subdivision (a)(5)c.

## § 143-151.52. (Repealed effective October 1, 2013) Requirements to be licensed as an associate home inspector.

To be licensed as an associate home inspector, a person must do all of the following:

(1) Submit a completed application to the Board upon a form provided by the Board.
(2) Pass a licensing examination prescribed by the Board.
(3) Pay the applicable fees.
(4) Have a high school diploma or its equivalent.
(5) Be employed by or affiliated with or intend to be employed by or affiliated with a licensed home inspector and submit a sworn statement by that licensed home inspector certifying that the licensed home inspector will actively supervise and train the applicant. (1993 (Reg. Sess., 1994), c. 724, s. 1; 1998-211, s. 34; 2009-509, s. 3.3.)

**Section Repealed Effective October 1, 2013.** — This section is repealed effective October 1, 2013, by Session Laws 2009-509, s. 3.3.

**Editor's Note.** — Session Laws 2009-509, s. 3.1, provides: "The Board may not accept an application for licensure as an associate home inspector after April 1, 2011. The Board may not issue a license for an associate home inspector on or after October 1, 2011. The Board may not renew an associate home inspector license on or after October 1, 2013."

## § 143-151.53. Notification to applicant following evaluation of application.

If the Board finds that the applicant has not met fully the requirements for licensing, the Board shall refuse to issue the license and shall notify in writing the applicant of the denial, stating the grounds of the denial. The application may also be denied for any reason for which a license may be suspended or revoked or not renewed under G.S. 143-151.56. Within 30 days after service of the notification, the applicant may make a written demand upon the Board for a review to determine the reasonableness of the Board's action. The review shall be completed without undue delay, and the applicant shall be notified promptly in writing as to the outcome of the review. Within 30 days after service of the notification as to the outcome, the applicant may make a written demand upon the Board for a hearing under Article 3A of Chapter 150B of the General Statutes if the applicant disagrees with the outcome. (1993 (Reg. Sess., 1994), c. 724, s. 1; 1998-211, s. 35.)

## § 143-151.54. Miscellaneous license provisions.

(a) License as Property of the Board and Display of License. — A license issued by the Board is the property of the Board. If the Board suspends or revokes a license issued by it, the individual to whom it is issued must give it to the Board upon demand. An individual who is licensed by the Board must display the license certificate in the manner prescribed by the Board. A license holder whose address changes must report the change to the Board.

(b) Report Criminal Convictions and Disciplinary Actions. — A license holder who is convicted of any felony or misdemeanor or is disciplined by any governmental agency in connection with any other occupational or professional license shall file with the Board a written report of the conviction or disciplinary action within 60 days of the final judgment, order, or disposition of the case. (1993 (Reg. Sess., 1994), c. 724, s. 1; 2009-509, s. 5.1.)

**Effect of Amendments.** — Session Laws 2009-509, s. 5.1, effective October 1, 2009, designated the previously existing provisions of the section as subsection (a); inserted the subsection (a) heading; and added subsection (b).

## § 143-151.55. Renewal of license; inactive licenses; lapsed licenses.

(a) Renewal. — A license expires on September 30 of each year. A license may be renewed by filing an application for renewal with the Board and paying the required renewal fee. The Board must notify license holders at least 30 days before their licenses expire. The Board must renew the license of a person who files an application for renewal, pays the required renewal fee, has fulfilled the continuing education requirements set by the Board, and is not in violation of this Article when the application is filed. If the Board imposes a continuing education requirement as a condition of renewing a license, the Board must ensure that the courses needed to fulfill the requirement are available in all geographic areas of the State.

(b) Late Renewal. — The Board may provide for the late renewal of a license upon the payment of a late fee, but no late renewal of a license may be granted more than one year after the license expires.

(c) Inactive License. — A license holder may apply to the Board to be placed on inactive status. An applicant for inactive status must follow the procedure set by the Board. A license holder who is granted inactive status is not subject to the license renewal requirements during the period the license holder remains on inactive status.

A license holder whose application is granted and is placed on inactive status may apply to the Board to be reinstated to active status at any time. To change a license from inactive status to active status, the license holder must complete the same number of continuing education credit hours that would have been required of the license holder had the license holder maintained an active license. The number of continuing education credit hours required to return an inactive license to active status shall not exceed 24 credit hours. The Board may set conditions for reinstatement to active status. An individual who is on inactive status and applies to be reinstated to active status must comply with the conditions set by the Board.

(d) **(Effective until October 1, 2011)** Lapsed License. — The license of a licensed home inspector shall lapse if the licensee fails to continuously maintain minimum net assets or a bond as required by G.S. 143-151.58. The license of a licensed associate home inspector shall lapse if the licensee fails to continuously be employed by or affiliated with a licensed home inspector as required by G.S. 143-151.58.

(d) **(Effective October 1, 2011 until October 1, 2013)** Lapsed License. — The license of a licensed home inspector shall lapse if the licensee fails to continuously maintain the requirements provided in G.S. 143-151.58(b). The license of a licensed associate home inspector shall lapse if the licensee fails to continuously be employed by or affiliated with a licensed home inspector as required by G.S. 143-151.58.

(d) **(Effective October 1, 2013)** Lapsed License. — The license of a licensed home inspector shall lapse if the licensee fails to continuously maintain the [insurance] requirements provided in G.S. 143-151.58(b). (1993 (Reg. Sess., 1994), c. 724, s. 1; 1999-149, s. 1; 2009-509, ss. 2.3, 3.5, 5.2.)

**Subsection (d) Set Out Three Times.** — The first version of subsection (d) set out above is effective until October 1, 2011. The second version of subsection (d) set out above is effective October 1, 2011 until October 1, 2013. The third version of subsection (d) set out above is effective October 1, 2013.

**Editor's Note.** — Subsection (d) was amended by Session Laws 2009-509, ss. 2.3 and 3.5, in the coded bill drafting format provided by G.S. 120-20.1. In subsection (d) as amended by s. 3.5, effective October 1, 2013, the word 'insurance' was inserted without the required underlined text indicating the change. Subsection (d) has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2009-509, s. 1.2, provides: "The North Carolina Home Inspector Licensure Board has the authority under G.S. 143-151.49(a)(12) and G.S. 143-151.55(a) to establish continuing education requirements as a condition of licensure renewal. Under that authority, the Board must require home inspectors and associate home inspectors licensed on or before September 30, 2011, to complete a continuing education program that focuses on inspection techniques and reporting requirements. The program must consist of 48 hours of instruction, composed of three separate 16-hour segments. A separate segment must be offered each renewal period. A licensee must complete one segment of the program for each of the three license renewal periods beginning with the license renewal period that starts on October 1, 2011. A licensee must complete the three-year program by October 1, 2014. Completion of each program segment satisfies the continuing education requirements under G.S. 143-151.64 for the renewal period in which it is completed. The Board may not allow continuing education credit for an unapproved course under G.S. 143-151.64(c) to be substituted for the continuing education requirements of this section."

Session Laws 2009-509, s. 3.1, provides: "The Board may not accept an application for licensure as an associate home inspector after April 1, 2011. The Board may not issue a license for an associate home inspector on or after October 1, 2011. The Board may not renew an associate home inspector license on or after October 1, 2013."

**Effect of Amendments.** — Session Laws 2009-509, s. 2.3, effective October 1, 2011, substituted "the requirements provided in G.S. 143-151.58(b)" for "minimum net assets or a bond as required by G.S. 143-151.58" at the end of the first sentence of subsection (d).

Session Laws 2009-509, s. 3.5, effective October 1, 2013, deleted the former second sentence in subsection (d), which read: "The license of a licensed associate home inspector shall lapse if the licensee fails to continuously be employed by or affiliated with a licensed home inspector as required by G.S. 143-151.58.".

Session Laws 2009-509, s. 5.2, effective October 1, 2009, substituted "one year" for "five years" in subsection (b); and added the second and third sentences in the second paragraph of subsection (c).

## § 143-151.56. Suspension, revocation, and refusal to renew license.

(a) The Board may deny or refuse to issue or renew a license, may suspend or revoke a license, or may impose probationary conditions on a license if the license holder or applicant for licensure has engaged in any of the following conduct:

(1) Employed fraud, deceit, or misrepresentation in obtaining or attempting to obtain or renew a license.

(2) Committed an act of malpractice, gross negligence, or incompetence in the practice of home inspections.

(3) Without having a current license, either performed home inspections for compensation or claimed to be licensed.

(4) Engaged in conduct that could result in harm or injury to the public.

(5) Been convicted of or pled guilty or nolo contendere to any misdemeanor involving moral turpitude or to any felony.

(6) Been adjudicated incompetent.

(7) Engaged in any act or practice that violates any of the provisions of this Article or any rule issued by the Board, or aided, abetted, or assisted any person in a violation of any of the provisions of this Article.

(8) **(Effective October 1, 2011)** Failed to maintain the requirements provided in G.S. 143-151.58(b).

(b) A denial of licensure, refusal to renew, suspension, revocation, or imposition of probationary conditions upon a license holder may be ordered by the Board after a hearing held in accordance with Article 3A of Chapter 150B of the General Statutes and rules adopted by the Board. An application may be made to the Board for reinstatement of a revoked license if the revocation has been in effect for at least one year. (1993 (Reg. Sess., 1994), c. 724, s. 1; 1998-211, s. 36; 2009-509, s. 2.4.)

**Effect of Amendments.** — Session Laws 2009-509, s. 2.4, effective October 1, 2011, added subdivision (a)(8).

## § 143-151.57. Fees.

(a) **(Effective until October 1, 2013)** Maximum Fees. — The Board may adopt fees that do not exceed the amounts set in the following table for administering this Article:

| Item | Maximum Fee |
|---|---|
| Application for home inspector license | $35.00 |
| Application for associate home inspector license | 20.00 |
| Home inspector examination | 80.00 |
| Issuance or renewal of home inspector license | 160.00 |
| Issuance or renewal of associate home inspector license | 110.00 |
| Late renewal of home inspector license | 30.00 |
| Late renewal of associate home inspector license | 20.00 |
| Application for course approval | 150.00 |
| Renewal of course approval | 75.00 |
| Course fee, per credit hour per licensee | 5.00 |
| Credit for unapproved continuing education course | 50.00 |
| Copies of Board rules or licensure standards | Cost of printing and mailing. |

(a) **(Effective October 1, 2013)** Maximum Fees. — The Board may adopt fees that do not exceed the amounts set in the following table for administering this Article:

| Item | Maximum Fee |
|---|---|
| Application for home inspector license | $35.00 |
| Home inspector examination | 80.00 |
| Issuance or renewal of home inspector license | 160.00 |
| Late renewal of home inspector license | 30.00 |
| Application for course approval | 150.00 |
| Renewal of course approval | 75.00 |
| Course fee, per credit hour per licensee | 5.00 |
| Credit for unapproved continuing education course | 50.00 |
| Copies of Board rules or licensure standards | Cost of printing and mailing. |

Or renewal 20.00 110.00 20.00

(b) Subsequent Application. — An individual who applied for a license as a home inspector and who failed the home inspector examination is not required to pay an additional application fee if the individual submits another application for a license as a home inspector. The individual must pay the examination fee, however, to be eligible to take the examination again. An individual may take the examination only once every 180 days. (1993 (Reg. Sess., 1994), c. 724, s. 1; 1999-149, s. 2; 2000-140, s. 32; 2009-451, s. 21.8; 2009-509, ss. 3.6, 5.3.)

**Subsection (a) Set Out Twice.** — The first version of subsection (a) set out above is effective until October 1, 2013. The second version of subsection (a) set out above is effective October 1, 2013.

**Editor's Note.** — Subsection (a) of this section was amended by Session Laws 2009-451, s. 21.8, effective July 1, 2009, and by Session Laws 2009-509, s. 3.6, effective October 1, 2013, in the coded bill drafting format provided by G.S. 120-20.1. Session Laws 2009-509 did not account for the changes made to the section by Session Laws 2009-451, and subsection (a) has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2009-451, s. 1.2, provides:

"This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2009-451, s. 21.8, effective July 1, 2009, in subsection (a), inserted "or renewal" in the fourth and fifth items, and in the first item, substituted "35.00" for "25.00"; in the second item, substituted "20.00" for "15.00"; in the third item, substituted "80.00" for "75.00"; in the fourth item, substituted "160.00" for "150.00"; in the fifth item, substituted "110.00" for "100.00"; in the sixth item, substituted "30.00" for "25.00"; and in the seventh item, substituted "20.00" for "15.00."

Session Laws 2009-509, s. 3.6, effective October 1, 2013, in the maximum fee table in subsection (a), deleted entries for "Application for associate home inspector," "Issuance of associate home inspector license," and "Late renewal of associate home inspector license."

Session Laws 2009-509, s. 5.3, effective August 26, 2009, added the last sentence in subsection (b).

## § 143-151.58. (Effective until October 1, 2013) Duties of licensed home inspector or licensed associate home inspector.

(a) Home Inspection Report. — A licensed home inspector or licensed associate home inspector must give to each person for whom the inspector performs a home inspection for compensation a written report of the home inspection. The inspector must give the person the report by the date set in a written agreement by the parties to the home inspection. If the parties to the home inspection did not agree on a date in a written agreement, the inspector must give the person the report within three business days after the inspection was performed.

(a1) Summary Page. — A written report provided under subsection (a) of this section for a prepurchase home inspection of three or more systems must include a summary page that contains the information required by this subsection. All other subject matters pertaining to the home inspection must appear in the body of the report. The summary page must contain the following statement: "This summary page is not the entire report. The complete report may include additional information of interest or concern to you. It is strongly recommended that you promptly read the complete report. For information regarding the negotiability of any item in this report under the real estate purchase contract, contact your North Carolina real estate agent or an attorney."

The summary page must describe any system or component of the home that does not function as intended, allowing for normal wear and tear that does not prevent the system or component from functioning as intended. The summary page must also describe any system or component that appears not to function as intended, based upon documented tangible evidence, and that requires either subsequent examination or further investigation by a specialist. The summary page may describe any system or component that poses a safety concern.

(a2) State Building Code. — If a licensee includes a deficiency in the written report of a home inspection that is stated as a violation of the North Carolina State Residential Building Code, the licensee must do all of the following:

(1) Determine the date of construction, renovation, and any subsequent installation or replacement of any system or component of the home.

(2) Determine the State Building Code in effect at the time of construction, renovation, and any subsequent installation or replacement of any system or component of the home.

(3) Conduct the home inspection using the building codes in effect at the time of the construction, renovation, and any subsequent installation or replacement of any system or component of the home.

In order to fully inform the client, if the licensee describes a deficiency as a violation of the State Building Code in the written report, then the report shall

**G.S. 143-151.58 is set out twice. See notes.**

include the information described in subdivision (1) of this subsection and photocopies of the relevant provisions of the State Building Code used pursuant to subdivision (2) of this subsection to determine any violation stated in the report. The Board may adopt rules that are more restrictive on the use of the State Building Code by home inspectors.

(b) **(Effective until October 1, 2011)** Bond Required. — A licensed home inspector must continuously maintain minimum net assets or a bond as required in G.S. 143-151.51(3).

(b) **(Effective October 1, 2011)** Insurance, Net Assets, and Bond Requirements. — A licensed home inspector must continuously maintain general liability insurance and minimum net assets, a bond, or errors and omissions insurance as required in G.S. 143-151.51(b).

(c) Supervision. — A licensed associate home inspector must be continuously employed by or affiliated with a licensed home inspector as required in G.S. 143-151.52(5).

(d) Record Keeping. — All licensees under this Article shall make and keep full and accurate records of business done under their licenses. Records shall include the written, signed contract and the written report required by subsection (a) of this section and the standards of practice referred to in G.S. 143-151.49(a)(2) and any other information the Board requires by rule. Records shall be retained by licensees for not less than three years. Licensees shall furnish their records to the Board on demand. (1993 (Reg. Sess., 1994), c. 724, s. 1; 1999-149, s. 3; 2009-509, ss. 2.5, 4.1, 4.2.)

**Section Set Out Twice.** — The section above is effective until October 1, 2013. For the section as amended October 1, 2013, see the following section, also numbered G.S. 143-151.58.

**Subsection (b) Set Out Twice.** — The first version of subsection (b) set out above is effective until October 1, 2011. The second version of subsection (b) set out above is effective October 1, 2011.

**Effect of Amendments.** — Session Laws 2009-509, s. 2.5, effective October 1, 2011, rewrote subsection (b) pertaining to net assets and bond requirements.

Session Laws 2009-509, ss. 4.1 and 4.2, effective October 1, 2009, added subsections (a1) and (a2); and inserted "subsection (a) of this section and" in the second sentence of subsection (d).

## § 143-151.58. (Effective October 1, 2013) Duties of licensed home inspector.

(a) Home Inspection Report. — A licensed home inspector must give to each person for whom the inspector performs a home inspection for compensation a written report of the home inspection. The inspector must give the person the report by the date set in a written agreement by the parties to the home inspection. If the parties to the home inspection did not agree on a date in a written agreement, the inspector must give the person the report within three business days after the inspection was performed.

(a1) Summary Page. — A written report provided under subsection (a) of this section for a prepurchase home inspection of three or more systems must include a summary page that contains the information required by this subsection. All other subject matters pertaining to the home inspection must appear in the body of the report. The summary page must contain the following statement: "This summary page is not the entire report. The complete report may include additional information of interest or concern to you. It is strongly recommended that you promptly read the complete report. For information regarding the negotiability of any item in this report under the real estate

**G.S. 143-151.58 is set out twice. See notes.**

purchase contract, contact your North Carolina real estate agent or an attorney."

The summary page must describe any system or component of the home that does not function as intended, allowing for normal wear and tear that does not prevent the system or component from functioning as intended. The summary page must also describe any system or component that appears not to function as intended, based upon documented tangible evidence, and that requires either subsequent examination or further investigation by a specialist. The summary page may describe any system or component that poses a safety concern.

(a2) State Building Code. — If a licensee includes a deficiency in the written report of a home inspection that is stated as a violation of the North Carolina State Residential Building Code, the licensee must do all of the following:

(1) Determine the date of construction, renovation, and any subsequent installation or replacement of any system or component of the home.

(2) Determine the State Building Code in effect at the time of construction, renovation, and any subsequent installation or replacement of any system or component of the home.

(3) Conduct the home inspection using the building codes in effect at the time of the construction, renovation, and any subsequent installation or replacement of any system or component of the home.

In order to fully inform the client, if the licensee describes a deficiency as a violation of the State Building Code in the written report, then the report shall include the information described in subdivision (1) of this subsection and photocopies of the relevant provisions of the State Building Code used pursuant to subdivision (2) of this subsection to determine any violation stated in the report. The Board may adopt rules that are more restrictive on the use of the State Building Code by home inspectors.

(b) Insurance, Net Assets, and Bond Requirements. — A licensed home inspector must continuously maintain general liability insurance and minimum net assets, a bond, or errors and omissions insurance as required in G.S. 143-151.51(b).

(c) Repealed by Session Laws 2009-509, s. 3.3, effective October 1, 2013.

(d) Record Keeping. — All licensees under this Article shall make and keep full and accurate records of business done under their licenses. Records shall include the written, signed contract and the written report required by subsection (a) of this section and the standards of practice referred to in G.S. 143-151.49(a)(2) and any other information the Board requires by rule. Records shall be retained by licensees for not less than three years. Licensees shall furnish their records to the Board on demand. (1993 (Reg. Sess., 1994), c. 724, s. 1; 1999-149, s. 3; 2009-509, ss. 2.5, 3.3, 3.7, 4.1, 4.2.)

**Section Set Out Twice.** — The section above is effective October 1, 2013. For the section as in effect until October 1, 2013, see the preceding section, also numbered G.S. 143-151.58.

**Effect of Amendments.** — Session Laws 2009-509, s. 2.5, effective October 1, 2011, rewrote subsection (b) pertaining to net assets and bond requirements.

Session Laws 2009-509, ss. 3.3 and 3.7, effective October 1, 2013, deleted "or licensed associate home inspector" following "licensed home inspector" in the section heading and in the first sentence of subsection (a); and repealed subsection (c) pertaining to supervision of licensed associate home inspectors.

Session Laws 2009-509, ss. 4.1 and 4.2, effective October 1, 2009, added subsections (a1) and (a2); and inserted "subsection (a) of this section and" in the second sentence of subsection (d).

## § 143-151.59. Violation is a misdemeanor.

A person who violates a provision of this Article is guilty of a Class 2 misdemeanor. Each unlawful act or practice constitutes a distinct and separate offense. (1993 (Reg. Sess., 1994), c. 724, s. 1.)

## § 143-151.60. Injunctions.

The Board may make application to any appropriate court for an order enjoining violations of this Article. Upon a showing by the Board that any person has violated or is about to violate this Article, the court may grant an injunction or a restraining order or take other appropriate action. (1993 (Reg. Sess., 1994), c. 724, s. 1.)

## § 143-151.61. (Repealed effective October 1, 2013) Certain applicants do not have to be licensed as an associate home inspector before being eligible for licensure as a home inspector.

The requirement that an applicant for licensure as a home inspector first have a license as an associate home inspector does not apply to a person who, prior to October 1, 1996, had been engaged in the business of performing home inspections for compensation for at least one year and had conducted at least 100 home inspections for compensation. All other requirements for licensure as a home inspector, including passing a licensing examination provided by the Board, apply to an applicant who is exempted by this section from the requirement of prior licensure as an associate home inspector. (1993 (Reg. Sess., 1994), c. 724, s. 1; 2009-509, s. 3.3.)

**Section Repealed Effective October 1, 2013.** — This section is repealed effective October 1, 2013, by Session Laws 2009-509, s. 3.3.

## § 143-151.62. Persons and practices not affected.

This Article does not apply to any of the following:

(1) A person who is employed as a code enforcement official by the State or a political subdivision of the State and is certified pursuant to Article 9C of Chapter 143 of the General Statutes, when acting within the scope of that employment.

(2) A plumbing or heating contractor who does not claim to be a home inspector and is licensed under Article 2 of Chapter 87 of the General Statutes, when acting pursuant to that Article.

(3) An electrical contractor who does not claim to be a home inspector and is licensed under Article 4 of Chapter 87 of the General Statutes, when acting pursuant to that Article.

(4) A real estate broker or a real estate sales representative who does not claim to be a home inspector and is licensed under Article 1 of Chapter 93A of the General Statutes, when acting pursuant to that Article.

(5) A structural pest control licensee licensed under the provisions of Article 4C of Chapter 106 of the General Statutes, an employee of the licensee, or a certified applicator licensed under the provisions of Article 4C of Chapter 106 of the General Statutes who does not claim to be a home inspector, while performing structural pest control activities pursuant to that Article. (1993 (Reg. Sess., 1994), c. 724, s. 1.)

## § 143-151.63. Administration.

(a) The Division of Engineering and Building Code in the Department of Insurance shall provide clerical and other staff services required by the Board, and shall administer and enforce all provisions of this Article and all rules adopted under this Article, subject to the direction of the Board. The Board shall reimburse the Division for its services to the Board.

(b) Any monies received by the Board pursuant to this Article shall be deposited in the State treasury to the account of the Board and shall be used to administer this Article.

(c) The books and records of the Board are subject to the oversight of the State Auditor, as provided in G.S. 93B-4. (1993 (Reg. Sess., 1994), c. 724, s. 1.)

## § 143-151.64. Continuing education requirements.

(a) Requirements. — The Board may establish programs of continuing education for licensees under this Article. A licensee subject to a program under this section shall present evidence to the Board upon the license renewal following initial licensure, and every renewal thereafter, that during the 12 months preceding the annual license expiration date the licensee has completed the required number of classroom hours of instruction in courses approved by the Board. Annual continuing education hour requirements shall be determined by the Board, but shall not be less than 12 credit hours and no more than 20 hours. No member of the Board shall provide or sponsor a continuing education course under this section while that person is serving on the Board.

(b) Fees. — The Board may establish a nonrefundable course application fee to be charged to a course sponsor for the review and approval of a proposed continuing education course. Approval of a continuing education course must be renewed annually. The Board may also require a course sponsor to pay a fee for each licensee completing an approved continuing education course conducted by the sponsor.

(c) Credit for Unapproved Course. — The Board may award continuing education credit for an unapproved course or related educational activity. The Board may prescribe procedures for a licensee to submit information on an unapproved course or related educational activity for continuing education credit. The Board may charge a fee to the licensee for each course or activity submitted.

(d) Extension of Time. — The Board may, for good cause shown, grant extensions of time to licensees to comply with these requirements. Any licensee who, after obtaining an extension under this subsection, offers evidence satisfactory to the Board that the licensee has satisfactorily completed the required continuing education courses, is in compliance with this section.

(e) Rules. — The Board may adopt rules governing continuing education requirements, including rules that govern:

(1) The content and subject matter of continuing education courses.
(2) The criteria, standards, and procedures for the approval of courses, course sponsors, and course instructors.
(3) The methods of instruction.
(4) The computation of course credit.
(5) The ability to carry forward course credit from one year to another.
(6) The waiver of or variance from the continuing education requirement for hardship or other reasons.
(7) The procedures for compliance and sanctions for noncompliance. (1999-149, s. 4; 2001-421, s. 2.5; 2009-509, s. 1.1.)

**Editor's Note.** — Session Laws 2009-509, s. 1.2, provides: "The North Carolina Home Inspector Licensure Board has the authority under G.S. 143-151.49(a)(12) and G.S. 143-151.55(a) to establish continuing education requirements as a condition of licensure renewal. Under that authority, the Board must require home inspectors and associate home inspectors licensed on or before September 30, 2011, to complete a continuing education program that focuses on inspection techniques and reporting requirements. The program must consist of 48 hours of instruction, composed of three separate 16-hour segments. A separate segment must be offered each renewal period. A licensee must complete one segment of the program for each of the three license renewal periods beginning with the license renewal period that starts on October 1, 2011. A licensee must complete the three-year program by October 1, 2014. Completion of each program segment satisfies the continuing education requirements under G.S. 143-151.64 for the renewal period in which it is completed. The Board may not allow continuing education credit for an unapproved course under G.S. 143-151.64(c) to be substituted for the continuing education requirements of this section."

**Effect of Amendments.** — Session Laws 2009-509, s. 1.1, effective October 1, 2009, substituted "but shall not be less than 12 credit hours and no more than 20 hours" for "but shall not be more than 12 credit hours" at the end of the second sentence in subsection (a).

## ARTICLE 10.

## *Various Powers and Regulations.*

### § 143-152. Injury to water supply misdemeanor.

If any person shall in any way intentionally or maliciously damage or obstruct any waterline of any public institution, or in any way contaminate or render the water impure or injurious, he shall be guilty of a Class 1 misdemeanor. (1893, c. 63, s. 3; Rev., s. 3458; C.S., s. 7526; 1993, c. 539, s. 1014; 1994, Ex. Sess., c. 24, s. 14(c).)

### § 143-153. Keeping swine near State institutions; penalty.

On the petition of a majority of the legal voters living within a radius of one quarter of a mile of the administrative building of any State educational or charitable institution, it shall be unlawful for any person to keep swine or swine pens within such radius of one quarter of a mile. Any person violating this section shall be guilty of a Class 3 misdemeanor and shall be subject to only a fine of not less than ten dollars ($10.00) nor more than fifty dollars ($50.00). (1909, c. 706; C.S., s. 7527; 1993, c. 539, s. 1015; 1994, Ex. Sess., c. 14, s. 62; c. 24, s. 14(c).)

#### OPINIONS OF ATTORNEY GENERAL

**This section does not protect any church or other non-governmental organization.** See opinion of Attorney General to The Honorable Cary Allred, The North Carolina General Assembly, 2001 N.C. AG LEXIS 14 (6/12/2001).

**The statute does not apply to protect local public schools.** See opinion of Attorney General to The Honorable Cary Allred, The North Carolina General Assembly, 2001 N.C. AG LEXIS 14 (6/12/2001).

### § 143-154. Expenditures for departments and institutions; accounting and warrants.

All expenditures of any character allowed by the General Assembly in making appropriations and not covered in the appropriations named shall be charged against the department or institution for which the expense is incurred, and the warrant shall be made to show clearly for what purpose the expenditure is made. The warrant shall be charged against the department or institution, thereby showing the total amount expended for the maintenance and expenses of such department or institution. (1917, c. 289; C.S., s. 7528; 1983, c. 913, s. 35.)

## § 143-155: Repealed by Session Laws 1983, c. 913, s. 36.

## § 143-156. Certain institutions to report to Governor and General Assembly.

It shall be the duty of the boards of directors, managers, or trustees of the several State institutions for the insane, or the several institutions for the deaf, dumb, and blind, and of the State Prison to submit their respective reports to the Governor, to be transmitted by him with his message to the General Assembly. (1883, c. 60, ss. 2, 4; Rev., s. 5373; C.S., s. 7530.)

## § 143-157. Reports of departments and institutions; investigations and audits.

All State departments and State institutions shall make reports to the Governor from time to time as may be required by him, and the Governor is empowered to have all departments of the State government and State institutions examined and audited from time to time, and shall employ such experts to make audits and examinations and to analyze the reports of such institutions and departments as he may deem to be necessary. (1917, c. 58, s. 7; C.S., s. 7531.)

## § 143-157.1. Reports on gender-proportionate appointments to statutorily created decision-making regulatory bodies.

(a) Appointments. — In appointing members to public bodies set forth in subsections (c) and (d) of this section, the appointing authority should select, from among the most qualified persons, those persons whose appointment would promote membership on the body that accurately reflects the proportion that each gender represents in the population of the State as a whole or, in the case of a local body, in the population of the area represented by the or body, as determined pursuant to the most recent federal decennial census, unless the law regulating such appointment requires otherwise. If there are multiple appointing authorities for the body, they may consult with each other to accomplish the purposes of this section.

(b) Reports Generally. — Each appointing authority described in subsection (a) shall submit a report to the Secretary of State annually which discloses the number of appointments made during the preceding year and the number of appointments of each gender made, expressed both in numerical terms and as a percentage of the total membership of the body. In addition, each appointing authority shall designate a person responsible for retaining all applications for appointment, who shall ensure that information describing each applicant's gender and qualifications is available for public inspection during reasonable hours. Nothing in this section requires disclosure of an applicant's identity or of any other information made confidential by law. The Secretary of State shall prescribe the form used to report these appointments and may accept these reports by electronic means. Reports by appointing authorities shall be due in the Department of the Secretary of State on or before September 1. From these reports, the Secretary of State shall generate an annual composite report that shall be published by December 1. Copies of the report shall be submitted to the Governor, the Speaker of the House of Representatives, and the President Pro Tempore of the Senate.

(c) State Reporting. — Each State appointing authority that makes appointments to a statutorily created public body, however denominated, except those having only advisory authority, shall file a report with the Secretary of State as prescribed in subsection (b) of this section. The Secretary shall submit to the Governor, the Speaker of the House of Representatives, and the President Pro Tempore by July 1 of each year the names of all State bodies that an appointing authority must report on pursuant to this section.

(d) Reporting by Local Units of Government. — In those cases where a county or a city is the appointing authority, the reporting required by subsection (b) of this section shall be submitted to the Secretary of State by the clerk of that appointing authority. Appointments to the following local, municipal, or county public bodies, or to public bodies however denominated that have the functions of the following public bodies, must be reported:

(1) City or county ABC board, or local board created pursuant to G.S. 18B-703.
(2) Adult Care Home Community Advisory Committee.
(3) Airport Authority.
(4) Community Child Protection Team or a Child Fatality Prevention Team.
(5) Civil Service Board or similarly named board established by local act.
(6) Community Relations Committee.
(7) Council of Governments.
(8) Criminal Justice Partnership Task Force.
(9) Emergency Planning Committee.
(10) Board of Equalization and Review.
(11) Local Board of Health.
(12) Hospital Authority.
(13) Housing Authority.
(14) Human Relations Commission.
(15) County Industrial Facilities and Pollution Control Financing Authority.
(16) Juvenile Crime Prevention Council.
(17) Library Board of Trustees.
(18) Community College Board of Trustees.
(19) Economic development commission.
(20) Area mental health, developmental disabilities, and substance abuse board.
(21) Adult care home community advisory committee.
(22) Local partnership for children.
(23) Planning Board.
(24) Recreation Board.
(25) County board of social services.
(26) A public transportation authority created pursuant to Article 25 of Chapter 160A of the General Statutes, a regional public transportation authority created pursuant to Article 26 of Chapter 160A of the General Statutes, or a regional transportation authority created pursuant to Article 27 of Chapter 160A of the General Statutes.
(27) Local tourism development authority.
(28) Water and sewer authority.
(29) Workforce Development Board.
(30) Zoning Board of Adjustment.
(31) Planning and Zoning Board.
(32) Board of Adjustment.

(33) Historic Preservation Commission.
(34) Redevelopment Commission.
(35) City board of education (if appointive).
(36) Metropolitan Planning Organization.
(37) Rural Planning Organization. (1999, c. 457, s. 1(b), (c); 2007-167, s. 1.)

**Editor's Note.** — Session Laws 1999-457, s. 1(b), and (c), were codified as this section at the direction of the Revisor of Statutes.

Session Laws 1999-457, s. 1.(a) provides that it is the intent of the General Assembly to recognize the importance of balance in the appointment of both genders to membership on statutorily created decision-making and regulatory boards, commissions, councils, and committees, and to promote that balance through the provisions of this section and further that the General Assembly recognizes that statutorily created decision-making and regulatory boards, commissions, councils, and committees play a vital role in shaping public policy for North Carolina, and the selection of well-qualified candidates is the paramount obligation of the appointing authority. Section 1.(e) provides that while gender equity is its purpose, the act does not direct, mandate or require such.

Session Laws 1999-457, s. 1.(d) provides: "This act applies to appointments and reappointments made after the effective date of this act [August 13, 1999]. Nothing in this act shall be construed to require an appointing authority to make an appointment or remove an appointee on the basis of gender."

## § 143-158. Special investigations.

At any time, upon complaint made to him or upon his own motion, the Governor may appoint a special commission to investigate any State department or State institution, which commission shall have power to subpoena witnesses, require the production of books and papers, and to do all things necessary to a full and thorough investigation, and shall submit its findings to the Governor. The members of such special commission shall, while engaged in the performance of their duties, receive their actual expenses and a per diem of four dollars ($4.00). (1917, c. 58, s. 8; C.S., s. 7532.)

## § 143-159. Governor given authority to direct investigation.

The Governor is hereby authorized and empowered to call upon and direct the Attorney General to investigate the management of or condition within any department, agency, bureau, division or institution of the State, or any other matters pertaining to the administration of the Executive Department, when the Governor shall determine that such an investigation shall be necessary. (1927, c. 234, s. 1.)

## § 143-160. Conduct of investigation.

Whenever called upon and requested by the Governor as set out in G.S. 143-159, the Attorney General shall conduct such investigation at such reasonable time and place as may be determined by him. He shall have power to issue subpoenas, administer oaths, compel the attendance of witnesses and the production of papers necessary and material in such investigation. All subpoenas issued by him shall be served by the sheriff or other officer of any county to which they may be directed. Parties interested in such investigation may appear at the hearing and be represented by counsel, who shall have the right to examine or cross-examine witnesses.

All persons subpoenaed to attend any hearing before the Attorney General shall, for a failure so to attend and testify, be subject to the same penalties as prescribed by law for such failure in the superior court. (1927, c. 234, s. 2.)

## § 143-161. Stenographic record of proceedings.

A stenographic record of the proceedings had in such investigation shall be taken and copy thereof forwarded by the Attorney General to the Governor with his report. (1927, c. 234, s. 3.)

## § 143-162: Repealed by Session Laws 1955, c. 984.

## § 143-162.1. First menu operator access.

(a) The General Assembly finds that:

(1) Some telephone systems operated by State government agencies require callers to proceed through several menus to finally reach an individual extension, an arrangement that can be intimidating to the caller;

(2) Many State telephone systems also make it difficult to reach an attendant or operator at the agency; and

(3) While automated telephone systems and voice mail are intended to improve the efficiency of government, the first duty of government is to serve the people, and efficiency should not impede the average citizen in attempting to contact a State agency for service or information.

(b) State agency telephone systems routing calls to multiple extensions shall be reprogrammed by September 1, 1997, to minimize the number of menus that a caller must go through to reach the desired extension, and to allow the caller to reach an attendant or operator after accessing not more than two menus from the first menu when calling during normal business hours. As used in this section, the term "menu" refers to the first point in the call at which the caller is asked to choose from two or more options, regardless of whether that choice is referred to as a menu, router, or other term within the telephone industry itself.

This act shall be implemented by State agencies with existing personnel at no additional cost to the State.

(c) All State agencies shall include the agency's telephone number or numbers in a prominent place on all agency letterhead.

(d) The provisions of subsection (b) of this section shall not apply to any "511" traveler information system operated by the Department of Transportation. (1997-351, ss. 1, 2; 1999-429, ss. 1, 2; 2003-184, s. 4.)

**Editor's Note.** — Session Laws 1997-351, s. 1 and s. 2, enacted as uncodified sections, have been codified as this section at the direction of the Revisor of Statutes.

Session Laws 1999-429, s. 2, has been codified as subsection (c) at the direction of the Revisor of Statutes.

## § 143-162.2. Use of public property by production companies.

If a State agency makes real property available to a production company for a production, it shall not charge any fee other than reimbursement of actual costs incurred and actual revenues lost by the agency. As used in this section, the term "production company" has the meaning provided in G.S. 105-164.3. This section does not require a State agency to make real property available to a production company for a production. (2000-153, s. 3.)

## Article 11.

## *Revenue Bonds and Governmental Aid.*

### § 143-163. State agencies may issue bonds to finance certain public undertakings.

The several departments, institutions, agencies and commissions of the State of North Carolina, acting at the suggestion of the Governor of North Carolina, with the approval of the Council of State, are hereby authorized to issue bonds of the several departments, agencies or commissions of the State, in such sum or sums, not to exceed in the aggregate two million dollars ($2,000,000), at such time or times, in such denominations as may be determined, and at such rate of interest as may be most advantageous to the several departments, institutions, agencies and commissions of the State, the said bonds to run for a period not exceeding 30 years from date, which bonds may be sold and delivered as other like bonds of the State of North Carolina: Provided, however, that the credit of the State of North Carolina, or any of its departments, institutions, agencies or commissions, shall not be pledged further in the payment of such bonds, except with respect to the rentals, profits and proceeds received in connection with the undertaking, for which said bonds are issued, and said bonds and interest so issued shall be payable solely out of the receipts from the undertaking for which they were issued, without further obligation on the part of the State of North Carolina, or any of its departments, institutions, agencies or commissions, provided that no State department or institution issuing any of said bonds shall be allowed to pledge any of its appropriations received from the State as security for these bonds; provided, further, that no State department, institution, agency or commission of the State shall make application for or issue any bonds, as provided in this section, after June 1, 1941. (1935, c. 479, s. 1; Ex. Sess. 1936, c. 2, s. 1; 1937, c. 323; 1939, c. 391.)

### § 143-164. Acceptance of federal loans and grants permitted.

The State of North Carolina, and its several departments, institutions, agencies and commissions, are hereby authorized to accept and receive loans, grants, and other assistance from the United States government, departments and/or agencies thereof, for its use, and to receive like financial and other aid from other agencies in carrying out any undertaking which has been authorized by the Governor of North Carolina, with the approval of the Council of State. (1935, c. 479, s. 2.)

### § 143-165. Approval by Governor and Council of State necessary; covenants in resolutions authorizing bonds.

The several departments, institutions, agencies and commissions of the State of North Carolina, before issuing any revenue bonds as herein provided for any undertaking, shall first receive the approval of the undertaking from the Governor of North Carolina, which action shall be approved by the Council of State before such undertaking shall be entered into and revenue bonds issued in payment therefor in whole or in part.

Any resolution or resolutions heretofore or hereafter adopted authorizing the issuance of bonds under this Article may contain covenants which shall have the force of contract so long as any of said bonds and interest thereon remain outstanding and unpaid as to

(1) The use and disposition of revenue of the undertaking for which the said bonds are to be issued,
(2) The pledging of all the gross receipts or any part thereof derived from the operation of the undertaking to the payment of the principal and interest of said bonds including reserves therefor,
(3) The operation and maintenance of such undertaking,
(4) The insurance to be carried thereon and the use and disposition of the insurance moneys,
(5) The fixing and collection of rates, fees and charges for the services, facilities and commodities furnished by such undertaking sufficient to pay said bonds and interest as the same shall become due, and for the creation and maintenance of reasonable reserve therefor,
(6) Provisions that the undertaking shall not be conveyed, leased or mortgaged so long as any of the bonds and interest thereon remain outstanding and unpaid.

Provided, however, that the credit of the State of North Carolina or any of its departments, institutions, agencies or commissions shall not be pledged to the payment of such bonds except with respect to the rentals, profits and proceeds received in connection with the undertaking for which the said bonds are issued, and that none of the appropriations received from the State shall be pledged as security for said bonds. (1935, c. 479, s. 3; Ex. Sess. 1936, c. 2, s. 2.)

## ARTICLE 12.

## *Law-Enforcement Officers' Retirement System.*

**§§ 143-166 through 143-166.04:** Repealed by Session Laws 1985, c. 479, s. 196(t).

**Cross References.** — As to the Law-Enforcement Officers', Firemen's, Rescue Squad Workers' and Civil Air Patrol Members' Death Benefits Act, see G.S. 143-166.1 et seq. As to retirement benefits for local governmental law-enforcement officers, see now G.S. 143-166.50. As to separate insurance benefits plan for state and local governmental law-enforcement officers, see now G.S. 143-166.60. As to transfers of assets of Law-Enforcement Officers' Retirement System to other retirement systems, see G.S. 143-166.70.

**Editor's Note.** — Session Laws 1971, c. 837, contained provisions as to the transfer of wildlife protectors from the Teachers' and State Employees' Retirement System to the Law-Enforcement Officers' Benefit and Retirement Fund.

Session Laws 1973, c. 572, as amended by Session Laws 1973, c. 874, contained provisions as to the transfer of law-enforcement officers who were members of the Teachers' and State Employees' Retirement System or the Local Governmental Employees' Retirement System to the Law-Enforcement Officers' Benefit and Retirement Fund.

Section 8 of Session Laws 1985, c. 751, which amended repealed G.S. 143-166, provided: "In order to fund the provisions of this act, the Board of Trustees of the Local Governmental Employees' Retirement System, and Law Enforcement Officers' Retirement System with the advice of its consulting actuary, shall apply any unencumbered actuarial gain remaining after application of actuarial gains to any cost-of-living increase granted to retired members effective July 1, 1985, and shall adjust the normal contribution rate of employers, without increase in the total employers' contribution rates and without changes in the amortization periods for liquidation of unfunded accrued liabilities of employers participating in the Retirement System."

## ARTICLE 12A.

## *Law-Enforcement Officers', Firemen's, Rescue Squad Workers' and Civil Air Patrol Members' Death Benefits Act.*

### § 143-166.1. Purpose.

In consideration of hazardous public service rendered to the people of this State, there is hereby provided a system of benefits for dependents of law-enforcement officers, firemen, rescue squad workers and senior Civil Air Patrol members killed in the discharge of their official duties. (1959, c. 1323, s. 1; 1965, c. 937; 1973, c. 634, s. 2; 1975, c. 284, s. 6; 1977, c. 797; 1983, c. 761, s. 236.)

#### CASE NOTES

**Cited** in State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992).

### § 143-166.2. Definitions.

(a) The term "dependent child" shall mean any unmarried child of the deceased officer, fireman, rescue squad worker or senior member of the Civil Air Patrol whether natural, adopted, posthumously born or whether an illegitimate child as entitled to inherit under the Intestate Succession Act, who is under 18 years of age and dependent upon and receiving his chief support from said officer or fireman or rescue squad worker or senior member of the Civil Air Patrol at the time of his death; provided, however, that if a dependent child is entitled to receive benefits at the time of the officer's or fireman's or rescue squad worker's or senior Civil Air Patrol member's death as hereinafter provided, he shall continue to be eligible to receive such benefits regardless of his age thereafter; and further provided that any child over 18 years of age who is physically or mentally incapable of earning a living and any child over 18 years of age who was enrolled as a full-time student at the time of the officer's, the fireman's, the rescue squad worker's or the senior Civil Air Patrol member's death shall so long as he remains a full-time student as defined in the Social Security Act be regarded as a dependent child and eligible to receive benefits under the provisions of this Article.

(b) The term "dependent parent" shall mean the parent of the deceased officer, fireman, rescue squad worker or senior member of the Civil Air Patrol, whether natural or adoptive, who was dependent upon and receiving his total and entire support from the officer, fireman, rescue squad worker or senior member of the Civil Air Patrol at the time of the injury which resulted in his death.

(c) The term "killed in the line of duty" shall apply to any law-enforcement officer, fireman, rescue squad worker who is killed or dies as a result of bodily injuries sustained or of extreme exercise or extreme activity experienced in the course and scope of his official duties while in the discharge of his official duty or duties. When applied to a senior member of the Civil Air Patrol as defined in this Article, "killed in the line of duty" shall mean any such senior member of the North Carolina Wing-Civil Air Patrol who is killed or dies as a result of bodily injuries sustained or of extreme exercise or extreme activity experienced in the course and scope of his official duties while engaged in a State requested and approved mission pursuant to Article 11 of Chapter 143B of the General Statutes. For purposes of this Article, when a law enforcement officer, fireman, rescue squad worker, or senior Civil Air Patrol member dies as the direct and proximate result of a myocardial infarction suffered while on duty or within 24 hours after participating in a training exercise or responding to an emergency situation, the law enforcement officer, fireman, rescue squad worker, or senior Civil Air Patrol member is presumed to have been killed in the line of duty.

(d) The term "law-enforcement officer", "officer", or "fireman" shall mean a sheriff and all law-enforcement officers employed full-time, permanent part-time, or temporarily by a sheriff, the State of North Carolina or any county or municipality thereof, whether paid or unpaid; and all full-time custodial employees and probation and parole officers of the North Carolina Department of Correction; and all full time institutional and full-time, permanent part-time, and temporary detention employees of the Department of Juvenile Justice and Delinquency Prevention and full-time, permanent part-time, and temporary detention officers employed by any sheriff, county or municipality, whether paid or unpaid. The term "firemen" shall mean both "eligible firemen" as defined in G.S. 58-86-25 and all full-time, permanent part-time and temporary employees of the North Carolina Division of Forest Resources, Department of Environment and Natural Resources, during the time they are actively engaged in fire-fighting activities; and shall mean all full-time employees of the North Carolina Department of Insurance during the time they are actively engaged in fire-fighting activities, during the time they are training fire fighters or rescue squad workers, and during the time they are engaged in activities as members of the State Emergency Response Team, when the Team has been activated; and shall mean all otherwise eligible persons who, while actively engaged as firefighters or rescue squad workers, are acting in the capacity of a fire or rescue instructor outside their own department or squad. The term "rescue squad worker" shall mean a person who is dedicated to the purpose of alleviating human suffering and assisting anyone who is in difficulty or who is injured or becomes suddenly ill by providing the proper and efficient care or emergency medical services. In addition, this person must belong to an organized rescue squad which is eligible for membership in the North Carolina Association of Rescue Squads, Inc., and the person must have attended a minimum of 36 hours of training and meetings in the last calendar year. Each rescue squad belonging to the North Carolina Association of Rescue Squads, Inc., must file a roster of those members meeting the above requirements with the State Treasurer on or about January 1 of each year, and this roster must be certified to by the secretary of said association. In addition, the term "rescue squad worker" shall mean a member of an ambulance service certified by the Department of Health and Human Services pursuant to Article 7 of Chapter 131E of the General Statutes. The Department of Health and Human Services shall furnish a list of ambulance service members to the State Treasurer on or about January 1 of each year. The term "Civil Air Patrol members" shall mean those senior members of the North Carolina Wing-Civil Air Patrol 18 years of age or older and currently certified pursuant to G.S. 143B-491(a). The term "fireman" shall also mean county fire marshals when engaged in the performance of their county duties. The term "rescue squad worker" shall also mean county emergency services coordinators when engaged in the performance of their county duties.

(e) The term "spouse" shall mean the wife or husband of the deceased officer, fireman, rescue squad worker or senior Civil Air Patrol member who survives him and who was residing with such officer, fireman, rescue squad worker, or senior Civil Air Patrol member at the time of and during the six months next preceding the date of injury to such officer, fireman, rescue squad worker or senior Civil Air Patrol member which resulted in his death and who also resided with such officer, fireman, rescue squad worker or senior Civil Air

Patrol member from that date of injury up to and at the time of his death and who remains unmarried during the time benefits are forthcoming; provided, however, the part of this section requiring the spouse to have been residing with the deceased officer, fireman, rescue squad worker or senior Civil Air Patrol member for six months next preceding the date of the injury which resulted in his death shall not apply where marriage occurred during this six-month period or where the officer, fireman, rescue squad worker or senior Civil Air Patrol member was absent during this six-month period due to service in the armed forces of this country.

(f) The term "official duties" means those duties performed while en route to, engaged in, or returning from training, or in the course of responding to, engaged in or returning from a call by the department of which he is a member, or from a call for assistance from any department or such organization within the State of North Carolina or within a service area contiguous to the borders of the State of North Carolina, when served or aided by a department from within the State of North Carolina. While within the State of North Carolina, any eligible person, as defined in this section or in G.S. 58-86-25, who renders service or assistance, of his own volition, at the scene of an emergency, is performing his official duties when:

(1) Reasonably apparent circumstances require prompt decisions and actions to protect persons and property; and

(2) The necessity of immediate action is so reasonably apparent that any delay in acting would seriously worsen the property damage or endanger any person's life. (1959, c. 1323, s. 1; 1965, c. 937; 1969, c. 1025; 1973, c. 634, s. 2; c. 955, ss. 1, 2; 1975, c. 19, s. 49; c. 284, s. 7; 1977, c. 1048; 1979, c. 516, ss. 2, 3; c. 869; 1981, c. 944, s. 1; 1983, c. 761, s. 237; 1987, c. 812; 1987 (Reg. Sess., 1988), c. 1050, s. 1; 1989, c. 727, s. 218(97); 1989 (Reg. Sess., 1990), c. 1024, s. 32; 1991 (Reg. Sess., 1992), c. 833, s. 5; 1997-443, ss. 11A.118(a), 11A.119(a); 2000-137, s. 4(y); 2003-284, s. 30.18A(b); 2004-124, s. 31.18C(a); 2005-276, s. 29.30C; 2005-376, s. 1; 2008-163, s. 1.)

**Editor's Note.** — Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Subsection (d), as amended by Session Laws 2004-124, s. 31.18C(c), effective July 20, 2004, is applicable to persons killed in the line of duty on or after July 20, 2004, and the subsequent amendment by Session Laws 2005-376, s. 1, effective November 1, 2004, is applicable to all deaths occurring on or after November 1, 2004.

Session Laws 2008-163, s. 2, provides: "This act becomes effective June 1, 2008, and applies to workers' compensation claims arising from injuries occurring on or after that date and to death benefits awarded on or after that date under Article 12A of Chapter 143 of the General Statutes."

**Effect of Amendments.** — Session Laws 2008-163, s. 1, effective June 1, 2008, in subsection (d), substituted "'eligible firemen'" for "'eligible fireman'; or 'fireman'" near the beginning of the second sentence, and added "and shall mean all otherwise eligible persons who, while actively engaged as firefighters or rescue squad workers, are acting in the capacity of a fire or rescue instructor outside their own department or squad" at the end of the second sentence. See Editor's note for applicability.

**Legal Periodicals.** — For casenote: "The Established Standard for Fathers Who Have Acknowledged Paternity and Who Are Seeking Custody of Their Illegitimate Child(ren): Rosero v. Blake, 357 N.C. 193 (2003)," see 26 N.C. Cent. L.J. 116 (2003).

## CASE NOTES

**Cited** in Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003).

## § 143-166.3. Payments; determination.

(a) When any law-enforcement officer, fireman, rescue squad worker or senior Civil Air Patrol member shall be killed in the line of duty, the Industrial Commission shall award a death benefit to be paid in the amounts set forth in subsection (b) to the following:

(1) The spouse of such officer, fireman, rescue squad worker or senior Civil Air Patrol member if there be a surviving spouse; or

(2) If there be no spouse qualifying under the provisions of this Article, then payments shall be made to any surviving dependent child of such officer, fireman, rescue squad worker or senior Civil Air Patrol member and if there be more than one surviving dependent child, then said payment shall be made to and equally divided among all surviving dependent children; or

(3) If there be no spouse and no dependent child or children qualifying under the provisions of this Article, then payments shall be made to the surviving dependent parent of such officer, fireman, rescue squad worker or senior Civil Air Patrol member and if there be more than one surviving dependent parent then said payments shall be made to and equally divided between the surviving dependent parents of said officer, fireman, rescue squad worker or senior Civil Air Patrol member.

(b) Payment shall be made to the person or persons qualifying therefor under subsection (a) in the following amounts:

(1) At the time of the death of an officer, fireman, rescue squad worker or senior Civil Air Patrol member, twenty thousand dollars ($20,000) shall be paid to the person or persons entitled thereto.

(2) Thereafter, ten thousand dollars ($10,000) shall be paid annually to the person or persons entitled thereto until the sum of the initial payment and each annual payment reaches fifty thousand dollars ($50,000).

(3) In the event there is no person qualifying under subsection (a) of this section, fifty thousand dollars ($50,000) shall be paid to the estate of the deceased officer, fireman, rescue squad worker or senior Civil Air Patrol member at the time of death.

(c) In the event that any person or persons eligible for payments under subsection (a) of this section shall become ineligible, and other eligible person or persons qualify for said death benefit payments under subsection (a), then they shall receive the remainder of any payments up to the limit of fifty thousand dollars ($50,000) in the manner set forth in subsection (b) of this section.

(d) In the event any person or persons eligible for payments under subsection (a) of this section shall become ineligible and no other person or persons qualify for payments under that subsection and where the sum of the initial payment of twenty thousand dollars ($20,000) and each subsequent annual payment of ten thousand dollars ($10,000) does not total fifty thousand dollars ($50,000), then the difference between the total of the payments made and fifty thousand dollars ($50,000) shall immediately be payable to the estate of the deceased officer, fireman, rescue squad worker, or senior Civil Air Patrol member. (1959, c. 1323, s. 1; 1965, c. 937; 1971, c. 960; 1973, c. 634, s. 2; 1975, c. 284, s. 8; 2003-284, s. 30.18A(a).)

## § 143-166.4. Funds; conclusiveness of award.

Such award of benefits as is provided for by this Article shall be paid from the Contingency and Emergency Fund and such amounts as may be required to pay benefits provided for by this Article are hereby appropriated from said fund for this special purpose.

The Industrial Commission shall have power to make necessary rules and regulations for the administration of the provisions of this Article. It shall be vested with power to make all determinations necessary for the administration of this Article and all of its decisions and determinations shall be final and conclusive and not subject to review or reversal except by the Industrial Commission itself. The Industrial Commission shall keep a record of all proceedings conducted under this Article and shall have the right to subpoena any persons and records which it may deem necessary in making its determinations, and the Industrial Commission shall further have the power to require all persons called as witnesses to testify under oath or affirmation, and any member of the Industrial Commission may administer oaths. If any person shall refuse to comply with any subpoena issued hereunder or to testify with respect to any matter relevant to proceedings conducted under this Article, the Superior Court of Wake County, on application of the Industrial Commission, may issue an order requiring such person to comply with the subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as for contempt. (1959, c. 1323, s. 1; 1965, c. 937.)

### CASE NOTES

**Commission's Decisions Under This Article Are Conclusive and Not Appealable.** — This section governs the administration of claims under this Article; by its specific terms, decisions by the Industrial Commission are final and conclusive and appeal from such decisions is proscribed. In re Vandiford, 56 N.C. App. 224, 287 S.E.2d 912 (1982).

**Appellate Review Under Workers' Compensation Act Not Applicable.** — This Article is not a part of the North Carolina Workers' Compensation Act, and the methods of appellate review contained in the compensation act are not applicable to the Industrial Commission's function under this Article. In re Vandiford, 56 N.C. App. 224, 287 S.E.2d 912 (1982).

## § 143-166.5. Other benefits not affected.

None of the other benefits now provided for law-enforcement officers, or other persons covered by this Article, or their dependents by the Workers' Compensation Act or other laws shall be affected by the provisions of this Article, and the benefits provided for herein shall not be diminished, abated or otherwise affected by such other provisions of law. (1959, c. 1323, s. 1; 1965, c. 937; 1979, c. 245; c. 714, s. 2.)

### CASE NOTES

**Cited** in Kestler v. Board of Trustees, 48 F.3d 800 (4th Cir. 1995).

## § 143-166.6. Awards exempt from taxes.

Any award made under the provisions of this Article shall be exempt from taxation by the State or any political subdivision. The Industrial Commission shall not be responsible for any determination of the validity of any claims against said awards and shall distribute the death benefit awards directly to the dependent or dependents entitled thereto under the provisions of this Article. (1959, c. 1323, s. 1; 1965, c. 937.)

## § 143-166.7. Applicability of Article.

The provisions of this Article shall apply and be in full force and effect with respect to any law-enforcement officer, fireman, rescue squad worker or senior Civil Air Patrol member killed in the line of duty on or after May 13, 1975. The provisions of this Article shall apply with respect to full-time, permanent part-time and temporary employees of North Carolina Division of Forest Resources, Department of Environment and Natural Resources, killed in line of duty on or after July 1, 1975. The provisions of this Article shall apply to county fire marshals and emergency services coordinators killed in the line of duty on and after July 1, 1988. (1965, c. 937; 1973, c. 634, s. 3; 1975, c. 284, s. 9; 1981, c. 944, s. 2; 1987 (Reg. Sess., 1988), c. 1050, s. 2; 1989, c. 727, s. 218(98); 1997-443, s. 11A.119(a).)

**§§ 143-166.8 through 143-166.12:** Reserved for future codification purposes.

## Article 12B.

## *Salary Continuation Plan for Certain State Law-Enforcement Officers.*

## § 143-166.13. Persons entitled to benefits under Article.

(a) The following persons who are subject to the Criminal Justice Training and Standards Act are entitled to benefits under this Article:

(1) State Government Security Officers, Department of Administration;
(2) State Correctional Officers, Department of Corrections;
(3) State Probation and Parole Officers, Department of Corrections;
(4) Sworn State Law-Enforcement Officers with the power of arrest, Department of Corrections;
(5) Alcohol Law-Enforcement Agents, Department of Crime Control and Public Safety;
(6) State Highway Patrol Officers, Department of Crime Control and Public Safety;
(7) General Assembly Special Police, General Assembly;
(8) Sworn State Law-Enforcement Officers with the power of arrest, Department of Health and Human Services;
(9) Juvenile Justice Officers, Department of Juvenile Justice and Delinquency Prevention;
(10) Insurance Investigators, Department of Insurance;
(11) State Bureau of Investigation Officers and Agents, Department of Justice;
(12) Director and Assistant Director, License and Theft Enforcement Section, Division of Motor Vehicles, Department of Transportation;
(13) Members of License and Theft Enforcement Section, Division of Motor Vehicles, Department of Transportation, designated by the Commissioner of Motor Vehicles as either "inspectors" or uniformed weigh station personnel;
(14) Utilities Commission Transportation Inspectors and Special Investigators;
(15) North Carolina Ports Authority Police, Department of Commerce;
(16) Sworn State Law-Enforcement Officers with the power of arrest, Department of Environment and Natural Resources;

(17) Sworn State Law-Enforcement Officers with the power of arrest, Department of Crime Control and Public Safety.
(18) Sworn State Law-Enforcement Officers with the power of arrest, Department of Revenue.
(19) Sworn State Law-Enforcement Officers with the power of arrest, University System.

(b) The following persons are entitled to benefits under this Article regardless of whether they are subject to the Criminal Justice Training and Standards Act:

(1) Driver License Examiners injured by accident arising out of and in the course of giving a road test, Division of Motor Vehicles, Department of Transportation;
(2) Employees of the Department of Correction injured by a direct and deliberate act of an offender supervised by the Department or while performing supervisory duties over offenders which place the employees at risk of such injury. (1979, 2nd Sess., c. 1272, s. 1; 1981, c. 348, s. 1; c. 964, s. 19; 1989, c. 727, s. 218(99), c. 751, s. 7(15); 1991 (Reg. Sess., 1992), c. 959, s. 34; 1996, 2nd Ex. Sess., c. 18, s. 20.7(a); 1997-443, ss. 11A.118(a), 11A.119(a); 1997-503, s. 3; 1998-212, s. 28.25(a); 2001-487, s. 89; 2005-359, s. 3.)

### CASE NOTES

**Cited** in Vandiford v. North Carolina Dep't of Cor., 97 N.C. App. 640, 389 S.E.2d 408 (1990).

### OPINIONS OF ATTORNEY GENERAL

**Employee Coverage.** — If an employee is in a position which (1) requires certification by the Criminal Justice Education and Training Standards Commission, and (2) is within a category listed in this section as defined by the Commission, the employee is covered by the Plan. Otherwise the employee is not covered. See opinion of Attorney General to Mr. Gerald Hodnett, Personnel Director, Department of Correction, 57 N.C.A.G. 79 (1987).

## § 143-166.14. Payment of salary notwithstanding incapacity; Workers' Compensation Act applicable after two years; duration of payment.

The salary of any of the above listed persons shall be paid as long as his employment in that position continues, notwithstanding his total or partial incapacity to perform any duties to which he may be lawfully assigned, if that incapacity is the result of an injury by accident or an occupational disease arising out of and in the course of the performance by him of his official duties, except if that incapacity continues for more than two years from its inception, the person shall, during the further continuance of that incapacity, be subject to the provisions of Chapter 97 of the General Statutes pertaining to workers' compensation. Salary paid to a person pursuant to this Article shall cease upon the resumption of his regularly assigned duties, retirement, resignation, or death, whichever first occurs, except that temporary return to duty shall not prohibit payment of salary for a subsequent period of incapacity which can be shown to be directly related to the original injury. (1979, 2nd Sess., c. 1272, s. 1.)

### CASE NOTES

**As long as an individual who is covered by the statute does not come within articulated terms for salary discontinuation,** his employment for salary continuation benefit purposes continues. Vandiford v. North Carolina Dep't of Cor., 97 N.C. App. 640, 389 S.E.2d 408, cert. denied, 326 N.C. 805, 393 S.E.2d 907 (1990); 498 U.S. 963, 111 S. Ct. 398, 112 L. Ed. 2d 407 (1991).

**Former correctional officer's coverage did not end with expiration of his probationary certificate,** and he was eligible to receive salary continuation benefits for the full two-year period from the date of the injury. Vandiford v. North Carolina Dep't of Cor., 97 N.C. App. 640, 389 S.E.2d 408, cert. denied, 326 N.C. 805, 393 S.E.2d 907 (1990); 498 U.S. 963, 111 S. Ct. 398, 112 L. Ed. 2d 407 (1991).

## § 143-166.15. Application of § 97-27; how payments made.

Notwithstanding the provisions of G.S. 143-166.14 of this Article, the persons entitled to benefits shall be subject to the provisions of G.S. 97-27 during the two-year period of payment of full salary. All payments of salary shall be made at the same time and in the same manner as other salaries are paid to other persons in the same department. (1979, 2nd Sess., c. 1272, s. 1.)

## § 143-166.16. Effect on workers' compensation and other benefits; application of § 97-24.

The provisions of G.S. 143-166.14 shall be in lieu of all compensation provided for the first two years of incapacity by G.S. 97-29 and 97-30, but shall be in addition to any other benefits or compensation to which such person shall be entitled under the provisions of the Workers' Compensation Act. The provisions of G.S. 97-24 will commence at the end of the two-year period for which salary is paid pursuant to G.S. 143-166.14. (1979, 2nd Sess., c. 1272, s. 1.)

## § 143-166.17. Period of incapacity not charged against sick leave or other leave.

The period for which the salary of any person is paid pursuant to G.S. 143-166.14 while he is incapacitated as a result of an injury by accident or an occupational disease arising out of and in the course of the performance by him of his official duties, shall not be charged against any sick or other leave to which he shall be entitled under any other provision of law. (1979, 2nd Sess., c. 1272, s. 1.)

## § 143-166.18. Report of incapacity.

Any person designated in G.S. 143-166.13, who, as a result of an injury by accident arising out of and in the course of the performance by him of his official duties, is totally or partially incapacitated to perform any duties to which he may be lawfully assigned, shall report the incapacity as soon as practicable in the manner required by the secretary or other head of the department to which the agency is assigned by statute. (1979, 2nd Sess., c. 1272, s. 1; 1981, c. 348, s. 2.)

## § 143-166.19. Determination of cause and extent of incapacity; hearing before Industrial Commission; appeal; effect of refusal to perform duties.

Upon the filing of the report, the secretary or other head of the department or, in the case of the General Assembly, the Legislative Services Officer, shall determine the cause of the incapacity and to what extent the claimant may be assigned to other than his normal duties. The finding of the secretary or other head of the department shall determine the right of the claimant to benefits under this Article. Notice of the finding shall be filed with the North Carolina Industrial Commission. Unless the claimant, within 30 days after he receives notice, files with the North Carolina Industrial Commission, upon the form it shall require, a request for a hearing, the finding of the secretary or other department head shall be final. Upon the filing of a request, the North Carolina Industrial Commission shall proceed to hear the matter in accordance with its regularly established procedure for hearing claims filed under the Worker's Compensation Act, and shall report its findings to the secretary or other head of the department. From the decision of the North Carolina Industrial Commission, an appeal shall lie as in other matters heard and determined by the Commission. Any person who refuses to perform any duties to which he may be properly assigned as a result of the finding of the secretary, other head of the department or of the North Carolina Industrial Commission shall be entitled to no benefits pursuant to this Article as long as the refusal continues. (1979, 2nd Sess., c. 1272, s. 1; 1981, c. 348, s. 3.)

### CASE NOTES

**Attorney's fees.** — In a workers' compensation case involving a Department of Corrections officer's claim for salary continuation, the Industrial Commission could in its discretion award reasonable attorney's fees under this section. Ruggery v. North Carolina Dep't of Cors., 135 N.C. App. 270, 520 S.E.2d 77 (1999).

## § 143-166.20. Subrogation.

The same rights and remedies set forth in G.S. 97-10.2 shall apply in all third party liability cases occurring under this Article, including cases involving the right of the affected State agency to recover the salary paid to an injured officer during his period of disability. (1981, c. 348, s. 4.)

## §§ 143-166.21 through 143-166.29: Reserved for future codification purposes.

## ARTICLE 12C.

## *Retirement Benefits for State Law-Enforcement Officers.*

## § 143-166.30. Retirement benefits for State law-enforcement officers.

(a) Definitions. — The following words and phrases as used in this Article, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) "Beneficiary" means any person in receipt of a retirement allowance or other benefit from a Retirement System.

(2) "Creditable service" means membership service plus prior service plus military service allowable with a Retirement System.

(3) "Employer" means the State of North Carolina and its departments, agencies and institutions.

(4) "Law-enforcement officer" means a full-time paid employee of an employer who is actively serving in a position with assigned primary duties and responsibilities for prevention and detection of crime or the general enforcement of the criminal laws of the State or serving civil processes, and who possesses the power of arrest by virtue of an oath administered under the authority of the State.

(5) "Member" means an officer included in the membership of a retirement system including former officers no longer employed who also elected to leave their accumulated contributions on deposit with a Retirement System.
(6) "Officer" means a "law-enforcement officer."
(7) "Participant" means an officer with an individual account with the Supplemental Retirement Income Plan.
(8) "Regular accumulated contributions" means the sum of all contributions of a member made to the Retirement System, together with regular interest thereon, pursuant to G.S. 143-166 as the same appeared prior to January 1, 1985.
(9) "Retirement allowance" means annual payments for life payable in monthly installments continuing until the death of a beneficiary.
(10) "Law-Enforcement Officers' Retirement System" means the system provided for under G.S. 143-166.
(11) "Special annuity account accumulated contributions" means the sum of all contributions of a member or an employer made to the Special Annuity Accounts for Members of the Law-Enforcement Officers' Retirement System, together with regular interest thereon, pursuant to G.S. 143-166.03 as the same appeared prior to January 1, 1985.
(12) "Special Annuity Accounts" means the supplemental defined contribution provisions of the Law-Enforcement Officers' Retirement System, provided for under G.S. 143-166.03 as the same appeared prior to January 1, 1985.
(13) "State" means the State of North Carolina.
(14) "State Retirement System" means the Teachers' and State Employees' Retirement System of North Carolina provided for under Article 1 of Chapter 135 of the General Statutes.
(15) "Supplemental Retirement Income Plan" means a plan created in conformance with Section 401(a), 401(k), or any other section of the Internal Revenue Code of 1954 as amended.

(b) Basic Retirement System. — On and after January 1, 1985, law-enforcement officers employed by the State shall be members of the Teachers' and State Employees' Retirement System and beneficiaries who were last employed as officers by the State, or who are surviving beneficiaries of officers last employed by the State, shall be beneficiaries of the State Retirement System and paid in benefit amounts then in effect. All members of the Law-Enforcement Officers' Retirement System last employed and paid by the State shall be members of the State Retirement System.

(c) Transfers of Assets and Liabilities to Other Retirement Systems. — As of January 1, 1985, certain assets and liabilities of the Law-Enforcement Officers' Retirement System shall be transferred to the Teachers' and State Employees' Retirement System and the Supplemental Retirement Income Plan in the amounts calculated and in the order of precedence enumerated as follows:
(1) The regular accumulated contributions of members of the Law-Enforcement Officers' Retirement System employed by the State or last employed by the State shall be transferred from the annuity savings fund of the Law-Enforcement Officers' Retirement System to the annuity savings fund of the State Retirement System to the credit of each individual officer.
(2) An amount equal to the present value of the liabilities on account of the retirement allowances payable to beneficiaries last employed as officers by the State and the surviving beneficiaries of officers last employed by the State, as calculated by the Retirement System's consulting actuary, shall be transferred from the pension accumulation fund of the Law-Enforcement Officers' Retirement System to the pension accumulation fund of the State Retirement System.

(3) After the transfers provided for above, additional assets in the pension accumulation fund of the Law-Enforcement Officers' Retirement System shall be transferred to the pension accumulation fund of the State Retirement System, in an amount equal to the ratio of the accrued liabilities on account of members of the Law-Enforcement Officers' Retirement System employed by the State or last employed by the State to the total accrued liabilities on account of all members of the Law-Enforcement Officers' Retirement System.

(4) The special annuity account accumulated contributions shall be transferred from the special annuity savings fund of the Law-Enforcement Officers' Retirement System to the Supplemental Retirement Income Plan pursuant to subsection (d) of this section to the credit of individual officers.

(d) Supplemental Retirement Income Plan for State Law-Enforcement Officers. — As of January 1, 1985, there shall be created a Supplemental Retirement Income Plan, hereinafter called the "Plan," established for the benefit of all law-enforcement officers employed by the State, who shall be participants. The Board of Trustees of the State Retirement System shall administer the Plan and shall, under the terms and conditions otherwise appearing herein, provide Plan benefits either (i) by establishing a separate trust fund in conformance with Section 401(a), Section 401(k) or other sections of the Internal Revenue Code of 1954 as amended or, (ii) by causing the Plan to affiliate with some master trust fund providing the same benefits for participants. The Plan shall be separate and apart from any retirement systems.

In addition to the contributions transferred from the Law-Enforcement Officers' Retirement System and the contributions otherwise provided for in this Article, participants may make voluntary contributions to the Plan to be credited to the designated individual accounts of participants; provided, in no instance shall the total contributions by a participant exceed ten percent (10%) of a participant's compensation within any calendar year.

All contributions to the Plan shall be credited to the individual accounts of participants, and shall be fully and immediately vested in the name of the participant, and shall be invested according to each participant's election, as provided by the Board of Trustees, including but not limited to time deposits, and both fixed and variable investments. The Plan may provide for loans to participants, at reasonable rates of interest to be charged, from participants' individual accounts, and may provide for withdrawal of contributions on account of hardship.

The benefit to a participant in the Plan shall be either a lump-sum distribution or a distribution in periodic installments of the participant's account payable under retirement, disability, or termination of employment. Upon the death of a participant there shall be paid the same lump-sum distribution or periodic installments to the surviving spouse of the participant or otherwise to the participant's estate; provided, should a participant instruct the Board of Trustees in writing that he does not wish these benefits to be paid to his spouse or estate, then the benefits shall be paid to the person or persons as the participant may name for this purpose.

Upon retirement, a participant in the Plan may elect to transfer his eligible accumulated contributions, not including any Roth after-tax contributions and the earnings thereon, to the Teachers' and State Employees' Retirement System and receive, in addition to his basic service, early or disability retirement allowance a special retirement allowance which shall be based on his eligible accumulated account balance at the date of the transfer of the assets.

(e) State Contributions to the Supplemental Retirement Income Plan. — Under all other restrictions as are herein provided, the State shall contribute monthly to the individual accounts of participants who are employed by the State an amount equal to five percent (5%) of the compensation of each participant. The contributions so paid shall be in addition to the contributions on account of court cost assessments as hereinafter provided.

Contributions shall be made to the individual accounts of all participants in the Plan on a per capita basis in equal shares, equal to the sum of the one-half dollar ($0.50) for each cost of court assessed and collected under G.S. 7A-304.

(e1) Rights of Participants under the Uniformed Services Employment and Reemployment Rights Act. — A participant whose employment is interrupted by reason of service in the Uniformed Services, as that term is defined in section 4303(16) of the Uniformed Services Employment and Reemployment Rights Act, Public Law 103-353, hereafter referred to as "USERRA", shall be entitled to all rights and benefits that the participant would have been entitled to under this section had the participant's employment not been interrupted, provided that the participant returns to service as a law enforcement officer while the participant's reemployment rights are protected under the provisions of USERRA.

(f) Administration. — The provisions of the State Retirement System pertaining to administration and management of funds under G.S. 135-6 and 7 are made applicable to the Plan.

(g) Exemption from Garnishment and Attachment. — The right of a participant in the Supplemental Retirement Income Plan to the benefits provided under this Article is nonforfeitable and exempt from levy, sale, and garnishment.

(h) Notwithstanding any other provisions of law, any pending or inchoate rights of a member of the Law-Enforcement Officers' Retirement System as of their transfer to the State Retirement System on January 1, 1985, including the rights to a vested deferred retirement allowance and to commence retirement at certain ages with required years of service as a law-enforcement officer, shall in no way be diminished; provided, however, in no event may a member commence retirement and continue membership service with the same Retirement System.

No eligible officer shall be precluded from exercising that officer's pending or inchoate rights under this section, should the officer elect to make Roth after-tax contributions to the Supplemental Retirement Income Plan, except that these Roth after-tax contributions and the earnings thereon shall not be subsequently transferred to the Teachers' and State Employees' Retirement System. (1983 (Reg. Sess., 1984), c. 1034, s. 248; 1985, c. 479, s. 196(s); 1989, c. 792, s. 2.7; 1995, c. 361, s. 5; 2006-141, s. 1; 2007-384, s. 10.5.)

**Editor's Note.** — Section 143-166, referred to in subdivision (a)(8) and (a)(10) of this section, was repealed by Session Laws 1985, c. 479, s. 196(t).

Section 143-166.03, referred to in subdivisions (a)(11) and (a)(12) of this section, was repealed by Session Laws 1985, c. 479, s. 196(t).

Session Laws 2007-384, s. 11(b), provides: "The Board of Trustees of the Teachers' and State Employees' Retirement System shall adopt straight life annuity factors, for the purpose of determining the special retirement allowance, based upon mortality and such other tables and the interest assumption rate recommended by the actuary based upon the actual experience as reported in the last five year experience study as required by G.S. 135-6(n) and including an assumed annual post-retirement allowance increase of four percent (4%). The Board of Trustees of the Local Governmental Employees' Retirement System shall adopt straight life annuity factors, for the purpose of determining the special retirement allowance, based upon mortality and such other tables and the interest assumption rate recommended by the actuary based upon the actual experience as reported in the last five year experience study as required by G.S. 128-29(o) and including an assumed annual post-retirement allowance increase of four percent (4%). Sections 10.1 through 10.6 of this act become effective the first of the month following the adoption of those factors by the Boards of Trustees."

Session Laws 2007-384, which, in s. 10.5, added the last paragraph of subsection (d), in.s. 11(b), provides: "The Board of Trustees of the

Teachers' and State Employees' Retirement System shall adopt straight life annuity factors, for the purpose of determining the special retirement allowance, based upon mortality and such other tables and the interest assumption rate recommended by the actuary based upon the actual experience as reported in the last five year experience study as required by G.S. 135-6(n) and including an assumed annual post-retirement allowance increase of four percent (4%). The Board of Trustees of the Local Governmental Employees' Retirement System shall adopt straight life annuity factors, for the purpose of determining the special retirement allowance, based upon mortality and such other tables and the interest assumption rate recommended by the actuary based upon the actual experience as reported in the last five year experience study as required by G.S. 128-29(o) and including an assumed annual post-retirement allowance increase of four percent (4%). Sections 10.1 through 10.6 of this act become effective the first of the month following the adoption of those factors by the Boards of Trustees."

### CASE NOTES

**Cited** in Braswell v. Ellis, 950 F. Supp. 145 (E.D.N.C. 1995); Carter v. Good, 951 F. Supp. 1235 (W.D.N.C. 1996).

### OPINIONS OF ATTORNEY GENERAL

**Participation by Commissioner of Motor Vehicles in State 401(k) Plan.** — Because the current Commissioner of Motor Vehicles appears to meet the definition of a "law-enforcement officer" for purposes of this section, employer contributions to the State 401(k) Plan on behalf of the Commissioner should be accepted. See opinion of Attorney General to Mr. Michael Williamson, Director, Department of State Treasurer, Retirement Systems Division, 2004 N.C.A.G. 8 (6/30/04).

**§§ 143-166.31 through 143-166.39:** Reserved for future codification purposes.

## Article 12D.

## *Separation Allowances for Law-Enforcement Officers.*

### § 143-166.40. Rules for selection and retention of law-enforcement officers; rules exempt from Administrative Procedure Act.

(a) Except as otherwise provided by State and federal law, the head of each principal State department may establish rules and procedures for the selection and retention of sworn law-enforcement officers to ensure that they are physically, emotionally, and intellectually qualified to perform their duties. These rules and procedures shall not establish any mandatory age limit for service as a law-enforcement officer that conflicts with a federal statute.

(b) These rules and procedures are exempt from the provisions of Chapter 150B of the General Statutes. (1983 (Reg. Sess., 1984), c. 1034, s. 104; 1987, c. 827, s. 1.)

### § 143-166.41. Special separation allowance.

(a) Notwithstanding any other provision of law, every sworn law-enforcement officer as defined by G.S. 135-1(11b) or G.S. 143-166.30(a)(4) employed by a State department, agency, or institution who qualifies under this section shall receive, beginning in the month in which he retires on a basic service retirement under the provisions of G.S. 135-5(a) or G.S. 143-166(y), an annual separation allowance equal to eighty-five hundredths percent (0.85%) of the annual equivalent of the base rate of compensation most recently applicable to him for each year of creditable service. The allowance shall be paid in equal installments on the payroll frequency used by the employer. To qualify for the allowance the officer shall:

(1) Have (i) completed 30 or more years of creditable service or, (ii) have attained 55 years of age and completed five or more years of creditable service; and

(2) Not have attained 62 years of age; and

(3) Have completed at least five years of continuous service as a law enforcement officer as herein defined immediately preceding a service retirement. Any break in the continuous service required by this subsection because of disability retirement or disability salary continuation benefits shall not adversely affect an officer's qualification to receive the allowance, provided the officer returns to service within 45 days after the disability benefits cease and is otherwise qualified to receive the allowance.

(b) As used in this section, "creditable service" means the service for which credit is allowed under the retirement system of which the officer is a member, provided that at least fifty percent (50%) of the service is as a law enforcement officer as herein defined.

(c) Payment to a retired officer under the provisions of this section shall cease at the first of:

(1) The death of the officer;

(2) The last day of the month in which the officer attains 62 years of age; or

(3) The first day of reemployment by any State department, agency, or institution, except that this subdivision does not apply to an officer returning to State employment in a position exempt from the State Personnel Act in an agency other than the agency from which that officer retired.

(d) This section does not affect the benefits to which an individual may be entitled from State, federal, or private retirement systems. The benefits payable under this section shall not be subject to any increases in salary or retirement allowances that may be authorized by the General Assembly for employees of the State or retired employees of the State.

(e) The head of each State department, agency, or institution shall determine the eligibility of employees for the benefits provided herein.

(f) The Director of the Budget may authorize from time to time the transfer of funds within the budgets of each State department, agency, or institution necessary to carry out the purposes of this Article. These funds shall be taken from those appropriated to the department, agency, or institution for salaries and related fringe benefits.

(g) The head of each State department, agency, or institution shall make the payments set forth in subsection (a) to those persons certified under subsection (e) from funds available under subsection (f). (1983 (Reg. Sess., 1984), c. 1034, s. 104; 1985, c. 479, s. 143; 1985 (Reg. Sess., 1986), c. 1014, ss. 51, 52; 2002-126, s. 28.14; 2007-69, s. 1.)

**Editor's Note.** — Section 143-166, referred to in subsection (a) of this section, was repealed by Session Laws 1985, c. 479, s. 196(t), effective January 1, 1986. See now G.S. 143-166.50, 143-166.60.

## CASE NOTES

**Amount of Separation Allowance Mandatory.** — This statute permits local governments to determine eligibility and requires them to make payments, but it does not authorize local governments to determine the amount of the separation allowance differently from the mandate of subsection (a). Bowers v. City of High Point, 339 N.C. 413, 451 S.E.2d 284 (1994).

**Eligibility.** — Since the initial eligibility requirement for a separation allowance under G.S. 143-166.41 was that police officers retire on a service retirement, police officer was not eligible because he retired on a disability retirement. Cochrane v. City of Charlotte, 148 N.C. App. 621, 559 S.E.2d 260, 2002 N.C. App. LEXIS 45 (2002), cert. denied, 356 N.C. 160, 568 S.E.2d 189 (2002).

Police officer who retired on disability retirement was not eligible for a special separation allowance because he did not retire on a service retirement and was, therefore, not among the class of persons statutorily eligible for a special separation allowance. Cochrane v. City of Charlotte, 148 N.C. App. 621, 559 S.E.2d 260, 2002 N.C. App. LEXIS 45 (2002), cert. denied, 356 N.C. 160, 568 S.E.2d 189 (2002).

**Creditable Service.** — When a police officer retired on disability retirement, his time spent on disability retirement could not be considered "creditable service" for purposes of determining eligibility for a special separation allowance. Cochrane v. City of Charlotte, 148 N.C. App. 621, 559 S.E.2d 260, 2002 N.C. App. LEXIS 45 (2002), cert. denied, 356 N.C. 160, 568 S.E.2d 189 (2002).

**"Base rate of compensation"** refers to that portion of compensation which is relatively stable and forms the foundation or groundwork of the employee's entire compensation scheme; this would generally be the minimum amount of compensation to which the employee is entitled in any given pay period relatively independent of factors other than the employment relationship itself. Bowers v. City of High Point, 339 N.C. 413, 451 S.E.2d 284 (1994).

In this section "base rate of compensation" has a definite meaning not subject to alteration by local governments and does not include overtime pay, longevity pay, or pay for unused accrued vacation. Bowers v. City of High Point, 339 N.C. 413, 451 S.E.2d 284 (1994).

**Authority of Municipalities.** — This section and G.S. 143-166.42 do not authorize municipalities to make separation allowances based on overtime pay, longevity pay, and accrued vacation. Bowers v. City of High Point, 339 N.C. 413, 451 S.E.2d 284 (1994).

Establishing reemployment by another local government as grounds for cessation of the payment of a separation allowance pursuant to G.S. 143-166.42 is within a city's authority; G.S. 143-166.42 does not allow the city to determine the amount of the payment but does permit it to determine a retiree's eligibility. Campbell v. City of Laurinburg, 168 N.C. App. 566, 608 S.E.2d 98, 2005 N.C. App. LEXIS 335 (2005).

Pursuant to the plain and unambiguous language of G.S. 143-166.42, as well as of G.S. 143-166.41 upon which it was based, the actions of a county and a county board of commissioners in entering into a contractual relationship with a retired local law enforcement officer, wherein he was to receive a special separation allowance, were legislatively authorized; accordingly, such was not an ultra vires act on the part of the county entities. Wiggs v. Edgecombe County, 361 N.C. 318, 643 S.E.2d 904, 2007 N.C. LEXIS 411 (2007).

**Reemployment By Local Government.** — Retired city police officer lost his right to receive a separation allowance pursuant to G.S. 143-166.42 when he became reemployed by a county sheriff's office, which was a local government as defined by G.S. 143-166.41. Campbell v. City of Laurinburg, 168 N.C. App. 566, 608 S.E.2d 98, 2005 N.C. App. LEXIS 335 (2005).

Establishing reemployment by another local government as grounds for cessation of the payment of a separation allowance pursuant to G.S. 143-166.42 is within a city's authority; G.S. 143-166.42 does not allow the city to determine the amount of the payment but does permit it to determine a retiree's eligibility. Campbell v. City of Laurinburg, 168 N.C. App. 566, 608 S.E.2d 98, 2005 N.C. App. LEXIS 335 (2005).

**Resolution Restricting Vested Allowance was Improper.** — County's resolution, pursuant to its authority under G.S. 143-166.42, restricting a former officer's ability to collect a special separation allowance, impaired the obligation of the state's contract with former officer under the retirement system; because the resolution was enacted after the former officer had retired and his right to receive the special separation had become vested, it was improper. Wiggs v. Edgecombe County, 179 N.C. App. 47, 632 S.E.2d 249, 2006 N.C. App. LEXIS 1645 (2006).

**Cited** in BellSouth Telecomms., Inc. v. City of Laurinburg, 168 N.C. App. 75, 606 S.E.2d 721, 2005 N.C. App. LEXIS 164; Finger v. Gaston County, 178 N.C. App. 367, 631 S.E.2d 171, 2006 N.C. App. LEXIS 1396 (2006).

### § 143-166.42. Special separation allowances for local officers.

(a) On and after January 1, 1987, every sworn law enforcement officer as defined by G.S. 128-21(11b) or G.S. 143-166.50(a)(3) employed by a local government employer who qualifies under this section shall receive, beginning in the month in which the officer retires on a basic service retirement under the provisions of G.S. 128-27(a), an annual separation allowance equal to eighty-five hundredths percent (0.85%) of the annual equivalent of the base rate of compensation most recently applicable to the officer for each year of creditable service. The allowance shall be paid in equal installments on the payroll frequency used by the employer. To qualify for the allowance, the officer shall:

(1) Have (i) completed 30 or more years of creditable service or (ii) have attained 55 years of age and completed five or more years of creditable service; and

(2) Not have attained 62 years of age; and

(3) Have completed at least five years of continuous service as a law enforcement officer as herein defined immediately preceding a service retirement. Any break in the continuous service required by this subsection because of disability retirement or disability salary continuation benefits shall not adversely affect an officer's qualification to receive the allowance, provided the officer returns to service within 45 days after the disability benefits cease and is otherwise qualified to receive the allowance.

(b) As used in this section, "creditable service" means the service for which credit is allowed under the retirement system of which the officer is a member, provided that at least fifty percent (50%) of the service is as a law enforcement officer as herein defined.

(c) Payment to a retired officer under the provisions of this section shall cease at the first of:

(1) The death of the officer;

(2) The last day of the month in which the officer attains 62 years of age; or

(3) The first day of reemployment by a local government employer in any capacity.

Notwithstanding the provisions of subdivision (3) of this subsection, a local government employer may employ retired officers in a public safety position in a capacity not requiring participation in the Local Governmental Employees' Retirement System, and doing so shall not cause payment to cease to those officers under the provisions of this section.

(d) This section does not affect the benefits to which an individual may be entitled from State, local, federal, or private retirement systems. The benefits payable under this section shall not be subject to any increases in salary or retirement allowances that may be authorized by local government employers or for retired employees of local governments.

(e) The governing body of each local employer shall determine the eligibility of employees for the benefits provided herein.

(f) The governing body of each local employer shall make the payments set forth in subsection (a) of this section to those persons certified under subsection (e) of this section from funds available. (1985 (Reg. Sess., 1986), c. 1019, s. 2; 2009-396, s. 1.)

**Editor's Note.** — Session Laws 2009-396, s. 2, provides: "Nothing in this act shall be deemed to (i) entitle a law enforcement officer to retroactive payments of any benefit for the period prior to the effective date of this act for which the officer's employer previously determined that the officer was not entitled; (ii) prospectively deny payment of an annual separation allowance to an officer who was previously determined by the officer's employer to be eligible for such benefit; (iii) apply to any pending litigation related to the special separation allowance; or (iv) extend the payment beyond the date when payment shall cease pursuant to G.S. 143-166.42(c), as enacted by Section 1 of this act."

**Effect of Amendments.** — Session Laws 2009-396, s. 1, effective July 31, 2009, and applicable prospectively to payments required by this act whether the officer retired before, on, or after July 31, 2009, rewrote the section.

## CASE NOTES

**Authority of Municipalities.** — Section 143-166.41 and this section do not authorize municipalities to make separation allowances based on overtime pay, longevity pay, and accrued vacation. Bowers v. City of High Point, 339 N.C. 413, 451 S.E.2d 284 (1994).

Pursuant to the plain and unambiguous language of G.S. 143-166.42, as well as of G.S. 143-166.41 upon which it was based, the actions of a county and a county board of commissioners in entering into a contractual relationship with a retired local law enforcement officer, wherein he was to receive a special separation allowance, were legislatively authorized; accordingly, such was not an ultra vires act on the part of the county entities. Wiggs v. Edgecombe County, 361 N.C. 318, 643 S.E.2d 904, 2007 N.C. LEXIS 411 (2007).

**Reemployment By Local Government.** — Retired city police officer lost his right to receive a separation allowance pursuant to G.S. 143-166.42 when he became reemployed by a county sheriff's office, which was a local government as defined by G.S. 143-166.41. Campbell v. City of Laurinburg, 168 N.C. App. 566, 608 S.E.2d 98, 2005 N.C. App. LEXIS 335 (2005).

**Resolution Restricting Vested Allowance was Improper.** — County's resolution, pursuant to its authority under G.S. 143-166.42, restricting a former officer's ability to collect a special separation allowance, impaired the obligation of the state's contract with former officer under the retirement system; because the resolution was enacted after the former officer had retired and his right to receive the special separation had become vested, it was improper. Wiggs v. Edgecombe County, 179 N.C. App. 47, 632 S.E.2d 249, 2006 N.C. App. LEXIS 1645 (2006).

**Contracts Clause Violated by Retroactive Resolution to Stop Payments.** — County and county board of commissioners' attempt to terminate a retired local law enforcement officer's payments of a special separation allowance under G.S. 143-166.42 was violative of the contracts clause of U.S. Const., Art. I, § 10, as the statute allowed the parties to enter into the payment arrangement without any restrictions and, accordingly, the county entities could not pass a resolution to terminate the payments upon re-employment by the retired officer with another participant in the North Carolina Local Government Employees' Retirement System; such a resolution would have retroactively terminated his contractual right, which would have unconstitutionally impaired the contract. Wiggs v. Edgecombe County, 361 N.C. 318, 643 S.E.2d 904, 2007 N.C. LEXIS 411 (2007).

## OPINIONS OF ATTORNEY GENERAL

**"Creditable service,"** for purposes of determining a local law enforcement officer's eligibility for the special separation allowance benefit and for calculating the amount of that benefit, is service for which credit is allowed under either retirement system of which the officer is a member. See opinion of Attorney General to Claire McNaught, Public Safety Attorney, City of Winston-Salem, 56 N.C.A.G. 40 (1986).

**A local law enforcement officer's eligibility** for the special separation allowance benefit is in all instances determined by the officer's local government employer. See opinion of Attorney General to Claire McNaught, Public Safety Attorney, City of Winston-Salem, 56 N.C.A.G. 40 (1986).

**§§ 143-166.43 through 143-166.49:** Reserved for future codification purposes.

## ARTICLE 12E.

## *Retirement Benefits for Local Governmental Law-Enforcement Officers.*

### § 143-166.50. Retirement benefits for local governmental law-enforcement officers.

(a) Definitions. — The following words and phrases as used in this Article, unless a different meaning is plainly required by the context, have the following meaning:

(1) "Beneficiary" means any person in receipt of a retirement allowance or other benefit from a Retirement System.

(2) "Employer" means a county, city, town or other political subdivision of the State.

(3) "Law-enforcement officer" means a full-time paid employee of an employer, who possesses the power of arrest, who has taken the law enforcement oath administered under the authority of the State as prescribed by G.S. 11-11, and who is certified as a law enforcement officer under the provisions of Chapter 17C of the General Statutes or certified as a deputy sheriff under the provisions of Chapter 17E of the General Statutes. "Law enforcement officer" also means the sheriff of the county. The number of paid personnel employed as law enforcement officers by a law enforcement agency may not exceed the number of law enforcement positions approved by the applicable local governing board.

(4) "Law-Enforcement Officers' Retirement System" means the system provided for under Article 12 of Chapter 143 of the General Statutes, as it existed prior to January 1, 1986.

(5) "Local Governmental Employees' Retirement System" means the Local Governmental Employees' Retirement System of North Carolina provided for under Article 3 of Chapter 128 of the General Statutes.

(6) "Member" means an officer included in the membership of a retirement system, including former officers no longer employed who also elected to leave their accumulated contributions on deposit with a Retirement System.

(7) "Officer" means a "law-enforcement officer."

(8) "State" means the State of North Carolina.

(b) Basic Retirement System. — On and after January 1, 1986, law-enforcement officers employed by an employer shall be members of the Local Government Employees' Retirement System, and beneficiaries who were last employed as officers by an employer, or who are surviving beneficiaries of officers last employed by an employer, are beneficiaries of the Local Governmental Employees' Retirement System and paid in benefit amounts then in effect. All members of the Law-Enforcement Officers' Retirement System last employed and paid by an employer are members of the Local Retirement System.

(c) Rights. — Notwithstanding any other provisions of law, any accrued or inchoate rights of a member of the Law-Enforcement Officers' Retirement System as of his transfer to the Local Governmental Employees' Retirement System on January 1, 1986, including the rights to a vested deferred retirement allowance and to commence retirement at certain ages with required years of service as a law-enforcement officer, may in no way be diminished; provided, however, in no event may a member commence retirement and continue membership service with the same Retirement System after January 1, 1986.

No eligible officer shall be precluded from exercising that officer's pending or inchoate rights under this section, should the officer elect to make Roth after-tax contributions to the Supplemental Retirement Income Plan, except that these Roth after-tax contributions and the earnings thereon shall not be subsequently transferred to the Local Governmental Employees' Retirement System.

(d) Court Cost Receipts. — Of the sum derived from the cost of court provided for in G.S. 7A-304(a)(3), the amount designated for this Article, except for the amount designated for the provisions of G.S. 143-166.50(e), shall be paid over to the pension accumulation fund of the Local Governmental Employees' Retirement System and shall offset, to the extent of these receipts, the employers' normal contribution rate required in G.S. 128-30(d)(2) as it pertains to law enforcement officers.

(e) Supplemental Retirement Income Plan for Local Governmental Law-Enforcement Officers. — As of January 1, 1986, all law-enforcement officers employed by a local government employer, are participating members of the Supplemental Retirement Income Plan as provided by Article 5 of Chapter 135 of the General Statutes. In addition to the contributions transferred from the Law-Enforcement Officers' Retirement System, participants may make voluntary contributions to the Supplemental Retirement Income Plan to be credited to the designated individual accounts of participants; provided, in no instance shall the total contributions by a participant exceed ten percent (10%) of a participant's compensation within any calendar year. From July 1, 1987, until July 1, 1988, local government employers of law enforcement officers shall contribute an amount equal to at least two percent (2%) of participating local officers' monthly compensation to the Supplemental Retirement Income Plan to be credited to the designated individual accounts of participating local officers; and on and after July 1, 1988, local government employers of law enforcement officers shall contribute an amount equal to five percent (5%) of participating local officers' monthly compensation to the Supplemental Retirement Income Plan to be credited to the designated individual accounts of participating local officers.

Additional contributions shall also be made to the individual accounts of all participants in the Plan, except for Sheriffs, on a per capita equal-share basis from the sum of one dollar and twenty-five cents ($1.25) for each cost of court collected under G.S. 7A-304.

Upon retirement, a participant in the Plan may elect to transfer his eligible accumulated contributions, not including any Roth after-tax contributions and the earnings thereon, to the Local Governmental Employees' Retirement System and receive, in addition to his basic service, early or disability retirement allowance a special retirement allowance which shall be based on his eligible accumulated account balance at the date of the transfer of the assets.

(e1) Rights of Participants under the Uniformed Services Employment and Reemployment Rights Act. — A participant whose employment is interrupted by reason of service in the Uniformed Services, as that term is defined in section 4303(16) of the Uniformed Services Employment and Reemployment Rights Act, Public Law 103-353, hereafter referred to as "USERRA", shall be entitled to all rights and benefits that the participant would have been entitled to under this section had the participant's employment not been interrupted, provided that the participant returns to service as a law enforcement officer while the participant's reemployment rights are protected under the provisions of USERRA. (1985, c. 479, s. 196(t); c. 729, ss. 6, 7; 1985 (Reg. Sess., 1986), c. 1015, s. 2; c. 1019, s. 1; 1995, c. 361, s. 6; 1997-144, s. 2; 2006-141, s. 2; 2007-384, s. 10.6.)

**Local Modification.** — Catawba: 1995, c. 306, s. 1; 1995 (Reg. Sess., 1996), c. 693, s. 2; Mecklenburg: 1995, c. 532, s. 1; 1995 (Reg. Sess., 1996), c. 693, s. 1; Eastern Band of the Cherokee: 1987, c. 427, s. 9.

**Editor's Note.** — Article 12 of Chapter 143, referred to in subdivision (a)(4) of this section, was repealed by Session Laws 1985, c. 479, s. 196(t).

Session Laws 2007-384, s. 11(b), provides: "The Board of Trustees of the Teachers' and State Employees' Retirement System shall adopt straight life annuity factors, for the purpose of determining the special retirement allowance, based upon mortality and such other tables and the interest assumption rate recommended by the actuary based upon the actual experience as reported in the last five year experience study as required by G.S. 135-6(n) and including an assumed annual post-retirement allowance increase of four percent (4%). The Board of Trustees of the Local Governmental Employees' Retirement System shall adopt straight life annuity factors, for the purpose of determining the special retirement allowance, based upon mortality and such other tables and the interest assumption rate recommended by the actuary based upon the actual experience as reported in the last five year experience study as required by G.S. 128-29(o) and including an assumed annual post-retirement allowance increase of four percent (4%). Sections 10.1 through 10.6 of this act become effective the first of the month following the adoption of those factors by the Boards of Trustees."

Session Laws 2007-384, which, in s. 10.6, added the last paragraph of subsection (e), in.s. 11(b), provides: "The Board of Trustees of the Teachers' and State Employees' Retirement System shall adopt straight life annuity factors, for the purpose of determining the special retirement allowance, based upon mortality and such other tables and the interest assumption rate recommended by the actuary based upon the actual experience as reported in the last five year experience study as required by G.S. 135-6(n) and including an assumed annual post-retirement allowance increase of four percent (4%). The Board of Trustees of the Local Governmental Employees' Retirement System shall adopt straight life annuity factors, for the purpose of determining the special retirement allowance, based upon mortality and such other tables and the interest assumption rate recommended by the actuary based upon the actual experience as reported in the last five year experience study as required by G.S. 128-29(o) and including an assumed annual post-retirement allowance increase of four percent (4%). Sections 10.1 through 10.6 of this act become effective the first of the month following the adoption of those factors by the Boards of Trustees."

## CASE NOTES

**This Section Found Controlling.** — Because G.S. 128-23(g) is more specific than 143-166.50(b), when there is a conflict, G.S. 128-23(g) controls. Taylor v. City of Lenoir, 129 N.C. App. 174, 497 S.E.2d 715 (1998), appeal dismissed, 140 N.C. App. 337, 536 S.E.2d 848 (2000).

**Town, Not Officers, Must Fund Mandatory Contribution.** — A town may increase or decrease the salary of its police officers according to its own discretion, as long as the town and not the officers fund the mandatory two percent contribution; where the contribution is funded from the salary increase of the officers, the ordinance providing for same violates this section. Abeyounis v. Town of Wrightsville Beach, 102 N.C. App. 341, 401 S.E.2d 847 (1991).

**Sheriff's Department is Local Governmental Entity.** — In the injured party's suit against a sheriff and individual detention officers arising out of a five-day episode in the county detention center where she alleged that they ignored her requests for medical treatment, the trial court properly concluded that the office of North Carolina sheriff was a "person" under 42 U.S.C.S. § 1983 because: (1) the state constitution created the office of sheriff, N.C. Const. art. VII, § 2, but included that provision within the article governing local governments, along with provisions for counties, cities, towns, and other governmental subdivisions, N.C. Const. art. VII, § 1; (2) state statutes, including G.S. 17E-1, 160A-288.2, 143-166.50, and 97-2, characterized a sheriff's department as a local governmental entity; (3) there was no contention that the State would be potentially liable for any monetary judgment entered against the sheriff and the detention officers; and (4) the State did not have, with respect to a sheriff, the minimum degree of control required for Eleventh Amendment immunity. Boyd v. Robeson County, — N.C. App. —, 615 S.E.2d 296, 2005 N.C. App. LEXIS 520 (2005), cert. denied, — N.C. —, 615 S.E.2d 866 (2005).

**Applied** in Campbell v. City of Laurinburg, 168 N.C. App. 566, 608 S.E.2d 98, 2005 N.C. App. LEXIS 335 (2005).

### OPINIONS OF ATTORNEY GENERAL

**Funding of Employer's Contribution.** — A local government employer may not use a local law enforcement officer's salary increase, or a portion thereof, to fund the employer's mandated contribution to the Supplemental Retirement Income Plan. See opinion of Attorney General to Sheriff John H. Baker, Jr., Wake County Sheriff's Department, 57 N.C.A.G. 24 (1987).

**§§ 143-166.51 through 143-166.59:** Reserved for future codification purposes.

## ARTICLE 12F.

## *Separate Insurance Benefits Plan for State and Local Governmental Law-Enforcement Officers.*

### § 143-166.60. Separate insurance benefits plan for law-enforcement officers.

(a) A Separate Insurance Benefits Plan, hereinafter called the "Plan", is to be an employee welfare benefit plan, established for the benefit of (i) all law enforcement officers, as defined in G.S. 135-1(11b) and G.S. 128-21(11b) employed by the State and local governments and (ii) all former law-enforcement officers previously employed by the State and local governments, who had 20 or more years of service as an officer or are in receipt of a disability retirement allowance from any State-administered retirement system or are in receipt of a benefit from the Disability Income Plan of North Carolina, who shall be participants.

(b) The Boards of Trustees of the Teachers' and State Employees' Retirement System and the Local Governmental Employees' Retirement System shall jointly administer the Plan and shall, under the terms and conditions otherwise appearing in this Article, provide Plan benefits either (i) by establishing a separate trust fund in conformance with Section 501(c)(9) of the Internal Revenue Code of 1954 as amended or, (ii) by causing the Plan to affiliate with a master trust providing the same benefits for participants.

(c) The initial assets of the Plan are the assets of the former Separate Benefit Plan established under G.S. 143-166.04 as it existed prior to January 1, 1986, which shall be transferred to the Plan on January 1, 1986. The Plan shall be separate and apart from any retirement systems or plans.

(d) The Boards of Trustees shall promulgate rules and regulations as are necessary to establish benefits under the Plan, within the availability of funds, to provide:

(1) An accident and sickness disability insurance benefit;

(2) A group life insurance benefit for participants employed by an employer at the time of death, not to exceed five thousand dollars ($5,000);

(3) A group life insurance benefit for participants who are eligible former officers, not to exceed four thousand dollars ($4,000); and

(4) An accidental line-of-duty insurance death benefit not to exceed two thousand one hundred dollars ($2,100) in total on account of the death of a participant caused by an accident while in the actual performance of duty as an officer.

(e) The insurance benefit of the Plan on account of the death of a participant shall be payable to the surviving spouse of the participant or otherwise to the participant's estate; provided, should a participant instruct the Board of

Trustees in writing that he does not wish these benefits to be paid to his spouse or estate, then the benefits shall be paid to the person or persons as the participant may name for this purpose. The life insurance benefits shall be payable only on account of participants in the Plan for six or more months or, if an actively employed officer, at any time after employment if death results from an accident. The accident and sickness disability insurance benefits shall be payable to a participant at any time after becoming a participant in the Plan.

(f) Should amounts in the trust fund of the Plan be insufficient at any time to enable the Boards of Trustees to pay benefits due in full, then an equitable graded percentage of the payment shall be made.

(g) The provisions of the State and Local Retirement Systems pertaining to administration and management of funds under G.S. 128-28, G.S. 128-29, G.S. 135-6 and G.S. 135-7 are made applicable to the Plan.

(h) Exemption from Garnishment and Attachment. — The right of a participant in the Separate Insurance Benefits Plan to the benefits provided under this Article is nonforfeitable and exempt from levy, sale, and garnishment. (1985, c. 479, s. 196(t); 1987, c. 738, s. 29(p); 1989, c. 792, s. 2.8; 2003-284, s. 30.19B(b).)

**§§ 143-166.61 through 143-166.69:** Reserved for future codification purposes.

## Article 12G.

## *Transfers of Assets of Law-Enforcement Officers' Retirement System to Other Retirement Systems.*

### § 143-166.70. Transfers of assets of Law-Enforcement Officers' Retirement System to other retirement systems.

As of January 1, 1986, assets of the Law-Enforcement Officers' Retirement System, provided for under Article 12 of Chapter 143 of the General Statutes, as it existed prior to January 1, 1986, shall be transferred to the Local Governmental Employees' Retirement System provided for under Article 3 of Chapter 128 of the General Statutes, and the Supplemental Retirement Income Plan of North Carolina, provided for under Article 5 of Chapter 135 of the General Statutes, in the amounts calculated and in the order of precedence enumerated as follows:

(1) The regular accumulated contributions of members of the Law-Enforcement Officers' Retirement System shall be transferred from the annuity savings fund of the Law-Enforcement Officers' Retirement System to the annuity savings fund of the Local Governmental Employees' Retirement System to the credit of each individual member.

(2) An amount equal to the present value of the liabilities on account of the retirement allowances payable to beneficiaries of the Law-Enforcement Officers' Retirement System, as calculated by the Retirement System's consulting actuary, shall be transferred from the pension accumulation fund of the Law-Enforcement Officers' Retirement System to the pension accumulation fund of the Local Governmental Employees' Retirement System.

(3) After the transfer provided for above, the remaining assets in the pension accumulation fund of the Law-Enforcement Officers' Retire-

ment System shall be transferred to the pension accumulation fund of the Local Governmental Employees' Retirement System with the amount of such assets to be taken into account by the Retirement System's consulting actuary in determining the employers' rates of contribution under G.S. 128-30(d)(9).

(4) The special annuity account accumulated contributions shall be transferred from the special annuity savings fund of the Law-Enforcement Officers' Retirement System to the Supplemental Retirement Income Plan of North Carolina, or some other employer-sponsored trust qualified under Sections 401(a) and 401(k) of the Internal Revenue Code of 1954 as amended.

(5) The separate trust fund reserves held under the death benefit plan provided for in G.S. 143-166.02, as it existed prior to January 1, 1986, shall be transferred to the separate trust fund for the death benefit plan provided for in G.S. 128-27(1) [128-27(*l*)]. (1985, c. 479, s. 196(u).)

**Editor's Note.** — Article 12 of Chapter 143, referred to in this section, was repealed by Session Laws 1985, c. 479, s. 196(t).

Section 143-166.02, referred to in subdivision (5) of this section, was repealed by Session Laws 1985, c. 479, s. 196(t).

The reference to G.S. 128-27(1) in subdivision (5) was apparently intended to refer to G.S. 128-27(*l*).

### CASE NOTES

**Applied** in Mathews v. Board of Trustees, 97 N.C. App. 186, 385 S.E.2d 343 (1989).

**§§ 143-166.71 through 143-166.79:** Reserved for future codification purposes.

## ARTICLE 12H.

## *Sheriffs' Supplemental Pension Fund Act of 1985.*

### § 143-166.80. Short title and purpose.

(a) This Article shall be known and may be cited as the "Sheriffs' Supplemental Pension Fund Act of 1985".

(b) The purpose of this Article is to create a pension fund to supplement local government retirement benefits which will attract the most highly qualified talent available within the State to the position of sheriff and to fully recognize that sheriffs are constitutional officials elected by the people and are also officers of the court enforcing the laws of the State of North Carolina. (1985, c. 729, s. 1.)

### § 143-166.81. Scope.

(a) This Article provides supplemental pension benefits for all county sheriffs who are retired from the Local Governmental Employees' Retirement System or an equivalent locally sponsored plan as herein described.

(b) The North Carolina Department of Justice shall administer the provisions of this Article.

(c) The provisions of this Article shall be subject to future legislative change or revision, and no person is deemed to have acquired any vested right to a pension payment provided by this Article. (1985, c. 729, s. 1.)

## § 143-166.82. Assets.

(a) On and after July 1, 1985, each Clerk of Superior Court shall remit to the Department of Justice the monthly receipts collected pursuant to G.S. 7A-304(a)(3a) to be deposited to the credit of the Sheriffs' Supplemental Pension Fund, hereinafter referred to as the Fund, to be used in making monthly pension payments to eligible retired sheriffs under the provisions of this Article and to pay the cost of administering the provisions of this Article.

(b) The State Treasurer shall be the custodian of the Sheriffs' Supplemental Pension Fund and shall invest its assets in accordance with the provisions of G.S. 147-69.2 and G.S. 147-69.3. (1985, c. 729, s. 1.)

## § 143-166.83. Disbursements.

(a) Repealed by Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 54.

(b) Immediately following January 1, 1993, and the first of January of each succeeding calendar year thereafter, the Department of Justice shall divide an amount equal to ninety percent (90%) of the assets of the Fund at the end of the preceding calendar year and shall add to that amount any assets remaining pursuant to subsection (f) of this section and disburse the same as monthly payments in accordance with the provisions of this Article.

(c) Ten percent (10%) of the Fund's assets as of January 1, 1993, and at the beginning of each calendar year thereafter, may be used by the Department of Justice in administering the provisions of this Article. This ten percent (10%) is to be derived from the Fund's assets prior to the addition of assets remaining pursuant to subsection (f) of this section.

(d) All the Fund's disbursements shall be conducted in the same manner as disbursements are conducted for other special funds of the State.

(e) If, for any reason, the Fund shall be insufficient to pay any pension benefits or other charges, then all benefits or payments shall be reduced pro rata for as long as the deficiency in amount exists. No claim shall accrue with respect to any amount by which a pension payment shall have been reduced.

(f) Any assets remaining after reserving an amount equal to the disbursements required under subsections (b) and (c) of this section shall be accrued and included in disbursements for pensioners in succeeding years. (1985, c. 729, s. 1; 1985 (Reg. Sess., 1986), c. 1030, ss. 1, 2; 1991 (Reg. Sess., 1992), c. 900, s. 54(a).)

## § 143-166.84. Eligibility.

(a) Each county sheriff who has retired from the Local Governmental Employees' Retirement System, and who has attained the age of 55 years or attained 30 years of creditable service regardless of age, and who has completed at least 10 years of eligible service as sheriff, is entitled to receive a monthly pension under this Article.

(a1) Each county sheriff who withdrew any service standing to his credit in the Local Governmental Employees' Retirement System prior to July 1, 1986, and who has attained the age of 55 or attained 30 creditable years of service regardless of age, and who has completed at least 10 years of eligible service as sheriff, is entitled to receive a monthly pension under this Article provided the sheriff is not eligible to receive any retirement benefit from any State or locally sponsored plan.

(a2) Each county sheriff who has been approved for disability benefits from the Local Governmental Employees' Retirement System is eligible to receive benefits from the Fund based on years of creditable service as sheriff, regardless of age, provided the retiree has at least 10 years of eligible service as sheriff.

(b) Each eligible retired sheriff as defined in subsections (a), (a1), and (a2) of this section relating to age and service shall be entitled to receive a monthly pension under this Article beginning with the month immediately following the effective date of retirement. (1985, c. 729, s. 1; 1985 (Reg. Sess., 1986), c. 1030, ss. 3, 5(a); 1987, c. 177, s. 3; 1989 (Reg. Sess., 1990) c. 1079, s. 1; 1991 (Reg. Sess., 1992), c. 900, s. 54(b).)

### § 143-166.85. Benefits.

(a) An eligible retired sheriff shall be entitled to and receive an annual pension benefit, payable in equal monthly installments, equal to one share for each full year of eligible service as sheriff multiplied by his total number of years of eligible service. The amount of each share shall be determined by dividing the total number of years of eligible service for all eligible retired sheriffs on December 31 of each calendar year into the amount to be disbursed as monthly pension payments in accordance with the provisions of G.S. 143-166.83(b). In no event however shall a monthly pension under this Article exceed an amount, which when added to a retired allowance at retirement from the Local Governmental Employees' Retirement System or to the amount he would have been eligible to receive if service had not been forfeited by the withdrawal of accumulated contributions, is greater than seventy-five percent (75%) of a sheriff's equivalent annual salary immediately preceding retirement computed on the latest monthly base rate, to a maximum amount of one thousand five hundred dollars ($1,500).

(b) All monthly pensions payable under this Article shall be paid on the last business day of each month.

(c) At the death of the pensioner, benefits for the current calendar year will continue and be paid in monthly installments to the decedent's spouse or estate, in accordance with the provisions of Chapter 28A of the General Statutes. Benefits will cease upon the last payment being made in December of the current year.

(d) Monthly pensions payable under this Article will cease upon the full-time reemployment of a pensioner with an employer participating in the Local Governmental Employees' Retirement System for as long as the pensioner is so reemployed.

(e) Repealed by Session Laws 1989, c. 792, s. 2.9.

(f) Nothing contained in this Article shall preclude or in any way affect the benefits that a pensioner may be entitled to from any state, federal or private pension, retirement or other deferred compensation plan. (1985, c. 729, s. 1; 1985 (Reg. Sess., 1986), c. 1030, ss. 4, 5(b); 1987, c. 177, s. 4; 1989, c. 792, s. 2.9; 1989 (Reg. Sess., 1990), c. 1079, s. 2; 1991 (Reg. Sess., 1992), c. 900, s. 54(c); 2005-276, s. 29.30(a).)

## ARTICLE 13.

## *Publications.*

**§ 143-167:** Transferred to G.S. 147-54.1 by Session Laws 1943, c. 543.

### § 143-168. Reports; conciseness.

The annual or biennial reports now authorized or required to be printed by the several State agencies and institutions shall be as compact and concise as is consistent with an intelligent understanding of the work of those agencies and institutions. The details of the work of the agencies and institutions shall not be printed when not necessary to an intelligent understanding of such work, but totals and results may be tabulated and printed in their reports. (1911, c. 211, s. 2; 1917, c. 202, s. 2; C.S., s. 7294; 1931, c. 261, s. 3; 1955, c. 983; 1961, c. 243, s. 2; 1983, c. 866, s. 1.)

### § 143-169. Limitations on publications.

(a) Repealed by Session Laws 1983, c. 866, s. 2.

(b) Repealed by Session Laws 2007-234, s. 1, effective July 18, 2007.

(c) Every publication published at State expense shall be prepared in accordance with the recycling and reuse requirements set forth in G.S. 130A-309.14(j). (1911, c. 211, s. 2; C.S., s. 7302; 1931, c. 261, s. 3; c. 312, ss. 14, 15; 1955, c. 1203; 1961, c. 243, s. 3; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1983, c. 866, s. 2; 1989, c. 727, s. 218(100); 1993, c. 448, s. 4; 1997-443, s. 11A.119(a); 2007-234, s. 1.)

### § 143-169.1. State agency public document mailing lists to be updated.

(a) On or before July 1 of each year, beginning with July 1, 1976, the head of every agency of this State shall certify to the Director of the Budget that the mailing lists for each public document issued by his agency have been carefully reviewed, updated and corrected within the previous 12 months. The above date may be extended by the Director of the Budget for 90 days for good cause shown. The reviewed, updated and corrected mailing lists shall be comprised only of those persons and organizations who, within the previous 12 months, have either requested that they be included in such a mailing list or have renewed a request that they be so included, or are recipients contemplated for receipt of the pertinent public document by express provision of statute or judicial order, but this sentence does not apply to mailing lists of alumni of a constituent institution of The University of North Carolina, used or maintained by the constituent institution.

(b), (c) Repealed by Session Laws 1989, c. 715, s. 2. (1975, c. 362, s. 1; 1983, c. 866, ss. 3-5; 1989, c. 715, s. 2; 1993, c. 448, s. 5.)

### § 143-169.2. Definitions.

(a) For the purposes of this Article, the term "public document" shall mean any annual, biennial, regular or special report or publication of which at least 200 copies are printed, but shall not include intra-agency communications nor agency correspondence.

(b) For the purposes of this Article, the term "agency" shall mean and include, as the context may require, State department, institution, university, commission, committee, board, licensing board, division, bureau, officer or official; provided, however, the provisions of G.S. 143-169.1 shall not apply to the General Assembly, the Department of Revenue, the Department of Commerce, or to the Administrative Office of the Courts and the court system, nor shall the provisions of G.S. 143-170.2 and 143-170.3 apply to the General Assembly or to the Administrative Office of the Courts and the courts system. (1989, c. 715, s. 3; c. 751, ss. 7(16), 18; 1991 (Reg. Sess., 1992), c. 959, s. 35.)

**§ 143-170:** Repealed by Session Laws 1955, c. 986.

### § 143-170.1. Statement of cost of public documents; chief administrator charged with compliance.

(a) Every agency of this State publishing a public document, other than one published for the principal purpose of sale to the public, shall cause the following statement to be printed adjacent to the identification of the agency responsible for the publication:

"(Number of copies) copies of this public document were printed at a cost of $____, or $____ per copy."

For the purposes of this Article the term "cost" shall include printing costs in the form of labor and materials, and other identifiable design, typesetting, and binding costs.

(a1) Any public document without a statement of cost shall not be mailed or distributed at public expense.

(a2) Whenever a public document that is published by an agency of this State is printed on recycled paper, the document shall contain a printed statement or symbol indicating that the document was printed on recycled paper.

(a3) If an agency fails to comply with this section, then the agency's printing budget for the fiscal year following the violation shall be reduced by ten percent (10%).

(b) The chief administrator of the agency authorizing the printing is charged with agency compliance with the provisions of this Article. (1983, c. 866, ss. 6, 7; 1989, c. 34; 1993, c. 256, s. 4; 1995, c. 324, s. 6.10.)

## § 143-170.2. Publication procedure manuals.

(a) The State Librarian in consultation with the State Auditor shall administer and periodically revise guidelines to be used by all State agencies and community colleges in developing publication procedures manuals for public documents. The initial guidelines developed by the Department of Administration shall be released no later than December 1, 1989 and shall address at least the following elements of publication production for public documents:

(1) Bibliographic style, substantially in accord with a recognized style manual approved by the State Librarian; provided, however, the Department shall not develop guidelines concerning the design, layout, size or appearance of publications except as otherwise permitted herein;
(2) Procedures for the notification of the State Library for title changes in serial publications;
(3) Pricing of documents for resale;
(4) Use of publication services at State-operated printing facilities;
(5) Purchase of commercial publication services; and
(6) The distribution of publications.

The Department of Administration shall submit the initial guidelines to State agencies for review and comment for a period of 60 days; provided, however, that submission to the University of North Carolina General Administration shall satisfy this requirement with respect to universities. The Department, in consultation with at least the State Librarian and the State Auditor, shall consider the comments of the State agencies before adopting final guidelines. The Department of Administration shall adopt and release the final guidelines no later than four months after the release of the initial guidelines.

(b) Upon the adoption and release of final guidelines by the Department of Administration, each State agency and community college shall within four months thereafter adopt a publication procedures manual for public documents consistent with the guidelines established pursuant to subsection (a) of this section and an administrative review and approval process to ensure appropriate review and approval of its public documents.

(c) Each State agency and community college shall submit to the State Library for review and retention a copy of its publication procedures manual and its administrative review procedure for public documents. Any revisions made by an agency shall also be submitted to the State Library within 30 days of adoption by the agency.

(d) Repealed by Session Laws 1991, c. 757.

(d1) The State Library may revise the final statewide guidelines, originally issued April 1, 1990, by the Department of Administration, at any time after July 1, 1990, provided that there be distribution of any proposed revisions to all agencies and institutions subject to these provisions, and that there be a 30-day review period for these agencies to comment. (1989, c. 715, s. 1; 1991, c. 757, s. 1.)

## § 143-170.3. Reports; audits.

(a) The Department of Administration shall report to the Joint Legislative Commission on Governmental Operations each State agency and community college that fails to timely adopt and submit to the Department the information required by G.S. 143-170.2. The initial report shall be made by January 1, 1991.

(b) Upon the determination of the State Auditor that a State agency or community college has failed to substantially comply with its publications procedure manual or its administrative review and approval process for public documents, the State Auditor shall report the noncompliance to the Joint Legislative Commission on Governmental Operations within 60 days if the General Assembly is not in session, and to the President Pro Tempore of the Senate, the Speaker of the House, and the Senate and House Appropriations Committee Chairmen within 30 days if the General Assembly is in session.

(c) The State Librarian and the University Librarian of the University of North Carolina at Chapel Hill shall identify the types of publications for which the use of acid-free paper is desirable and, with the assistance of the Department of Administration, shall study the availability of acid-free paper and the costs associated with purchasing and using acid-free paper. The State Librarian and the University Librarian of the University of North Carolina at Chapel Hill shall report to the Joint Legislative Commission on Governmental Operations no later than November 1, 1990 the information required by this subsection. (1989, c. 715, s. 1.)

## § 143-170.4. Administrative Office of the Courts; publications procedures manual; reports.

Not later than June 1, 1990, the Administrative Office of the Courts, after review of the Department of Administration's state publications procedures guidelines and after consultation with the State Librarian and State Auditor, shall adopt (i) a publications procedures manual for public documents, other than the official reports of the North Carolina Supreme Court and the North Carolina Court of Appeals and official forms published by the Administrative Office of the Courts pursuant to G.S. 7A-343, that addresses the elements of publication production described in G.S. 143-170.2 and (ii) an administrative review and approval process to ensure appropriate review and approval of its public documents. The initial guidelines and the administrative review and approval process shall be reported to the Joint Legislative Commission on Governmental Operations by January 1, 1991. (1989, c. 715, s. 1; 2001-424, s. 22.6(b).)

## § 143-170.5. Designated public documents to be printed on alkaline paper.

The State Librarian and the University Librarian at the University of North Carolina at Chapel Hill shall designate annually as provided by G.S. 125-11.13

those State documents that must be printed on alkaline paper. Each agency publishing a State document designated by the State Librarian and the University Librarian at the University of North Carolina at Chapel Hill as one that must be printed on alkaline paper shall comply with that publication requirement. (1991, c. 224, s. 2; 1993, c. 553, s. 4.)

## Article 14.

## *North Carolina Zoological Authority.*

**§§ 143-171 through 143-176.1:** Repealed by Session Laws 1973, c. 1262, s. 85.

**Cross References.** — As to the North Carolina Zoological Park Council, see G.S. 143B-335 and 143B-336.

### § 143-177. Right to receive gifts.

In order to carry out the purposes of this Article, the Board is authorized to acquire by gift or will, absolutely or in trust, from individuals, corporations, or any other source money or other property, or any interests in property, which may be retained, sold or otherwise used to promote the purposes of this Article. The use of gifts shall be subject to such limitations as may be imposed thereon by donors, notwithstanding any other provisions of this Article. (1969, c. 1104, s. 8.)

### § 143-177.1. North Carolina Zoological Park Fund.

All gifts made to the North Carolina Zoological Park for the purposes of this Article shall be exempt from every form of taxation including, but not by the way of limitation, ad valorem, intangible, gift, inheritance and income taxation. Proceeds from the sale of any property acquired under the provisions of this Article shall be deposited in the North Carolina State treasury and shall be credited to the North Carolina Zoological Park. (1969, c. 1104, s. 9; 1973, c. 1262, s. 85.)

### § 143-177.2. Cities and counties.

Cities and counties are hereby authorized to expend funds derived from nontax sources and to make gifts of surplus property, to assist in carrying out the purposes of this Article. (1969, c. 1104, s. 10.)

### § 143-177.3. Sources of funds.

(a) It is the intent of this Article that the funds for the creation, establishment, construction, operation and maintenance of the North Carolina Zoological Park shall be obtained primarily from private sources; however, the Council under the supervision and approval and with the assistance of the Secretary of Environment and Natural Resources is hereby authorized to receive and expend such funds as may from time to time become available by appropriation or otherwise from the State of North Carolina; provided, that the North Carolina Zoological Park Council shall not in any manner pledge the faith and credit of the State of North Carolina for any of its purposes.

(b) The Council with the approval of the Secretary of Environment and Natural Resources is authorized to establish and set admission fees which are reasonable and consistent with the purpose and function of the North Carolina Zoological Park. (1969, c. 1104, s. 11; 1973, c. 1262, s. 85; 1977, c. 771, s. 4; 1981, c. 278, s. 1; 1989, c. 727, s. 218(101); 1997-443, s. 11A.119(a).)

## ARTICLE 15.

## *Council of State Governments.*

**§§ 143-178 through 143-185:** Repealed by Session Laws 1975, c. 879, s. 25.

**Cross References.** — As to the North Carolina Council on Interstate Cooperation, see G.S. 143B-379 through 143B-384.

### § 143-186. Council of State Governments a joint governmental agency.

The Council of State Governments is hereby declared to be a joint governmental agency of this State and of the other states which cooperate through it. (1937, c. 374, s. 10; 1959, c. 137, s. 4.)

**§ 143-187:** Transferred to G.S. 143-186 by Session Laws 1959, c. 137, s. 4.

**§ 143-188:** Repealed by Session Laws 1959, c. 137, s. 1.

## ARTICLE 16.

## *Spanish-American War Relief Fund.*

**§§ 143-189, 143-190:** Repealed by Session Laws 1961, c. 481.

## ARTICLE 17.

## *State Post-War Reserve Fund.*

### § 143-191. Appropriation for fund.

There is hereby appropriated from the general fund of the State the sum of twenty million dollars ($20,000,000), the said sum, together with the investments and income therefrom, to be hereafter known and designated as the State Post-War Reserve Fund. (1943, c. 6, s. 1.)

### § 143-192. Fund to be invested by Governor and Council of State; State Treasurer custodian.

The Governor and Council of State are hereby fully authorized and directed to invest the said fund exclusively in bonds of the United States of America, of such series as may be readily converted into money and notes or certificates of indebtedness of the United States of America, or in bonds, notes or other obligations of any agency or instrumentality of the United States of America, when the payment of principal and interest thereof is fully guaranteed by the

United States of America, and in bonds or notes of the State of North Carolina. The interest and revenues received from such investments, or profits realized in the sale thereof, shall become a part of the said State Post-War Reserve Fund and shall be likewise invested. Bonds of the State of North Carolina purchased for the said fund shall not be cancelled or retired but shall remain in full force and the income therefrom reinvested as hereinbefore provided. The State Treasurer shall be custodian of all securities and investments made under authority of this Article. (1943, c. 6, s. 2.)

### § 143-193. Fund to be held for such use as directed by General Assembly.

The said State Post-War Reserve Fund shall be held for such use as shall hereafter be directed by an act of the General Assembly of North Carolina, and no other use thereof whatsoever shall be made. (1943, c. 6, s. 3.)

#### CASE NOTES

**Applied** in Slade v. New Hanover County Bd. of Educ., 10 N.C. App. 287, 178 S.E.2d 316 (1971).

### § 143-194. Report to General Assembly.

The Governor and Council of State shall make a report in writing to the General Assembly, not later than the tenth day of each regular or special session thereof, stating the nature and amount of all receipts and disbursements from the said fund and the amount contained in said fund, and giving an itemized statement of all investments made as herein authorized, which report shall be spread upon the journals of the Senate and House of Representatives. (1943, c. 6, s. 4.)

## Article 18.

## *Rules and Regulations Filed with Secretary of State.*

### §§ 143-195 through 143-198.1: Repealed by Session Laws 1973, c. 1331, s. 2.

**Cross References.** — For present provisions as to rule making by administrative agencies, see G.S. 150B-18 et seq. For present provisions as to publication of administrative rules, see G.S. 150B-21.17 et seq.

## Article 19.

## *Roanoke Island Historical Association.*

### § 143-199. Association under patronage and control of State.

Roanoke Island Historical Association, Incorporated is hereby permanently placed under the patronage and control of the State. (1945, c. 953, s. 1.)

**Cross References.** — As to recreation of Roanoke Island Historical Association, see G.S. 143B-92. For statute declaring the Association not to be a State agency, see G.S. 143B-93.

## § 143-200. Members of board of directors; terms; appointment.

The governing body of the Association shall be a board of directors consisting of the Governor of the State, the Attorney General, the Superintendent of Public Instruction, the Chair of the Dare County Board of Commissioners, and the Secretary of Cultural Resources, or their designees, as ex officio members, and the following 21 members: J. Spencer Love, Greensboro; Miles Clark, Elizabeth City; Mrs. Richard J. Reynolds, Winston-Salem; D. Hiden Ramsey, Asheville; Mrs. Charles A. Cannon, Concord; Dr. Fred Hanes, Durham; Mrs. Frank P. Graham, Chapel Hill; Bishop Thomas C. Darst, Wilmington; W. Dorsey Pruden, Edenton; John A. Buchanan, Durham; William B. Rodman, Jr., Washington; J. Melville Broughton, Raleigh; Melvin R. Daniels, Manteo; Paul Green, Chapel Hill; Samuel Selden, Chapel Hill; R. Bruce Etheridge, Manteo; Theodore S. Meekins, Manteo; Roy L. Davis, Manteo; M. K. Fearing, Manteo; A. R. Newsome, Chapel Hill. The members of the board of directors herein named other than the ex officio members, shall serve for a term of three years and until their successors are appointed. Appointments thereafter shall be made by the membership of the Association in regular annual meeting or special meeting called for such purpose. In the event the Association through its membership should fail to make such appointments, then the appointments shall be made by the Governor of the State. If a vacancy occurs between annual meetings, the board of directors may fill the vacancy until the next annual meeting. All vacancies occurring on the board of directors not filled by the board of directors within 30 days of the vacancy shall be filled by the Governor of the State. (1945, c. 953, s. 2; 1973, c. 476, s. 48; 1996, 2nd Ex. Sess., c. 18, s. 11.1(a); 1999-32, s. 1; 1999-431, s. 3.1.)

**Editor's Note.** — Session Laws 1999-431, s. 4, provides that unless otherwise provided for in the act, appointments are for terms to begin when the bill becomes law.

## § 143-201. Bylaws; officers of board.

The said board of directors when organized under the terms of this Article shall have authority to adopt bylaws for the organization and said bylaws shall thereafter be subject to change only by three-fifths vote of a quorum of said board of directors; the board of directors shall choose from its membership or from the membership of the Association a chairman, a vice-chairman, a secretary and a treasurer, which offices in the discretion of the board may be combined in one, and also a historian and a general counsel. The board also in its discretion may choose one or more honorary vice-chairmen. The duly elected officers of the Association shall serve as an advisory committee to the Secretary of Cultural Resources concerning matters relating to "The Lost Colony" historical drama. (1945, c. 953, s. 3; 1973, c. 476, s. 87.)

## § 143-202. Exempt from taxation; gifts and donations.

The said Association is and shall be an educational and charitable association within the meaning of the laws of the State of North Carolina, and the property and income of such Association, real and personal, shall be exempt from all taxation. The said Association is authorized and empowered to receive gifts and donations and administer the same for the charitable and educational purposes for which the Association is formed and in keeping with the will of the donors, and such gifts and donations to the extent permitted by law shall be exempted from the purpose of income taxes and gift taxes. (1945, c. 953, s. 4.)

**§ 143-203:** Repealed by Session Laws 1983, c. 913, s. 39.

**§ 143-204:** Repealed by Session Laws 1977, c. 996, s. 3.

**Cross References.** — For present provisions as to allotments from the Contingency and Emergency Fund to outdoor historical dramas, see G.S. 143-204.8.

## Article 19A.

## *Governor Richard Caswell Memorial Commission.*

**§§ 143-204.1 through 143-204.4:** Repealed by Session Laws 1973, c. 476, s. 116.

**Cross References.** — As to transfer of functions of the Governor Richard Caswell Memorial Commission to the Department of Cultural Resources, see G.S. 143B-51.

## Article 19B.

## *Historic Swansboro Commission.*

**§§ 143-204.5 through 143-204.7:** Repealed by Session Laws 1973, c. 476, s. 116.

**Cross References.** — As to transfer of functions of the Historic Swansboro Commission to the Department of Cultural Resources, see G.S. 143B-51.

## Article 19C.

## *Outdoor Historical Dramas.*

### § 143-204.8. Allotments to outdoor historical dramas.

(a) Upon the application of an outdoor historical drama corporation or trust, approved by the Secretary of Cultural Resources, the Governor and the Council of State may order an allotment from the Contingency and Emergency Fund of the State not to exceed fifteen thousand dollars ($15,000) a year to that outdoor historical drama corporation or trust to aid in the production of an outdoor historical drama if the provisions of subsection (b) of this section are met.

(b) An allotment shall only be made under this section upon evidence submitted to the Governor and Council of State by the Secretary of Cultural Resources that during the immediately preceding season of production, the drama was operated at a deficit because of inclement weather or other circumstances beyond the control of the corporation or trust and that contributions or gifts made to the corporation or trust are deductible for income tax purposes under the Internal Revenue Code.

(c) For purposes of this section, an "outdoor historical drama corporation or trust," means only the following corporations or trusts presenting outdoor historical dramas:

| *Corporation or Trust* | *Outdoor Historical Drama* |
|---|---|
| Cherokee Historical Association, Incorporated | "Unto These Hills" |
| The Committee for an Outdoor Drama at Bath, Incorporated | "Blackbeard — The Knight of the Black Flag" |
| The Duplin Outdoor Drama Society, Incorporated | "The Liberty Cart: A Duplin Story" |
| Eastern Stage, Inc. | "First for Freedom" |
| The Moore County Historical Association, Incorporated | "The House in the Horseshoe" |
| The Outdoor Theatre Fund Charitable Trust | "From This Day Forward" |
| "Revolution!", Incorporated | "Revolution!" |
| Roanoke Island Historical Association, Incorporated | "The Lost Colony" |
| Robeson Historical Drama, Incorporated | "Strike at the Wind" |
| Snow Camp Historical Drama Society, Incorporated | "Sword of Peace" |
| Southern Appalachian Historical Association, Incorporated | "Horn in the West" |
| The Waxhaws Historical Festival | "Listen and Remember" |

The above listing of dramas is for informational purposes only and shall not be construed to limit the eligibility of the specified outdoor historical drama corporation or trust to receive allotments under this section.

(d) An outdoor historical drama corporation or trust which has applied for or received an allotment under this section shall permit the State Auditor to inspect and audit its financial records. (1977, c. 996, s. 1; 1987 (Reg. Sess., 1988), c. 1086, s. 44; 1989, c. 752, s. 21; 1991, c. 636, s. 16.)

## ARTICLE 20.

## *Recreation Commission.*

### §§ 143-205 through 143-210.1: Repealed by Session Laws 1969, c. 1145, s. 4.

**Cross References.** — As to transfer of functions, property, etc., of the Recreation Commission to the Department of Local Affairs, see G.S. 143-326.

## ARTICLE 21.

## *Water and Air Resources.*

## Part 1. Organization and Powers Generally; Control of Pollution.

### § 143-211. Declaration of public policy.

(a) It is hereby declared to be the public policy of this State to provide for the conservation of its water and air resources. Furthermore, it is the intent of the General Assembly, within the context of this Article and Articles 21A and 21B of this Chapter, to achieve and to maintain for the citizens of the State a total environment of superior quality. Recognizing that the water and air resources of the State belong to the people, the General Assembly affirms the State's ultimate responsibility for the preservation and development of these resources in the best interest of all its citizens and declares the prudent utilization of these resources to be essential to the general welfare.

(b) It is the public policy of the State to maintain, protect, and enhance water quality within North Carolina. Further, it is the public policy of the State that the cumulative impact of transfers from a source river basin shall not result in a violation of the antidegradation policy set out in 40 Code of Federal Regulations § 131.12 (1 July 1997 Edition) and the statewide antidegradation policy adopted pursuant thereto.

(c) It is the purpose of this Article to create an agency which shall administer a program of water and air pollution control and water resource management. It is the intent of the General Assembly, through the duties and powers defined herein, to confer such authority upon the Department of Environment and Natural Resources as shall be necessary to administer a complete program of water and air conservation, pollution abatement and control and to achieve a coordinated effort of pollution abatement and control with other jurisdictions. Standards of water and air purity shall be designed to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources. It is the intent of the General Assembly that the powers and duties of the Environmental Management Commission and the Department of Environment and Natural Resources be construed so as to enable the Department and the Commission to qualify to administer federally mandated programs of environmental management and to qualify to accept and administer funds from the federal government for such programs. (1951, c. 606; 1967, c. 892, s. 1; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1979, 2nd Sess., c. 1158, s. 2; 1989, c. 135, s. 1; c. 727, s. 218(102); 1997-443, s. 11A.119(a); 1998-168, s. 1; 2006-259, ss. 31(b), 31(c).)

**Cross References.** — As to enforcement of environmental requirements in manufacturing redevelopment districts, see G.S. 66-343. See note at G.S. 143-214.7 relating to Session Laws 2004-163 and Phase II Stormwater Permit application and standards. As to organization of the Department of Environment and Natural Resources, see G.S. 143B-279.1 et seq. As to the Environmental Management Commission, see G.S. 143B-282 through 143B-285.

**Express Review Pilot Program.** — Session Laws 2003-284, ss. 11.4A(a)-(e), provide: "(a) The Department of Environment and Natural Resources may develop the Express Review Pilot Program, a pilot program to provide express permit and certification reviews. Participation in the Express Review Pilot Program is voluntary, and the program is to become supported by the fees determined pursuant to subsection (b) of this section. The Department of Environment and Natural Resources shall determine the project applications to review under the Express Review Pilot Program from those who request to participate in the Pilot Program. The Express Review Pilot Program may be applied to any one or all of the permits, approvals, or certifications in the following programs: the erosion and sedimentation control program, the coastal management program, and the water quality programs, including water quality certifications and stormwater management. The Express Review Pilot Program shall focus on the following permits or certifications:

"(1) Stormwater permits under Part 1 of Article 21 of Chapter 143 of the General Statutes.

"(2) Stream origination certifications under Article 21 of Chapter 143 of the General Statutes.

"(3) Water quality certification under Article 21 of Chapter 143 of the General Statutes.

"(4) Erosion and sedimentation control permits under Article 4 of Chapter 113A of the General Statutes.

"(5) Permits under the Coastal Area Management Act (CAMA), Part 4 of Article 7 of Chapter 113A of the General Statutes.

"(b) The Department of Environment and Natural Resources may establish up to eight positions to administer the Express Review Pilot Program and may determine the fees for express application review under the Pilot Program. Notwithstanding G.S. 143-215.3D, the maximum permit application fee to be charged under subsection (a) of this section for the express review of a project application requiring all of the permits under subdivisions (1) through (5) of subsection (a) of this section shall not exceed five thousand five hundred dollars ($5,500). Notwithstanding G.S. 143-215.3D, the maximum permit application fee to be charged for the express review of a project application requiring all of the permits under subdivisions (1) through (4) of subsection (a) of this section shall not exceed four thousand five hundred dollars ($4,500). Notwithstanding G.S. 143-215.3D, the maximum permit application fee charged for the express review of a project application for any other combination of permits under subdivisions (1) through (5) of subsection (a) of this section shall not exceed four thousand dollars ($4,000). Express review of a project application involving additional permits or certifications issued by the Department of Environment and Natural Resources other than those under subdivisions (1) through (5) of subsection (a) of this section may be allowed by the Department, and, notwithstanding G.S. 143-215.3D or any other statute or rule that sets a permit fee, the maximum permit application fee charged for the express review of a project application shall not exceed four thousand dollars ($4,000), plus one hundred fifty percent (150%) of the fee that would otherwise apply by statute or rule for that particular permit or certification. Additional fees, not to exceed fifty percent (50%) of the original permit application fee under this section, may be charged for subsequent reviews due to the insufficiency of the permit applications. The Department of Environment and Natural Resources may establish the procedure by which the amount of the fees under this subsection is determined, and the fees and procedures are not rules under G.S. 150B-2(8a) for the Express Review Pilot Program under this section.

"(c) The funds appropriated to the Department of Environment and Natural Resources in this act for the 2003-2004 fiscal year shall be used for the costs of implementing the Express Review Pilot Program under this section during the 2003-2004 fiscal year.

"(d) The Express Review Fund is created as a special nonreverting fund. The Express Review Fund shall be used for the costs of implementing the Express Review Pilot Program under this section. All fees collected under this section shall be credited to the Express Review Fund. If the Express Review Pilot Program is abolished, the funds in the Express Review Fund shall be credited to the General Fund.

"(e) No later than May 1, 2004, the Department of Environment and Natural Resources shall report to the General Assembly its findings on the success of the Express Review Pilot Program and whether it recommends that the Pilot Program be continued or expanded."

Session Laws 2001-355, ss. 1 to 6 provide for the implementation of the Tar-Pamlico River Basin-Nutrient Sensitive Waters Management Strategy: Agricultural Nutrient Control Strategy, as adopted by the Environmental Management Commission on 12 October 2000 and approved by the Rules Review Commission on 20 November 2000, to become effective on 1 September 2001. A Local Advisory Committee is to be appointed in each county or watershed, as specified in the Basin Oversight Committee, within the Tar-Pamlico River Basin; these committees terminate upon a finding by the Environmental Management Commission that the long-term maintenance of nutrient loads is assured. Under the act, the Soil and Water Commission is to approve best management practices for pasture-based production or management of livestock, including a point system applicable thereto. Harvesting of trees is also addressed. Furthermore, the Basin Oversight Committee is to develop a nutrient loading accounting methodology, to be approved by the Environmental Management Commission no later than 1 March 2003. The Environmental Management Commission may adopt and revise a temporary rule incorporating the provisions of the act until a permanent rule can be adopted. Session Laws 2001-355, s. 7, provides that ss. 2 and 3 of the act expire when the temporary rule becomes effective, and s. 4 expires upon a finding that the long-term maintenance of nutrient loads in the Tar-Pamlico River Basin is assured.

**Expand Express Review Pilot Program.** — Session Laws 2004-124, ss. 12.9(a)-(f), provides: "(a) The Department of Environment and Natural Resources shall continue the Express Review Pilot Program established by Section 11.4A of S.L. 2003-284 that was implemented in the Wilmington and Raleigh regional offices and shall expand the Express Review Pilot Program to two additional regional offices within the Department, to be selected by the Department based on the Department's determination of where the Pilot Program is most needed.

"(b) The Department of Environment and Natural Resources shall continue and support the eight positions that were authorized under Section 11.4A of S.L. 2003-284 to administer the expanded Express Review Pilot Program under this section. This expanded Program and these positions and support shall be funded from the Express Review Fund, created by Section 11.4A of S.L. 2003-284.

"(c) The Department of Environment and Natural Resources may establish and support four additional positions to administer the expanded Express Review Pilot Program under this section. These positions and support may be funded for the 2004-2005 fiscal year from funds appropriated in this act to the Department of Environment and Natural Resources for this purpose. It is the intent of the General Assembly that these positions and support be funded in future fiscal years from the Express Review Fund.

"(d) The Department of Environment and Natural Resources may establish and support four additional positions to administer the expanded Express Review Pilot Program under this section. These positions and support shall be funded from the Express Review Fund, created by Section 11.4A of S.L. 2003-284.

"(e) No later than March 1, 2005, the Department of Environment and Natural Resources shall report to the Fiscal Research Division and the Environmental Review Commission its findings on the success of the continued Express Pilot Review Program and whether it recommends that the Program be continued or expanded and any other findings or recommendations, including any legislative proposals, that it deems pertinent.

"(f) Subsection (c) of this section becomes effective January 1, 2005. The remaining subsections of this section become effective July 1, 2004."

**Water Quality in Drinking Water Supply Reservoirs.** — Session Laws 2005-190, s. 1, effective July 15, 2005, provides: "Legislative findings. — The General Assembly finds that:

"(1) Drinking water supply reservoirs are an essential source of water needed to meet municipal, industrial, and agricultural needs.

"(2) Drinking water supply reservoirs provide recreational opportunities and wildlife habitat and, if properly managed, improve water quality.

"(3) Management and protection of the quality and quantity of water in drinking water supply reservoirs are essential to the economic vitality of North Carolina.

"(4) Excessive nutrients are a major source of impairment of water quality in drinking water supply reservoirs.

"(5) It would be beneficial for the State to study the condition of drinking water supply reservoirs and to develop nutrient control criteria to prevent drinking water supply reservoirs from becoming impaired.

"(6) It would be beneficial for the State to develop calibrated nutrient response models and nutrient management strategies to ensure that drinking water supply reservoirs that are showing evidence of impairment are protected, as envisioned by Part 1 of Article 21 of Chapter 143 of the General Statutes and S.L. 1997-458, the Clean Water Responsibility and Environmentally Sound Policy Act."

Session Laws 2005-190, s. 2(a), effective July 15, 2005, provides: "Study of drinking water supply reservoirs. — The Environmental Management Commission shall study the water quality in the drinking water supply reservoirs in the State to determine whether the reservoirs meet current water quality standards. The Commission shall analyze existing data and report its findings and recommendations to the Environmental Review Commission by 1 May 2006."

Session Laws 2005-190, s. 2(b), effective July 15, 2005, provides: "Nutrient control criteria. — Based on the results of the study of drinking water supply reservoirs and an evaluation of current water quality standards, the Environmental Management Commission shall identify any nutrient control criteria necessary to prevent excess nutrient loading in each drinking water supply reservoir in order to protect public health and other designated uses by 1 January 2009. The Commission shall adopt final nutrient control criteria for each drinking water supply reservoir by 1 May 2010. If the Commission finds that the nutrient control criteria for any drinking water supply reservoir are not being achieved, the Commission shall develop and implement a plan for enhanced water quality monitoring in that drinking water supply reservoir within one year of the determination. The Commission shall report its progress in implementing this section, including its findings and recommendations, to the Environmental Review Commission as a part of each quarterly report it makes pursuant to G.S. 143B-282(b)."

Session Laws 2005-190, s. 3, as amended by Session Laws 2006-259, s. 31, and as amended by Session Laws 2009-486, s. 2, provides: "(a) Applicability of section to certain reservoirs. — This section applies only to drinking water supply reservoirs that meet all of the following criteria as of 1 July 2005:

"(1) The reservoir serves a population greater than 300,000 persons.

"(2) The Environmental Management Commission has classified all or any part of the water in the reservoir as a nutrient sensitive water (NSW).

"(3) Water quality monitoring data indicates that water quality in the reservoir violates the chlorophyll A standard

"(4) The Division of Water Quality of the Department of Environment and Natural Resources has not prepared or updated a calibrated nutrient response model for the reservoir since 1 July 2002.

"(b) Temporary limitation on increased nutrient loading. — If the Environmental Management Commission determines either that water quality in all or in any part of a drinking water supply reservoir to which this section applies does not meet current water quality standards or that it is likely that water quality will not meet water quality standards at any time prior to 1 July 2010, the Commission shall not make any new or increased nutrient loading allocation to any person who is required to obtain a permit under G.S. 143-215 for an individual wastewater discharge directly or indirectly into that reservoir. This limitation on new or increased nutrient loading allocation shall not be construed to prohibit a person who holds a permit for a wastewater discharge into a drinking water supply reservoir from purchasing a nutrient loading allocation from another person who holds a permit for a wastewater discharge into the same drinking water supply reservoir. This subsection expires with respect to a drinking water supply reservoir when permanent rules adopted by the Commission to implement the nutrient management strategy for that reservoir become effective.

"(c) Nutrient management strategy. — The Environmental Management Commission shall develop a nutrient management strategy for drinking water supply reservoirs to which this section applies by 15 January 2011. The nutrient management strategy shall be based on a calibrated nutrient response model that meets the requirement of G.S. 143-215.1(c5). The nutrient management strategy shall include specific mandatory measures to achieve the reduction goals. In developing the nutrient management strategy, the Commission shall consider the effectiveness of measures previously implemented in the watershed and the cost of the proposed measures in relation to their effectiveness. These measures could include, but are not limited to, buffers, erosion and sedimentation control requirements, post-construction stormwater management, agricultural nutrient reduction measures, the addition of nutrient removal treatment processes to point source permitted wastewater treatment plants, the removal of point source discharging wastewater treatments through regionalization and conversion to nondischarge treatment technologies, measures to address nutrient inputs from on-site wastewater treatment systems, control of atmospheric deposition, allowing the sale and purchase of nutrient offsets, allowing trading of nutrient loading allocations and credits for nutrient reductions, and any other measures that the Commission determines to be necessary to meet the nutrient reduction goals. To the extent that one or more other State programs already mandate any of these measures, the nutrient management strategy shall incorporate the mandated measures and any extension of those measures and any additional measures that may be necessary to achieve the nutrient reduction goals. In making a nutrient loading allocation to a permit holder, the Commission shall, to the extent allowed by federal and State law, give consideration to all voluntary efforts taken by the permit holder to protect water quality prior to the development of the nutrient management strategy.

"(d) Eligibility under the Clean Water Revolving Loan and Grant Act. — The definitions set out in G.S. 159G-3 apply to this subsection. The operator of a wastewater treatment works that is owned by an agency of the State may apply for a loan or grant under Chapter 159G of the General Statutes on the same basis as any other applicant if the operator is a local government unit and if the local government unit operates the wastewater treatment works pursuant to a contract with the State agency that contemplates that the local government unit will eventually acquire ownership of the wastewater treatment works.

"(e) Implementation; rulemaking. — The Environmental Management Commission shall adopt permanent rules to implement the nutrient management strategies required by this section by 15 January 2011. The rules shall require that reductions in nutrient loading from all sources begin no later than five years after the rules become effective. The rules shall require that stormwater management programs to reduce nutrient loading from new development be implemented no later than 30 months after the rules become effective.

"(f) Reports. — The Environmental Management Commission shall report its progress in implementing this section to the Environmental Review Commission as a part of each quarterly report it makes pursuant to G.S. 143B-282(b).

"(g) Compensatory mitigation for riparian buffer loss; nutrient offset purchases. — Compensatory mitigation for riparian buffer loss in the watershed of a drinking water supply to which this section applies must be performed in the watershed of the drinking water supply. The Environmental Management Commission may further limit the area in which compensatory mitigation for riparian buffer loss must be performed in the watershed of a drinking water supply to which this section applies. Any nutrient offset purchased to offset loading in the watershed of a drinking water supply to which this section applies may only be obtained from an offset project located in the watershed of the drinking water supply. The Environmental Management Commission may further limit the area from which nutrient offsets may be obtained in the watershed of a drinking water supply to which this section applies.

"(h) Additional standards for land-disturbing activities in the water supply watershed. — For purposes of this section, 'land-disturbing activity' does not include the land-disturbing activities set out in G.S. 113A-52.01. In addition to any other requirements of State, federal, and local law, land-disturbing activity in the watershed of the water supply reservoir to which this section applies shall meet all of the following design standards for sedimentation and erosion control:

"(1) Erosion and sedimentation control measures, structures, and devices shall be planned, designed, and constructed to provide protection from the runoff of the 25-year storm that produces the maximum peak rate of runoff as calculated according to procedures set out in the United States Department of Agriculture Soil Conservation Service's 'National Engineering Field Manual for Conservation Practices' or according to procedures adopted by any other agency of the State or the United States or any generally recognized organization or association.

"(2) Sediment basins shall be planned, designed, and constructed so that the basin will have a settling efficiency of at least seventy percent (70%) for the 40-micron size soil particle transported into the basin by the runoff of the two-year storm that produces the maximum peak rate of runoff as calculated according to procedures in the United States Department of Agriculture Soil Conservation Service's 'National Engineering Field Manual for Conservation Practices' or according to procedures adopted by any other agency of the State or the United States or any generally recognized organization or association.

"(3) Newly constructed open channels shall be planned, designed, and constructed with side slopes no steeper than two horizontal to one vertical if a vegetative cover is used for stabilization unless soil conditions permit steeper slopes or where the slopes are stabilized by using mechanical devices, structural devices, or other acceptable ditch liners. In any event, the angle for side slopes shall be sufficient to restrain accelerated erosion.

"(4) For an area of land-disturbing activity where grading activities have been completed, temporary or permanent ground cover sufficient to restrain erosion shall be provided as soon as practicable, but in no case later than seven days after completion of grading. For an area of land-disturbing activity where grading activities have not been completed, temporary ground cover shall be provided as follows:

"a. For an area with no slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of 14 days.

"b. For an area of moderate slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of 10 days. For purposes of this subdivision, 'moderate slope' means an inclined area, the inclination of which is less than or equal to three units of horizontal distance to one unit of vertical distance.

"c. For an area of steep slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of seven days. For purposes of this subdivision, 'steep slope' means an inclined area, the inclination of which is greater than three units of horizontal distance to one unit of vertical distance.

"(i) For purposes of this section, 'land-disturbing activity' does not include the land-disturbing activities set out in G.S. 113A-52.01. No later than December 31, 2011, the Sedimentation Control Commission shall adopt rules for the control of erosion and sedimentation resulting from land-disturbing activities in the watershed of the water supply reservoir to which this section applies. In developing the rules, the Commission shall consider the standards established pursuant to Section 3(h), as enacted by Section 2(b) of this act.

"(j) The Department of Environment and Natural Resources, in consultation with the Environmental Management Commission, shall identify improvements needed in the design, operation, and siting of septic tank systems in order to reduce excess nutrient loading from septic tank systems in the watershed of a drinking water supply to which this section applies. The Department shall report its findings and recommendations for specific changes to standards adopted by the Commission for Public Health pursuant to G.S. 130A-355 to the Commission for Public Health and to the Environmental Review Commission no later than March 1, 2010."

**Other Drinking Water Supply Reservoirs.** — Session Laws 2005-190, s. 4, as amended by Session Laws 2006-259, s. 31(c), effective July 15, 2005, provides: "The Environmental Management Commission shall not make any new or increased nutrient loading allocation to any person who is required to obtain a permit under G.S. 143-215 for an individual wastewater discharge directly or indirectly into any drinking water supply reservoir for which the Division of Water Quality of the Department of Environment and Natural Resources has prepared or updated a calibrated nutrient response model since 1 July 2002 until permanent rules adopted by the Commission to implement the nutrient management strategy for that reservoir become effective. The Commission shall report its progress in developing and implementing nutrient management strategies for reservoirs to which this section applies to the Environmental Review Commission by 1 April of each year beginning 1 April 2006."

**Expand Express Review Program Statewide.** — Session Laws 2005-276, s. 12.2(b), effective July 1, 2005, provides: "The Department of Environment and Natural Resources shall expand to a statewide program that operates in each regional office of the Department the Express Review Pilot Program established by Section 11.4A of S.L. 2003-284 and expanded by Section 12.9 of S.L. 2004-124, and the provisions of G.S. 143B-279.13, as enacted by subsection (a) of this section, shall apply to this statewide program."

**Land and Water Conservation Study Commission.** — Session Laws 2006-223, ss. 1-12, effective August 10, 2006, provide: "1. Commission Established. — The Land and Water Conservation Commission is hereby established.

"2. Membership. —The Commission shall consist of 16 members as follows:

"(1) Five members appointed by the President Pro Tempore of the Senate.

"(2) Five members appointed by the Speaker of the House of Representatives.

"(3) The State Treasurer or the State Treasurer's designee.

"(4) The Director of the Governor's Policy Office or the Director's designee.

"(5) The Secretary of Environment and Natural Resources or the Secretary's designee.

"(6) Three representatives from the public at large appointed by the Governor.

"3. Cochairs. — The Commission shall have two cochairs, one designated by the President Pro Tempore of the Senate and one designated by the Speaker of the House of Representatives from among their respective appointees. The Commission shall meet upon the call of the cochairs.

"4. Quorum. — A quorum of the Commission shall consist of nine members.

"5. Vacancies. — Any vacancy on the Commission shall be filled by the original appointing authority.

"6. Purpose and Duties. — The Commission shall:

"(1) Identify and evaluate the existing sources of State funding for: (i) the public acquisition of land or interests in land to protect drinking water quality and prevent polluted runoff, conserve rivers, wetlands, floodplains, coastal waters, working farms, working forests, local parks, State parks, game lands and other natural areas, urban forests, and land visible from scenic highways in North Carolina; (ii) historic preservation; and (iii) economic and community development tied to land and water conservation and historic preservation.

"(2) Collect research and information from North Carolina and other states and jurisdictions regarding incentive based techniques and management tools used to protect land and water and assess the applicability of such tools and techniques to land conservation in North Carolina.

"(3) Prepare a draft report with a statement of the issues, a summary of the research, and recommendations to address funding needs and other issues affecting land and water conservation in North Carolina.

"(4) Hold at least three public meetings, including at least one meeting in the Mountains, Piedmont, and the Coastal Plain region of the State to present the draft report and recommendations to the public and user groups.

"7. Expenses of Members. — Members of the Commission shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate.

"8. Staff. — Upon the prior approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional staff to the Commission to aid in its work.

"9. Consultants. — The Commission may hire consultants to assist with the study as provided in G.S. 120-32.02(b).

"10. Meetings. — The Commission may meet in the Legislative Building or the Legislative Office Building upon the approval of the Legislative Services Commission.

"11. Report. — The Commission shall report its findings and recommendations to the General Assembly and the Environmental Review Commission on or before 1 February 2007, at which time the Commission shall terminate.

"12. Funding. — From funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds for the purpose of conducting the study provided for in this act."

**Establishment of Tier II Hazardous Chemical Inventory Database and Web-based Access Application.** — Session Laws 2007-107, s. 5.1(a), provides: "The Division of Information Technology Services of the Department of Environment and Natural Resources, in collaboration with the Division of Emergency Management of the Department of Crime Control and Public Safety, shall establish a Tier II Hazardous Chemicals Inventory Database and Web-based access application that will accept uploads of Tier II data from local government systems acting as partners in the project and from the University of Texas at Dallas E-Plan repository until all Tier II hazardous chemical inventory is in the database. The database shall include data on sites listed in the planned Toxic Release Inventory exchange and the Department's existing Facilities Registry System. The Facilities Registry System is a database of facilities for which the Department has environmental concerns, including facilities that are subject to an environmental permit for water, air, waste, land quality, wetlands, public water supply, wastewater treatment, and other environmental permits. The database shall be connected via Web services to the North Carolina Exchange Node. The purposes of this database are to provide a one-stop, real-time information source for all hazardous and toxic materials release sites and all sites that are subject to an environmental permit in order to enhance the operational effectiveness of the Department of Environment and Natural Resources, the Division of Emergency Management of the Department of Crime Control and Public Safety, first responders and emergency management officials, local government officials, and any others with a role in emergency management or planning; to remove the burden of data reentry in multiple systems; to reduce the dependence on paper submissions for Tier II reporting; to extend the Network for the Exchange Node community; and to reuse information already deployed at the Department. The Tier II Hazardous Chemicals Inventory Database and Web-based access application shall be maintained by the Division of Emergency Management of the Department of Crime Control and Public Safety."

**Management of Water Quality in the Jordan Watershed.** — For provisions pertaining to water quality rule-making for the Jordan Watershed pursuant to Session Laws 2009-216, ss. 1-8, as amended by Session Laws 2009-484, ss. 6-8, see the notes at G.S. 143-214.7 and G.S. 143-215.1.

**Water Quality and Quantity in the Upper Neuse River Basin.** — The preamble to Session Laws 2009-486, provides: "Whereas, that portion of the Neuse River Basin that is upstream of the Falls Dam and that includes Falls Lake is often referred to as the Upper Neuse River Basin; and

"Whereas, the nine drinking water supply reservoirs in the Upper Neuse River Basin provide water for drinking, sanitation, food processing, cooling, industrial processing, and other essential uses for the citizens of Orange, Person, Durham, Granville, and Wake Counties; and

"Whereas, the General Assembly enacted S.L. 1997-458, the Clean Water Responsibility and Environmentally Sound Policy Act, to protect and restore the waters of the State in 1997; and

"Whereas, the General Assembly enacted S.L. 2005-190, the Clean Lakes Act, to protect and restore the drinking water supply reservoirs of the State in 2005; and

"Whereas, the North Carolina Division of Water Quality in the Department of Environment and Natural Resources listed Falls Lake in the Upper Neuse River Basin as impaired waters in 2008, and the U.S. Environmental Protection Agency also classifies Falls Lake as impaired waters due to nutrients and turbidity; and

"Whereas, the quality and quantity of the water in the nine drinking water supply reservoirs in the Upper Neuse River Basin are essential to public health, environmental quality, and the economic vitality of the region; and

"Whereas, the North Carolina Environmental Management Commission may not develop a nutrient management strategy and rules to implement the nutrient management strategy for the Upper Neuse River Basin by July 1, 2009, as required by law; and

"Whereas, delayed development of a nutrient management strategy and rules to implement the nutrient management strategy threatens the quality and quantity of drinking water supply reservoirs in the Upper Neuse River Basin; Now, therefore, The General Assembly of North Carolina enacts:"

For provisions pertaining to protection and restoration of water quality and quantity in the Upper Neuse River Basin, Falls Lake, and other drinking supply reservoirs pursuant to Session Laws 2009-486, see the notes at G.S. 143-214.1 and G.S. 143-215.

Session Laws 2009-486, s. 4, provides in part: "Section 3(h) of S.L. 2005-190, as enacted by Section 2(b) of this act, becomes effective January 1, 2010, applies to land-disturbing activities begun on or after January 1, 2010, and expires on the date that rules adopted pursuant to Section 3(i) of S.L. 2005-190, as enacted by Section 2(b) of this act, become effective."

**Legislative Study Commission on Water and Wastewater Infrastructure.** — Session Laws 2009-574, ss. 43.1 through 43.5, provide: "SECTION 43.1. There is created the Legislative Study Commission on Water and Wastewater Infrastructure. The Commission shall consist of 17 members appointed as follows:

"(1) Four members of the House of Representatives, appointed by the Speaker of the House of Representatives.

"(2) Four members of the Senate, appointed by the President Pro Tempore of the Senate.

"(3) Two members appointed by the Governor.

"(4) The Secretary of the North Carolina Department of Environment and Natural Resources or the Secretary's designee.

"(5) The Secretary of the North Carolina Department of Commerce or the Secretary's designee.

"(6) The President of the North Carolina Rural Economic Development Center or the President's designee.

"(7) The Executive Director of the North Carolina Clean Water Management Trust Fund or the Executive Director's designee.

"(8) The Executive Director of the North Carolina League of Municipalities or the Executive Director's designee.

"(9) The Executive Director of the North Carolina Association of County Commissioners or the Executive Director's designee.

"(10) The Chair of the State Water Infrastructure Commission.

"SECTION 43.2. The Speaker of the House of Representatives and the President Pro Tempore of the Senate shall each designate a cochair. The Commission may meet at any time upon the joint call of the cochairs. A quorum of the Commission shall be a majority of its members.

"Vacancies on the Commission shall be filled by the same appointing authority that made the initial appointment.

"Subject to the approval of the Legislative Services Commission, the Commission may meet in the Legislative Building or the Legislative Office Building.

"The Legislative Services Commission, through the Legislative Services Officer, shall assign professional staff to assist the Commission in its work. The House of Representatives' and the Senate's Director of Legislative Assistants shall assign clerical support staff to the Commission, and the expenses relating to the clerical employees shall be borne by the Commission.

"In addition, the State agencies and nonprofits serving on the Commission shall cooperate in providing information and additional staff resources as needed to accomplish the work of the Commission.

"The Commission, while in the discharge of its official duties, may exercise all powers provided for under G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4. The Commission may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02.

"SECTION 43.3. The Legislative Study Commission on Water and Wastewater Infrastructure shall focus on the development of an ongoing process to identify and regularly report to the North Carolina General Assembly on statewide water and wastewater infrastructure needs and to improve the delivery of State appropriated water and wastewater programs. The Commission shall specifically do all of the following:

"(1) Evaluate the information provided through the drinking water and wastewater needs assessment prepared by the Environmental Protection Agency (EPA) every four years; the drinking water and wastewater needs surveys currently done by the North Carolina Department of Environment and Natural Resources in support of the EPA needs assessment; the data compiled as part of Water 2030 by the North Carolina Rural Economic Development Center, Inc.; and any other existing data sets in order to determine what information currently exists and where there may be gaps in the data.

"(2) Study an ongoing method for regularly determining and reporting on the State's water and wastewater infrastructure needs, including the subject of small towns whose water or sewer rates exceed the high-unit-cost threshold as defined in G.S. 159G-20.

"(3) Select a method for identifying and reporting on infrastructure needs in the future.

"(4) Review infrastructure funding priorities currently set out in State law to determine whether the priorities appropriately reflect the State's most pressing needs in light of future growth projections.

"(5) Recommend changes to infrastructure funding priorities and appropriations processes to ensure that funds are used to meet the State's most pressing needs.

"(6) Ascertain the capacity and role of the State in bridging identified gaps between funding priorities and available funds.

"(7) Determine what steps funding agencies can take to improve the delivery of existing funding programs, including the following options:

"a. Developing common application requirements;

"b. Scheduling regular joint meetings between funders and applicants;

"c. Where projects are jointly funded, exploring options to share and improve oversight responsibilities; and

"d. Coordinating reporting requirements to produce a single integrated funders report on an annual basis.

"SECTION 43.4. As used in subdivision (7) of Section 43.3, 'funding agencies' means the Department of Commerce, the Department of Environment and Natural Resources, the Clean Water Management Trust Fund, and the Rural Economic Development Center.

"SECTION 43.5. On or before May 1, 2010, the Legislative Study Commission on Water and Wastewater Infrastructure shall submit an interim report to the 2009 General Assembly, Regular Session 2010. This interim report shall include any findings or recommendations of the Commission at that time. In addition, no later than the convening of the 2011 General Assembly, the Commission shall submit a final report to the General Assembly. This final report shall include the Commission's findings and recommendations under this study, including any legislative or administrative proposals. The Commission shall terminate upon the earlier of the filing of its final report or the convening of the 2011 General Assembly."

Session Laws 2009-574, s. 52.1, provides: "For legislative studies authorized by this act, out-of-state travel must be authorized by the President Pro Tempore of the Senate or the Speaker of the House of Representatives, as appropriate."

**Editor's Note.** — Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-276, s. 1.2, provides:

"This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

For provisions of the Permit Extension Act of 2009, Session Laws 2009-406, see the notes under G.S. 153A-344.1 and G.S. 160A-385.1.

**Legal Periodicals.** — For comment on this article, see 29 N.C.L. Rev. 365 (1951).

For article, "Introduction to Water Use Law in North Carolina," see 46 N.C.L. Rev. 1 (1967).

For note on coastal land use development and area-wide zoning, see 49 N.C.L. Rev. 866 (1971).

For note on estuarine pollution, see 49 N.C.L. Rev. 921 (1971).

For comment, "Legal Analysis of the Constitutionality of the Water Supply Watershed Protection Act of 1989 and the Hyde Bill," see 29 Wake Forest L. Rev. 1279 (1994).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

For legislative survey, see 21 Campbell L. Rev. 323 (1999).

For legislative survey, see 22 Campbell L. Rev. 253 (2000).

For article, "Now Open for Development?: The Present State of Regulation of Activities in North Carolina Wetlands," see 79 N.C.L. Rev. 1667 (2001).

For article, "The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation," see 29 Campbell L. Rev. 535 (2007).

## CASE NOTES

**Purpose.** — This section sets the goal which the General Assembly wants to reach in the administration of its water program. Town of Spruce Pine v. Avery County, 346 N.C. 787, 488 S.E.2d 144 (1997).

**Because the state regulation of the land application of residuals through G.S. 143-211 was comprehensive, constituting a complete and integrated regulatory scheme,** the county did not have authority to enact ordinances that also purported to specifically regulate that conduct; the trial court properly found the county ordinance invalid. Granville Farms, Inc. v. County of Granville, 170 N.C. App. 109, 612 S.E.2d 156, 2005 N.C. App. LEXIS 906 (2005).

Fact that county permit for land application of biosolids stated that it "does not preclude" compliance with the rules of local governments "which have jurisdiction" did not provide jurisdiction to the county to enact regulations that duplicated and conflicted with what was a comprehensive state regulatory scheme in G.S. 143-211. Granville Farms, Inc. v. County of Granville, 170 N.C. App. 109, 612 S.E.2d 156, 2005 N.C. App. LEXIS 906 (2005).

G.S. 143-211, coupled with the permit requirements set forth in the applicable regulations, were so comprehensive in scope that they were intended to comprise a "complete and integrated regulatory scheme" on a statewide basis, thus leaving no room for further local regulation. Granville Farms, Inc. v. County of Granville, 170 N.C. App. 109, 612 S.E.2d 156, 2005 N.C. App. LEXIS 906 (2005).

County's biosolids ordinance, which required those in business of application of biosolids to obtain county permit as well as state permit already required and to record warnings in chain of title if biosolids had been applied to land, was invalid because it was preempted by G.S. 143-211, which, coupled with regulations, was a complete and integrated regulatory scheme on a statewide basis, thus it left no room for further local regulation. Granville Farms, Inc. v. County of Granville, 170 N.C. App. 109, 612 S.E.2d 156, 2005 N.C. App. LEXIS 906 (2005).

**General Assembly's omission of citizen suit provision only bears on citizen enforcement of state regulatory scheme** rather than demonstrating any legislative intent to preempt private rights of action at common law. Biddix v. Henredon Furn. Indus., Inc., 76 N.C. App. 30, 331 S.E.2d 717 (1985).

**Evidence of Injury Sufficient to Be "Person Aggrieved."** — Where person alleged sufficient injury in fact to interests within the zone of those to be protected and regulated by the statute, and rules and standards promulgated pursuant thereto, he was, therefore, a "person aggrieved" within the meaning and intent of the Air Pollution Control Act. Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 768, rehearing denied, 338 N.C. 314, 451 S.E.2d 634 (1994).

**General Assembly Did Not Intend to Act with Respect to Common Law Rights.** — Notwithstanding the General Assembly's omission of specific statutory language reserving common law rights, by enacting legislation to seek state administration of the Federal Water Pollution Control Act the General Assembly did not intend to act with respect to common law riparian rights for waste discharges in excess of a National Pollutant Discharge Elimination System permit. Biddix v. Henredon Furn. Indus., Inc., 76 N.C. App. 30, 331 S.E.2d 717 (1985).

**Common-Law Actions of Nuisance and Continuing Trespass Not Preempted.** — The Clean Water Act does not preempt the common-law actions of nuisance and continuing trespass to land for the discharge of industrial waste in violation of an applicable National Pollutant Discharge Elimination System permit. Biddix v. Henredon Furn. Indus., Inc., 76 N.C. App. 30, 331 S.E.2d 717 (1985).

The very complex and comprehensive set of regulatory requirements and controls established under the pertinent provisions of Chapter 143 of the General Statutes are clearly distinguishable from the parameters of a private nuisance as that term was understood under common law. State ex rel. Cobey v. Ballard, 110 N.C. App. 486, 429 S.E.2d 735 (1993).

**Authority and Discretion of Commission.** — The trial court properly applied the whole record test, where it found that the North Carolina Department of Environment and Natural Resources and the Environmental Management Commission did not exceed their discretion and authority under G.S. 143-211(c), 143-215.107(a)(1), (3), and 143-215.114A(a)(1) in finding that the contractor had open burning piles within 1,000 feet from a dwelling. MW Clearing & Grading, Inc. v. N.C. Dep't of Env't & Natural Res., 171 N.C. App. 170, 614 S.E.2d 568, 2005 N.C. App. LEXIS 1210 (2005), cert. denied, 360 N.C. 65, 623 S.E.2d 585 (2005), rev'd in part, 360 N.C. 392, 628 S.E.2d 379 (2006) (as to finding violations rather than one).

**The case at bar should have been characterized as an action in nuisance,** thus qualifying it as a cause of action which existed at the adoption of our State's 1868 Constitution and satisfying the first prong of the test in State ex rel. Rhodes v. Simpson, 325 N.C. 514, 385 S.E.2d 329 (1989). State ex rel. Cobey v. Ballard, 110 N.C. App. 486, 429 S.E.2d 735 (1993).

**Cited** in Lewis v. White, 287 N.C. 625, 216 S.E.2d 134 (1975); State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986); In re Envtl. Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588 (1986); Rudd v. Electrolux Corp., 982 F. Supp. 355 (M.D.N.C. 1997); N.C. Home Bldrs. Ass'n v. Envtl. Mgmt. Comm'n, 155 N.C. App. 408, 573 S.E.2d 732, 2002 N.C. App. LEXIS 1617 (2002); Brinkman v. Barrett Kays & Assocs., P.A., 155 N.C. App. 738, 575 S.E.2d 40, 2003 N.C. App. LEXIS 17 (2003); N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 162 N.C. App. 467, 591 S.E.2d 549, 2004 N.C. App. LEXIS 178 (2004).

## § 143-212. Definitions.

Unless a different meaning is required by the context, the following definitions apply to this Article and Articles 21A and 21B of this Chapter:

(1) "Area of the State" means a municipality, a county, a portion of a county or a municipality, or other substantial geographic area of the State designated by the Commission.

(2) "Commission" means the North Carolina Environmental Management Commission.

(3) "Department" means the Department of Environment and Natural Resources.

(4) "Person" includes individuals, firms, partnerships, associations, institutions, corporations, municipalities and other political subdivisions, and governmental agencies.

(5) "Secretary" means the Secretary of Environment and Natural Resources.

(6) "Waters" means any stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, or other body or accumulation of water, whether surface or underground, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction. (1987, c. 827, s. 152A; 1989, c. 727, s. 218(103); 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1991 (Reg. Sess., 1992), c. 1028, s. 1; 1997-443, s. 11A.119(a).)

### CASE NOTES

**Statutory Authority over Wetlands.** — Because the definition of water provided in G.S. 143-212(6) was sufficiently broad to include the classification of wetlands, the absence of the term wetlands in the definition did not deprive the North Carolina Environmental Management Commission of statutory authority to classify waters and to adopt standards for wetlands. N.C. Home Bldrs. Ass'n v. Envtl. Mgmt. Comm'n, 155 N.C. App. 408, 573 S.E.2d 732, 2002 N.C. App. LEXIS 1617 (2002), cert. denied, 357 N.C. 62, 579 S.E.2d 392 (2003).

**Editor's Note.** — A former G.S. 143-212 was repealed by Session Laws 1973, c. 1262, s. 23.

### OPINIONS OF ATTORNEY GENERAL

**The Water Quality Committee of the Environmental Management Commission is authorized to adopt rules requiring permits for impacts to isolated wetlands and surface waters.** See opinion of Attorney General to Dr. Charles H. Peterson, Vice Chairman, Environmental Management Commission, and Ms. Coleen Sullins, Water Quality Section, Division of Water Quality, 2001 N.C. AG LEXIS 33 (9/5/01).

## § 143-213. Definitions.

Unless the context otherwise requires, the following terms as used in this Article and Articles 21A and 21B of this Chapter are defined as follows:

(1) The term "air cleaning device" means any method, process or equipment which removes, reduces, or renders less noxious air contaminants discharged into the atmosphere.

(2) The term "air contaminant" means particulate matter, dust, fumes, gas, mist, smoke, or vapor or any combination thereof.

(3) The term "air contamination" means the presence in the outdoor atmosphere of one or more air contaminants which contribute to a condition of air pollution.

(4) The term "air contamination source" means any source at, from, or by reason of which there is emitted into the atmosphere any air contaminant.

(5) The term "air pollution" shall mean the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as is or tends to be injurious to human health or welfare, to animal or plant life or to property or that interferes with the enjoyment of life or property.

(6) to (8) Repealed by Session Laws 1987, c. 827, s. 153.

(9) Whenever reference is made in this Article to the "discharge of waste," it shall be interpreted to include discharge, spillage, leakage, pumping, placement, emptying, or dumping into waters of the State, or into any unified sewer system or arrangement for sewage disposal, which system or arrangement in turn discharges the waste into the waters of the State.

(10) The term "disposal system" means a system for disposing of waste, and including sewer systems and treatment works.

(11) Repealed by Session Laws 1987, c. 827, s. 153.

(12) The term "emission" means a release into the outdoor atmosphere of air contaminants.

(13) The term "outlet" means the terminus of a sewer system, or the point of emergence of any waste or the effluent therefrom, into the waters of the State.

(14) Repealed by Session Laws 1987, c. 827, s. 153.

(15) The term "sewer system" means pipelines or conduits, pumping stations, and force mains, and all other construction, devices, and appliances appurtenant thereto, used for conducting wastes to a point of ultimate disposal.

(16) The term "standard" or "standards" means such measure or measures of the quality of water and air as are established by the Commission pursuant to G.S. 143-214.1 and G.S. 143-215.

(16a) "Stormwater" means the flow of water which results from precipitation and which occurs immediately following rainfall or a snowmelt.

(17) The term "treatment works" means any plant, septic tank disposal field, lagoon, pumping station, constructed drainage ditch or surface water intercepting ditch, incinerator, area devoted to sanitary landfill, or other works not specifically mentioned herein, installed for the purpose of treating, equalizing, neutralizing, stabilizing or disposing of waste.

(18) "Waste" shall mean and include the following:

a. "Sewage," which shall mean water-carried human waste discharged, transmitted, and collected from residences, buildings, industrial establishments, or other places into a unified sewerage system or an arrangement for sewage disposal or a group of such sewerage arrangements or systems, together with such ground, surface, storm, or other water as may be present.

b. "Industrial waste" shall mean any liquid, solid, gaseous, or other waste substance or a combination thereof resulting from any process of industry, manufacture, trade or business, or from the development of any natural resource.

c. "Other waste" means sawdust, shavings, lime, refuse, offal, oil, tar chemicals, dissolved and suspended solids, sediment, and all other substances, except industrial waste, sewage, and toxic chemicals which may be discharged into or placed in such proximity to the water that drainage therefrom may reach the water.

d. "Toxic waste" means that waste, or combinations of wastes, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformities, in such organisms or their offspring.

(19) The term "water pollution" means the man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of the waters of the State, including, but specifically not limited to, alterations resulting from the concentration or increase of natural pollutants caused by man-related activities.

(20) Repealed by Session Laws 1987, c. 827, s. 153.

(21) The term "watershed" means a natural area of drainage, including all tributaries contributing to the supply of at least one major waterway within the State, the specific limits of each separate watershed to be designated by the Commission.

(22) The term "complex sources" means any facility which is or may be an air pollution source or which will induce or tend to induce development or activities which will or may be air pollution sources, and which shall include, but not be limited to, shopping centers; sports complexes; drive-in theaters; parking lots and garages; residential, commercial, industrial or institutional developments; amusement parks and recreation areas; highways; and any other facilities which will result in increased emissions from motor vehicles or stationary sources.

(23) The term "effluent standards or limitations" means any restrictions established pursuant to this Article on quantities, rates, characteris-

tics and concentrations of chemical, physical, biological and other constituents of wastes which are discharged from any pretreatment facility or from any outlet or point source to the waters of the State.

(24) The term "point source" means any discernible, confined, and discrete conveyance, including, but specifically not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or concentrated animal-feeding operation from which wastes are or may be discharged to the waters of the State.

(25) The term "pretreatment facility" means any treatment works installed for the purpose of treating, equalizing, neutralizing or stabilizing waste from any source prior to discharge to any disposal system subject to effluent standards or limitations.

(26) The term "pretreatment standards" means effluent standards or limitations applicable to waste discharged from a pretreatment facility.

(27) The term "Clean Air Act" refers to the federal Clean Air Act, as amended, codified generally at 42 U.S.C. § 7401 et seq.

(28) The term "nonattainment area" refers to an area which is shown to exceed any national ambient air quality standard for such pollutant.

(29) The term "prevention of significant deterioration" refers to the statutory and regulatory requirements arising from the Clean Air Act designed to prevent the significant deterioration of air quality in areas with air quality better than required by the national ambient air quality standards.

(29a) Reserved.

(29b) "Title II" means Title II of the 1990 amendments to the federal Clean Air Act and the National Emission Standards Act (Pub. L. 101-549, 104 Stat. 2471, 42 U.S.C. § 7521 et seq.).

(29c) "Title III" means Title III of the 1990 amendments to the federal Clean Air Act (Pub. L. 101-549, 104 Stat. 2531, 42 U.S.C. § 7412 et seq.).

(29d) "Title IV" means Title IV of the 1990 amendments to the federal Clean Air Act (Pub. L. 101-549, 104 Stat. 2584, 42 U.S.C. § 7651 et seq.).

(29e) "Title V" means Title V of the 1990 amendments to the federal Clean Air Act (Pub. L. 101-549, 104 Stat. 2635, 42 U.S.C. § 7661 et seq.).

(29f) through (29o) Reserved.

(29p) "Title V Account" means the Account established in G.S. 143-215.3A(b).

(30) The term "waste treatment management practice" means any method, measure or practice to control plant site runoff, spillage or leaks, sludge or waste disposal and drainage from raw material storage which are associated with, or ancillary to the industrial manufacturing or treatment process of the class or category of point sources to which the management practice is applied. Waste treatment management practices may only be imposed, supplemental to effluent limitations, for a class or category of point sources, for any specific pollutant which has been designated as toxic or hazardous pursuant to sections 307(a)(1) or 311 of the Federal Water Pollution Control Act. (1951, c. 606; 1957, c. 1275, s. 1; 1959, c. 779, s. 8; 1967, c. 892, s. 1; 1971, c. 1167, s. 4; 1973, c. 821, ss. 1-3; c. 1262, s. 23; 1977, c. 771, s. 4; 1979, c. 545, ss. 8-10; c. 633, s. 1; 1987, c. 827, ss. 153, 154; 1989, c. 135, s. 2; c. 447, s. 1; c. 742, s. 7; 1991, c. 287, s. 1; c. 403, s. 1; c. 552, s. 1; 1991 (Reg. Sess., 1992), c. 889, ss. 1, 2; c. 1028, s. 2; c. 1039, s. 13; 1993, c. 400, ss. 1(a)-(c).)

**Cross References.** — As to the organization of the Department of Environment and Natural Resources, see G.S. 143B-279.1 et seq.

**Editor's Note.** — Session Laws 1991, c. 403, s. 6 provides: "This act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act. Each agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency."

Subdivisions (29f) through (29o) were reserved, and subdivision (29p) was so designated, at the direction of the Revisor of Statutes.

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

**§ 143-214:** Repealed by Session Laws 1973, c. 1262, s. 23.

## § 143-214.1. Water; water quality standards and classifications; duties of Commission.

(a) Development and Adoption of Classifications and Standards. — The Commission is hereby directed and empowered, as rapidly as possible within the limits of funds and facilities available to it, and subject to the procedural requirements of this Article:

(1) To develop and adopt, after proper study, a series of classifications and the standards applicable to each such classification, which will be appropriate for the purpose of classifying each of the waters of the State in such a way as to promote the policy and purposes of this Article most effectively;

(2) To survey all the waters of the State and to separately identify all such waters as the Commission believes ought to be classified separately in order to promote the policy and purposes of this Article, omitting only such waters, as in the opinion of the Commission, are insufficiently important to justify classification or control under this Article; and

(3) To assign to each identified water of the State such classification, from the series adopted as specified above, as the Commission deems proper in order to promote the policy and purposes of this Article most effectively.

(b) Criteria for Classification. — In developing and adopting classifications, and the standards applicable to each, the Commission shall recognize that a number of different classifications should be provided for (with different standards applicable to each) so as to give effect to the need for balancing conflicting considerations as to usage and other variable factors; that different classifications with different standards applicable thereto may frequently be appropriate for different segments of the same water; and that each classification and the standards applicable thereto should be adopted with primary reference to the best usage to be made of the waters to which such classification will be assigned.

(c) Criteria for Standards. — In establishing the standards applicable to each classification, the Commission shall consider and the standards when finally adopted and published shall state: the extent to which any physical, chemical, or biological properties should be prescribed as essential to the contemplated best usage.

(d) Criteria for Assignment of Classifications. — In assigning to each identified water the appropriate classifications (with its accompanying standards), the Commission shall consider, and the decision of the Commission when finally adopted and published shall contain its conclusions with respect to the following factors as related to such identified waters:

(1) The size, depth, surface area covered, volume, direction and rate of flow, stream gradient and temperature of the water;

(2) The character of the district bordering said water, including any peculiar suitability such district may have or any dominant economic

interest or development which has become established in relation to or by reason of any particular use of such water;

(3) The uses and extent thereof which have been made, are being made, or may in the future be made, of such water for domestic consumption, bathing, fish or wildlife and their culture, industrial consumption, transportation, fire prevention, power generation, scientific or research uses, the disposal of sewage, industrial wastes and other wastes, or any other uses;

(4) In revising existing or adopting new water quality classifications or standards, the Commission shall consider the use and value of State waters for public water supply, propagation of fish and wildlife, recreation, agriculture, industrial and other purposes, use and value for navigation, and shall take into consideration, among other things, an estimate as prepared under section 305(b)(1) of the Federal Water Pollution Control Act amendments of 1972 of the environmental impact, the economic and social costs necessary to achieve the proposed standards, the economic and social benefits of such achievement and an estimate of the date of such achievement;

(5) With regard to the groundwaters, the factors to be considered shall include the natural quality of the water below land surface and the condition of occurrences, recharge, movement and discharge, the vulnerability to pollution from wastewaters and other substances, and the potential for improvement of the quality and quantity of the water.

(e) Chapter 150B of the General Statutes governs the adoption and publication of rules under this Article.

(f), (g) Repealed by Session Laws 1987, c. 827, s. 156. (1951, c. 606; 1957, c. 1275, s. 2; 1967, c. 892, s. 1; 1969, c. 822, s. 1; 1973, c. 1262, s. 23; 1975, c. 19, s. 50; c. 583, s. 8; c. 655, s. 5; 1977, c. 771, s. 4; 1979, c. 633, s. 6; 1979, 2nd Sess., c. 1199; 1983, c. 296, s. 1; 1987, c..827, ss. 154, 156; 2006-259, ss. 31(b), 31(c).)

**Water Quality in Drinking Water Supply Reservoirs.** — Session Laws 2005-190, s. 1, effective July 15, 2005, provides: "Legislative findings. — The General Assembly finds that:

"(1) Drinking water supply reservoirs are an essential source of water needed to meet municipal, industrial, and agricultural needs.

"(2) Drinking water supply reservoirs provide recreational opportunities and wildlife habitat and, if properly managed, improve water quality.

"(3) Management and protection of the quality and quantity of water in drinking water supply reservoirs are essential to the economic vitality of North Carolina.

"(4) Excessive nutrients are a major source of impairment of water quality in drinking water supply reservoirs.

"(5) It would be beneficial for the State to study the condition of drinking water supply reservoirs and to develop nutrient control criteria to prevent drinking water supply reservoirs from becoming impaired.

"(6) It would be beneficial for the State to develop calibrated nutrient response models and nutrient management strategies to ensure that drinking water supply reservoirs that are showing evidence of impairment are protected, as envisioned by Part 1 of Article 21 of Chapter 143 of the General Statutes and S.L. 1997-458, the Clean Water Responsibility and Environmentally Sound Policy Act."

Session Laws 2005-190, s. 2(a), effective July 15, 2005, provides: "Study of drinking water supply reservoirs. — The Environmental Management Commission shall study the water quality in the drinking water supply reservoirs in the State to determine whether the reservoirs meet current water quality standards. The Commission shall analyze existing data and report its findings and recommendations to the Environmental Review Commission by 1 May 2006."

Session Laws 2005-190, s. 2(b), effective July 15, 2005, provides: "Nutrient control criteria. — Based on the results of the study of drinking water supply reservoirs and an evaluation of current water quality standards, the Environmental Management Commission shall identify any nutrient control criteria necessary to prevent excess nutrient loading in each drinking water supply reservoir in order to protect public health and other designated uses by 1 January 2009. The Commission shall adopt final nutrient control criteria for each drinking water supply reservoir by 1 May 2010. If the

Commission finds that the nutrient control criteria for any drinking water supply reservoir are not being achieved, the Commission shall develop and implement a plan for enhanced water quality monitoring in that drinking water supply reservoir within one year of the determination. The Commission shall report its progress in implementing this section, including its findings and recommendations, to the Environmental Review Commission as a part of each quarterly report it makes pursuant to G.S. 143B-282(b)."

Session Laws 2005-190, s. 3, as amended by Session Laws 2006-259, s. 31, and as amended by Session Laws 2009-486, s. 2, provides: "(a) Applicability of section to certain reservoirs. — This section applies only to drinking water supply reservoirs that meet all of the following criteria as of 1 July 2005:

"(1) The reservoir serves a population greater than 300,000 persons.

"(2) The Environmental Management Commission has classified all or any part of the water in the reservoir as a nutrient sensitive water (NSW).

"(3) Water quality monitoring data indicates that water quality in the reservoir violates the chlorophyll A standard

"(4) The Division of Water Quality of the Department of Environment and Natural Resources has not prepared or updated a calibrated nutrient response model for the reservoir since 1 July 2002.

"(b) Temporary limitation on increased nutrient loading. — If the Environmental Management Commission determines either that water quality in all or in any part of a drinking water supply reservoir to which this section applies does not meet current water quality standards or that it is likely that water quality will not meet water quality standards at any time prior to 1 July 2010, the Commission shall not make any new or increased nutrient loading allocation to any person who is required to obtain a permit under G.S. 143-215 for an individual wastewater discharge directly or indirectly into that reservoir. This limitation on new or increased nutrient loading allocation shall not be construed to prohibit a person who holds a permit for a wastewater discharge into a drinking water supply reservoir from purchasing a nutrient loading allocation from another person who holds a permit for a wastewater discharge into the same drinking water supply reservoir. This subsection expires with respect to a drinking water supply reservoir when permanent rules adopted by the Commission to implement the nutrient management strategy for that reservoir become effective.

"(c) Nutrient management strategy. — The Environmental Management Commission shall develop a nutrient management strategy for drinking water supply reservoirs to which this section applies by 15 January 2011. The nutrient management strategy shall be based on a calibrated nutrient response model that meets the requirement of G.S. 143-215.1(c5). The nutrient management strategy shall include specific mandatory measures to achieve the reduction goals. In developing the nutrient management strategy, the Commission shall consider the effectiveness of measures previously implemented in the watershed and the cost of the proposed measures in relation to their effectiveness. These measures could include, but are not limited to, buffers, erosion and sedimentation control requirements, post-construction stormwater management, agricultural nutrient reduction measures, the addition of nutrient removal treatment processes to point source permitted wastewater treatment plants, the removal of point source discharging wastewater treatments through regionalization and conversion to nondischarge treatment technologies, measures to address nutrient inputs from on-site wastewater treatment systems, control of atmospheric deposition, allowing the sale and purchase of nutrient offsets, allowing trading of nutrient loading allocations and credits for nutrient reductions, and any other measures that the Commission determines to be necessary to meet the nutrient reduction goals. To the extent that one or more other State programs already mandate any of these measures, the nutrient management strategy shall incorporate the mandated measures and any extension of those measures and any additional measures that may be necessary to achieve the nutrient reduction goals. In making a nutrient loading allocation to a permit holder, the Commission shall, to the extent allowed by federal and State law, give consideration to all voluntary efforts taken by the permit holder to protect water quality prior to the development of the nutrient management strategy.

"(d) Eligibility under the Clean Water Revolving Loan and Grant Act. — The definitions set out in G.S. 159G-3 apply to this subsection. The operator of a wastewater treatment works that is owned by an agency of the State may apply for a loan or grant under Chapter 159G of the General Statutes on the same basis as any other applicant if the operator is a local government unit and if the local government unit operates the wastewater treatment works pursuant to a contract with the State agency that contemplates that the local government unit will eventually acquire ownership of the wastewater treatment works.

"(e) Implementation; rulemaking. The Environmental Management Commission shall adopt permanent rules to implement the nutrient management strategies required by this section by 15 January 2011. The rules shall require that reductions in nutrient loading from all sources begin no later than five years after the rules become effective. The rules shall require that stormwater management programs to reduce nutrient loading from new development be implemented no later than 30 months after the rules become effective.

"(f) Reports. The Environmental Management Commission shall report its progress in implementing this section to the Environmental Review Commission as a part of each quarterly report it makes pursuant to G.S. 143B-282(b).

"(g) Compensatory mitigation for riparian buffer loss; nutrient offset purchases. Compensatory mitigation for riparian buffer loss in the watershed of a drinking water supply to which this section applies must be performed in the watershed of the drinking water supply. The Environmental Management Commission may further limit the area in which compensatory mitigation for riparian buffer loss must be performed in the watershed of a drinking water supply to which this section applies. Any nutrient offset purchased to offset loading in the watershed of a drinking water supply to which this section applies may only be obtained from an offset project located in the watershed of the drinking water supply. The Environmental Management Commission may further limit the area from which nutrient offsets may be obtained in the watershed of a drinking water supply to which this section applies.

"(h) Additional standards for land-disturbing activities in the water supply watershed. For purposes of this section, 'land-disturbing activity' does not include the land-disturbing activities set out in G.S. 113A-52.01. In addition to any other requirements of State, federal, and local law, land-disturbing activity in the watershed of the water supply reservoir to which this section applies shall meet all of the following design standards for sedimentation and erosion control:

"(1) Erosion and sedimentation control measures, structures, and devices shall be planned, designed, and constructed to provide protection from the runoff of the 25-year storm that produces the maximum peak rate of runoff as calculated according to procedures set out in the United States Department of Agriculture Soil Conservation Service's 'National Engineering Field Manual for Conservation Practices' or according to procedures adopted by any other agency of the State or the United States or any generally recognized organization or association.

"(2) Sediment basins shall be planned, designed, and constructed so that the basin will have a settling efficiency of at least seventy percent (70%) for the 40-micron size soil particle transported into the basin by the runoff of the two-year storm that produces the maximum peak rate of runoff as calculated according to procedures in the United States Department of Agriculture Soil Conservation Service's 'National Engineering Field Manual for Conservation Practices' or according to procedures adopted by any other agency of the State or the United States or any generally recognized organization or association.

"(3) Newly constructed open channels shall be planned, designed, and constructed with side slopes no steeper than two horizontal to one vertical if a vegetative cover is used for stabilization unless soil conditions permit steeper slopes or where the slopes are stabilized by using mechanical devices, structural devices, or other acceptable ditch liners. In any event, the angle for side slopes shall be sufficient to restrain accelerated erosion.

"(4) For an area of land-disturbing activity where grading activities have been completed, temporary or permanent ground cover sufficient to restrain erosion shall be provided as soon as practicable, but in no case later than seven days after completion of grading. For an area of land-disturbing activity where grading activities have not been completed, temporary ground cover shall be provided as follows:

"a. For an area with no slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of 14 days.

"b. For an area of moderate slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of 10 days. For purposes of this subdivision, 'moderate slope' means an inclined area, the inclination of which is less than or equal to three units of horizontal distance to one unit of vertical distance.

"c. For an area of steep slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of seven days. For purposes of this subdivision, 'steep slope' means an inclined area, the inclination of which is greater than three units of horizontal distance to one unit of vertical distance.

"(i) For purposes of this section, 'land-disturbing activity' does not include the land-disturbing activities set out in G.S. 113A-52.01. No later than December 31, 2011, the Sedimentation Control Commission shall adopt rules for the control of erosion and sedimentation resulting from land-disturbing activities in the watershed of the water supply reservoir to which this section applies. In developing the rules, the Commission shall consider the standards established pursuant to Section 3(h), as enacted by Section 2(b) of this act.

"(j) The Department of Environment and Natural Resources, in consultation with the Environmental Management Commission, shall identify improvements needed in the design, operation, and siting of septic tank systems in order to reduce excess nutrient loading from septic tank systems in the watershed of a drinking water supply to which this section applies. The Department shall report its findings and recommendations for specific changes to standards adopted by the Commission for Public Health pursuant to G.S. 130A-355 to the Commission for Public Health and to the Environmental Review Commission no later than March 1, 2010."

**Other Drinking Water Supply Reservoirs.** — Session Laws 2005-190, s. 4, as amended by Session Laws 2006-259, s. 31(c), effective July 15, 2005, provides: "The Environmental Management Commission shall not make any new or increased nutrient loading allocation to any person who is required to obtain a permit under G.S. 143-215 for an individual wastewater discharge directly or indirectly into any drinking water supply reservoir for which the Division of Water Quality of the Department of Environment and Natural Resources has prepared or updated a calibrated nutrient response model since 1 July 2002 until permanent rules adopted by the Commission to implement the nutrient management strategy for that reservoir become effective. The Commission shall report its progress in developing and implementing nutrient management strategies for reservoirs to which this section applies to the Environmental Review Commission by 1 April of each year beginning 1 April 2006."

**Management of Water Quality in the Jordan Watershed.** — For provisions pertaining to water quality rule-making for the Jordan Watershed pursuant to Session Laws 2009-216, ss. 1-8, as amended by Session Laws 2009-484, ss. 6-8, see the notes at G.S. 143-214.7 and G.S. 143-215.1.

**Water Quality and Quantity in the Upper Neuse River Basin.** — The preamble to Session Laws 2009-486, provides: "Whereas, that portion of the Neuse River Basin that is upstream of the Falls Dam and that includes Falls Lake is often referred to as the Upper Neuse River Basin; and

"Whereas, the nine drinking water supply reservoirs in the Upper Neuse River Basin provide water for drinking, sanitation, food processing, cooling, industrial processing, and other essential uses for the citizens of Orange, Person, Durham, Granville, and Wake Counties; and

"Whereas, the General Assembly enacted S.L. 1997-458, the Clean Water Responsibility and Environmentally Sound Policy Act, to protect and restore the waters of the State in 1997; and

"Whereas, the General Assembly enacted S.L. 2005-190, the Clean Lakes Act, to protect and restore the drinking water supply reservoirs of the State in 2005; and

"Whereas, the North Carolina Division of Water Quality in the Department of Environment and Natural Resources listed Falls Lake in the Upper Neuse River Basin as impaired waters in 2008, and the U.S. Environmental Protection Agency also classifies Falls Lake as impaired waters due to nutrients and turbidity; and

"Whereas, the quality and quantity of the water in the nine drinking water supply reservoirs in the Upper Neuse River Basin are essential to public health, environmental quality, and the economic vitality of the region; and

"Whereas, the North Carolina Environmental Management Commission may not develop a nutrient management strategy and rules to implement the nutrient management strategy for the Upper Neuse River Basin by July 1, 2009, as required by law; and

"Whereas, delayed development of a nutrient management strategy and rules to implement the nutrient management strategy threatens the quality and quantity of drinking water supply reservoirs in the Upper Neuse River Basin; Now, therefore, The General Assembly of North Carolina enacts:"

Session Laws 2009-486, s. 1, provides: "(a) Definition. — For purposes of this section, the term 'Upper Neuse River Basin' is that portion of the Neuse River Basin upstream of the Falls Dam, including Falls Lake.

"(b) Credit for Early Adoption. — The Environmental Management Commission shall encourage local governments, landowners, and others to develop, adopt, and implement policies and practices to reduce the runoff and discharge of nitrogen, phosphorus, sediment, and other pollutants into the surface waters and drinking water supply reservoirs in the Upper Neuse River Basin before it adopts permanent rules to implement the nutrient management strategy and the turbidity strategy for Upper Falls Lake. The Environmental Management Commission shall, in its permanent rules, provide credit for the early implementation of the nutrient management strategy for the Upper Neuse River Basin and the turbidity strategy for Falls Lake to local governments, landowners, and others who implement policies and practices after January 1, 2007, to reduce runoff and discharge of nitrogen, phosphorus, and sediment in the Upper Neuse River Basin.

"(c) Reports. — The Environmental Management Commission shall report its progress in implementing this section to the Environmental Review Commission as part of each quarterly report it makes pursuant to G.S. 143B-282(b)."

**Editor's Note.** — Session Laws 1998-138, s. 1, provided: "Pursuant to G.S. 150B-21.3(b), the amendments to 15A NCAC 2B.0316, (Tar-Pamlico River Basin), as adopted by the Environmental Management Commission and approved by the Rules Review Commission on 15 January 1998, are disapproved. The Environmental Management Commission may adopt, pursuant to G.S. 150B-21.1 and consistent with G.S. 143-214.1, 143-215.1, and 143-215.3(a)(1), a temporary rule that incorporates the amendments to 15A NCAC 2B.0316 that are disapproved by this act, except that the primary classification of the portion of the Tar River designated as Index Number 28-(74) may not be reclassified from WS-IV to WS-V by a temporary rule pursuant to this act."

Session Laws 1999-329, s. 1.1 provides that this act shall be known as the "Clean Water Act of 1999."

Session Laws 1999-329, s. 7.1, provides that, notwithstanding G.S. 150B-21.1(a)(2) and s. 8.6 of Session Laws 1997-458, the Environmental Management Commission may adopt temporary rules to protect water quality standards and uses as required to implement basinwide water quality management plans for the Cape Fear, Catawba, and Tar-Pamlico River Basins pursuant to G.S. 143-214.1, 143-214.7, 143-215.3, and 143B-282. The Commission is to provide notice and the opportunity for a hearing prior to the adoption of a temporary rule under this provision. Section 7.2 provides that s. 7.1 is to continue in effect until July 1, 2001. Section 7.3 provides that 7.1 through 7.3 are not to be construed to invalidate any development and implementation of basinwide water quality management plans by the Environmental Management Commission and the Department of Environment and Natural Resources occurring prior to the effective date thereof (July 21, 1999). The expiration date of certain temporary rules authorized by s. 7.1 were extended to September 1, 2004, by Session Laws 2001-418, s. 4(a).

Session Laws 1999-329, s. 13.7 provides that this act shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act. Every State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency.

Session Laws 1999-329, s. 13.8 contains a severability clause.

Session Laws 2001-355, ss. 1 to 6 provide for the implementation of the Tar-Pamlico River Basin-Nutrient Sensitive Waters Management Strategy: Agricultural Nutrient Control Strategy, as adopted by the Environmental Management Commission on 12 October 2000 and approved by the Rules Review Commission on 20 November 2000, to become effective on 1 September 2001. A Local Advisory Committee is to be appointed in each county or watershed, as specified in the Basin Oversight Committee, within the Tar-Pamlico River Basin; these committees terminate upon a finding by the Environmental Management Commission that the long-term maintenance of nutrient loads is assured. Under the act, the Soil and Water Commission is to approve best management practices for pasture-based production or management of livestock, including a point system applicable thereto. Harvesting of trees is also addressed. Furthermore, the Basin Oversight Committee is to develop a nutrient loading accounting methodology, to be approved by the Environmental Management Commission no later than 1 March 2003. The Environmental Management Commission may adopt and revise a temporary rule incorporating the provisions of the act until a permanent rule can be adopted. Session Laws 2001-355, s. 7 provides that ss. 2 and 3 of the act expire when the temporary rule becomes effective, and s. 4 expires upon a finding that the long-term maintenance of nutrient loads in the Tar-Pamlico River Basin is assured.

Session Laws 2001-361, s. 1, provides "Notwithstanding G.S. 150B-21.3(b), 15ANCAC 2B.0315 (Neuse River Basin), as amended by the Environmental Management Commission on 12 October 2000 and approved by the Rules Review Commission on 16 November 2000, becomes effective on 1 July 2004 unless the 2004 Regular Session of the 2003 General Assembly specifically disapproves 15A NCAC2B.0315 (Neuse River Basin), as amended by the Environmental Management Commission on 12 October 2000 and approved by the Rules Review Commission on 16 November 2000, by enactment of a bill as provided in G.S. 150B-21.3(b)."

Session Laws 2001-418, s. 4(b), provides: "Vested rights recognized or established under the common law or by G.S. 153A-344(b), 153A-344.1, 160A-385(b), or 160A-385.1 shall include the right, as provided in this subsection, to undertake and complete development in the Catawba River Basin without application of temporary rule 15A NCAC 2B.0243. The Commission and the Department shall not apply temporary rule 15A NCAC 2B.0243 to development with vested rights recognized or established under G.S. 153A-344(b), 153A-344.1, 160A-385(b), or 160A-385.1 prior to 1 July 2001. The Commission and the Department shall not apply temporary rule 15A NCAC 2B.0243 to development with vested rights recognized or established under the common law prior to the date this section becomes effective if the Commission has issued a certification pursuant to G.S. 143B-282(a)(1)u. prior to 1 July 2001. The Commission shall not adopt or enforce rules that confer or restrict a vested right to undertake or complete development. It is the intent of the General Assembly that this subsection apply only to the particular circumstances that are the subject of this section. This subsection does not establish a precedent as to the application of vesting under a zoning or land-use planning program administered by a local government or to any other environmental program."

Session Laws 2001-418, s. 4(c) provides: "Notwithstanding G.S. 150B-21.3(a), this section shall not be construed to authorize the adoption of additional temporary rules related to protection of water quality and riparian buffers."

Session Laws 2003-433, ss. 1 and 2, provide: "Pursuant to G.S. 150B-21.3(b), 15A NCAC 2B.0225 (Outstanding Resource Waters) and 15A NCAC 2B.0316 (Tar-Pamlico River Basin), as adopted by the Environmental Management Commission on 11 July 2002 and approved by the Rules Review Commission on 15 August 2002, are approved effective 1 August 2003 with respect to all waters and lands that are located west of Nash County State Road 1003 (Red Oak Road).

"With respect to all waters and lands that are located east of Nash County State Road 1003 (Red Oak Road), 15A NCAC 2B.0225 (Outstanding Resource Waters) and 15A NCAC 2B.0316 (Tar-Pamlico River Basin), as adopted by the Environmental Management Commission on 11 July 2002 and approved by the Rules Review Commission on 15 August 2002, shall not become effective as provided in G.S. 150B-21.3(b) and shall become effective only as the 2004 Regular Session of the 2003 General Assembly may provide by law."

Session Laws 2008-211 enacted improvements to the rules on the management of stormwater in the coastal counties in order to protect water quality, which superceded the former rules. The act is noted in full under G.S. 143-214.7.

Session Laws 2008-211, s. 1, provides: "Disapprove Rule. — Pursuant to G.S. 150B-21.3(b1), 15A NCAC 02H.1005 (Stormwater Requirements: Coastal Counties), as adopted by the Environmental Management Commission on 10 January 2008 and approved by the Rules Review Commission on 20 March 2008, is disapproved.

"Supersede Rule. — 15A NCAC 02H.1005 (Stormwater Requirements: Coastal Counties), effective 1 September 1995, is superseded by this act. References in the North Carolina Administrative Code to 15A NCAC 02H.1005 shall be deemed to refer to the equivalent provisions of this act."

Session Laws 2009-486, s. 4, provides in part: "Section 3(h) of S.L. 2005-190, as enacted by Section 2(b) of this act, becomes effective January 1, 2010, applies to land-disturbing activities begun on or after January 1, 2010, and expires on the date that rules adopted pursuant to Section 3(i) of S.L. 2005-190, as enacted by Section 2(b) of this act, become effective."

**Legal Periodicals.** — For note on estuarine pollution, see 49 N.C.L. Rev. 921 (1971).

For comment, "Legal Analysis of the Constitutionality of the Water Supply Watershed Protection Act of 1989 and the Hyde Bill," see 29 Wake Forest L. Rev. 1279 (1994).

### CASE NOTES

**"Best Usage" Defined.** — G.S. 143-214.1(b) provides that in classifying a water body each classification and the standards applicable thereto should be adopted with primary reference to the best usage to be made of the waters to which such classification will be assigned. "Best usage" is defined under 15A N.C. Admin. Code 2B.0211(1) to include aquatic life propagation and maintenance of biological integrity (including fishing, and fish). Table Rock Chapter of Trout Unlimited v. Envtl. Mgmt. Comm'n, 191 N.C. App. 362, 663 S.E.2d 333, 2008 N.C. App. LEXIS 1323 (2008).

**Illustrative Cases**. — Because the hog waste discharged by the facility owner continued to be intermixed with the waters of the State, the North Carolina Department of Environment and Natural Resources was entitled to assess a penalty under G.S. 143- 215.6A for each day that the violation continued, and the trial court erred in reducing the number of dissolved oxygen violations from eight to one. Murphy Family Farms v. N.C. Dep't of Env't & Natural Res., 160 N.C. App. 338, 585 S.E.2d 446, 2003 N.C. App. LEXIS 1793 (2003), cert. granted, 358 N.C. 155, 592 S.E.2d 690 (2004).

**Cited** in Biddix v. Henredon Furn. Indus., Inc., 76 N.C. App. 30, 331 S.E.2d 717 (1985); In re Envtl. Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588 (1986); Town of Spruce Pine v. Avery County, 346 N.C. 787, 488 S.E.2d 144 (1997); N.C. Home Bldrs. Ass'n v. Envtl. Mgmt. Comm'n, 155 N.C. App. 408, 573 S.E.2d 732, 2002 N.C. App. LEXIS 1617 (2002).

## § 143-214.2. Prohibited discharges.

(a) The discharge of any radiological, chemical or biological warfare agent or high-level radioactive waste to the waters of the State is prohibited.

(b) The discharge of any wastes to the subsurface or groundwaters of the State by means of wells is prohibited. This section shall not be construed to prohibit the operation of closed-loop groundwater remediation systems in accordance with G.S. 143-215.1A.

(c) Unless permitted by a rule of the Commission, the discharge of wastes, including thermal discharges, to the open waters of the Atlantic Ocean over which the State has jurisdiction are prohibited. (1973, c. 698, s. 2; c. 1262, s. 23; 1987, c. 827, ss. 154, 157; 1991 (Reg. Sess., 1992), c. 786, s. 2.)

**Legal Periodicals.** — For article, "North Carolina Employment Law After Coman: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

### OPINIONS OF ATTORNEY GENERAL

**Dumping Waste Prohibited Within Three Miles of Seashore.** — North Carolina General Statutes specifically prohibit the dumping of waste materials such as bags of medical refuse and other forms of ocean dumping or the introduction of other pollutants in coastal waters if the waste materials are dumped within three miles of the Atlantic seashore. See opinion of the Attorney General to Lieutenant Governor Robert B. Jordan, III, 58 N.C.A.G. 57 (1988).

## § 143-214.2A. Prohibited disposal of medical waste.

(a) Violation. — It is unlawful for any person to engage in conduct which causes or results in the dumping, discharging, or disposal directly or indirectly, of any medical waste as defined in G.S. 130A-290 to the open waters of the Atlantic Ocean over which the State has jurisdiction or to any waters of the State.

(b) Civil Penalty. —

(1) A civil penalty of not more than twenty-five thousand dollars ($25,000) may be assessed by the Secretary against any person for a first violation of this section and an additional penalty of twenty-five thousand dollars ($25,000) may be assessed for each day during which the violation continues. A civil penalty of not more than fifty thousand dollars ($50,000) may be assessed by the Secretary for a second or further violation and an additional penalty of fifty thousand dollars ($50,000) may be assessed for each day during which the violation continues.

(2) In determining the amount of the penalty the Secretary shall consider the factors set out in G.S. 143B-282.1(b). The procedures set out in G.S. 143B-282.1 shall apply to civil penalty assessments that are presented to the Commission for final agency decision.

(3) The Secretary shall notify any person assessed a civil penalty of the assessment and the specific reasons therefor by registered or certified mail, or by any means authorized by G.S. 1A-1, Rule 4. Contested case petitions shall be filed within 30 days of receipt of the notice of assessment.

(4) Requests for remission of civil penalties shall be filed with the Secretary. Remission requests shall not be considered unless made within 30 days of receipt of the notice of assessment. Remission requests must be accompanied by a waiver of the right to a contested case hearing pursuant to Chapter 150B and a stipulation of the facts on which the assessment was based. Consistent with the limitations in G.S. 143B-282.1(c) and (d), remission requests may be resolved by the Secretary and the violator. If the Secretary and the violator are unable to resolve the request, the Secretary shall deliver remission requests and his recommended action to the Committee on Civil Penalty Remissions of the Environmental Management Commission appointed pursuant to G.S. 143B-282.1(c).

(5) If any civil penalty has not been paid within 30 days after notice of assessment has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment, unless the violator contests the assessment as provided in subdivision (3) of this subsection, or requests remission of the assessment in whole or in part as provided in subdivision (4) of this subsection. If any civil penalty has not been paid within 30 days after the final agency decision or court order has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment.

(6) Repealed by Session Laws 1995 (Regular Session, 1996), c. 743, s. 12.

(7) The clear proceeds of civil penalties assessed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(c) Criminal Penalties. —

(1) A person who willfully violates this section is guilty of a Class 1 misdemeanor.

(2) A person who willfully violates this section and in so doing releases medical waste that creates a substantial risk of physical injury to any person who is not a participant in the offense is guilty of a Class F felony which may include a fine not to exceed fifty thousand dollars ($50,000) per day of violation.

(d) Restoration. —

(1) Any person having control over medical waste discharged in violation of this section shall immediately undertake to collect, remove, and dispose of the medical waste discharged and to restore the area affected by the discharge as nearly as may be to the condition existing prior to the discharge. If it is not feasible to collect and remove the medical waste, the person responsible shall take all practicable actions and measures to otherwise contain, treat, and disperse the medical waste; but no chemical or other dispersants or treatment materials shall be used for such purposes unless they shall have been previously approved by the Department.

(2) Notwithstanding the requirements of subdivision (1), the Department is authorized and empowered to utilize any staff, equipment and materials under its control or supplied by other cooperating State or local agencies, and to contract with any agent or contractor that it deems appropriate to take such actions as are necessary, to collect, investigate, perform surveillance over, remove, contain, treat or disperse or dispose of medical waste discharged into the waters of the State in violation of this section, and to perform any necessary restoration. The Secretary shall keep a record of all expenses incurred in carrying out any project or activity authorized under this section, including actual expenses incurred for services performed by the State's personnel and for use of the State's equipment and material.

(3) Every person owning or having control over medical waste discharged in violation of, or in circumstances likely to constitute a violation of this section, upon discovery that the discharge of medical waste has occurred, shall immediately notify the Department, or any of its agents or employees, of the nature, location and time of the discharge and of the measures which are being taken or are proposed to be taken to contain, remove, treat and dispose of the medical waste. The agent

or employee of the department receiving the notification shall immediately notify the Secretary or such member of the permanent staff of the Department as the Secretary may designate.

(4) Any person who discharges medical waste in violation of this section or violates any order or rule of the Commission regarding the prohibitions concerning medical waste, or fails to perform any duty imposed regarding medical waste, and in the course thereof causes the death of, or injury to fish, animals, vegetation or other resources of the State, or otherwise causes a reduction in the quality of the waters of the State below the standards set by the Commission, or causes the incurring of costs by the State for the containment, removal, treatment, or dispersal, or disposal of such medical waste, shall be liable to pay the State damages. Such damages shall be an amount equal to the cost of all reasonable and necessary investigations made or caused to be made by the State in connection with such violation and the sum of money necessary to restock such waters, replenish such resources, contain, remove, treat, or disperse, or dispose of such medical waste, or otherwise restore such waters and adjacent lands prior to the injury as such condition is determined by the Commission in conference with the Wildlife Resources Commission, the Marine Fisheries Commission, and any other State agencies having an interest affected by such violation (or by the designees of any such boards, commissions, and agencies).

(5) Upon receipt of the estimate of damages caused, the Department shall give written notice by registered or certified mail to the person responsible for the death, killing, or injury to fish, animals, vegetation, or other resources of the State, or any reduction in quality of the waters of the State, or the costs of the removal, treatment or disposal of such discharge, describing the damages and their causes with reasonable specificity, and shall request payment from such person. Damages shall become due and payable upon receipt of such notice. The Environmental Management Commission, if collection or other settlement of the damages is not obtained within a reasonable time, shall bring a civil action to recover such damages in the superior court in the county in which the discharge of waste or the damages to resources occurred, or in Wake County if the discharge or resource damage occurs in the open waters of the Atlantic Ocean. The assessment of damages is not a contested case under G.S. 150B-23.

(6) "Person having control over medical waste" shall mean, but shall not be limited to, any person using, storing, or transporting medical waste immediately prior to a discharge of such waste into the waters of the State, and specifically shall include carriers and bailees of such medical waste. (1989, c. 742, s. 8; 1989 (Reg. Sess., 1990), c. 1036, s. 9; 1993, c. 539, ss. 1016, 1312; 1994, Ex. Sess., c. 24, s. 14(c); 1995 (Reg. Sess., 1996), c. 743, s. 12; 1998-215, s. 60.)

**Legal Periodicals.** — For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

## § 143-214.2B. Storage of waste on vessels.

The operator of a vessel in the State's waters shall take precautions to ensure that certain items do not enter and contaminate the waters. The operator shall store fuel, oil, paint, varnish, solvent, pesticide, insecticide, fungicide, algicide, or any other hazardous liquid in one or more closed containers that are adequate to prevent the release of the items into the waters of the State. (1993, c. 466, s. 5.)

## § 143-214.3. Revision to water quality standard.

(a) Any person subject to the provisions of G.S. 143-215.1 may petition the Commission for a hearing pursuant to G.S. 143-215.4 for a revision to water quality standards adopted pursuant to G.S. 143-214.1 as such water quality standards may apply to a specific stream segment into which the petitioner discharges or proposes to discharge.

(b) Upon a finding by the Commission that:

(1) Natural background conditions in the stream segment preclude the attainment of the applicable water quality standards; or

(2) Irretrievable and uncontrollable man-induced conditions preclude the attainment of the applicable water quality standards; or

(3) Application of effluent limitations for existing sources established or proposed pursuant to G.S. 143-215.1 more restrictive than those effluent standards and limitations determined or promulgated by the United States Environmental Protection Agency pursuant to section 301 of the Federal Water Pollution Control Act in order to achieve and maintain applicable water quality standards would result in adverse social and economic impact, disproportionate to the benefits to the public health, safety or welfare as a result of maintaining the standards; and

(4) There exists no reasonable relationship between the cost to the petitioner of achieving the effluent limitations necessary to comply with applicable water quality standards to the benefits, including the incremental benefits to the receiving waters, to be obtained from the application of the said effluent limitations;

Then the Commission shall revise the standard or standards, as such standard may apply to the petitioner, provided that such revised standards shall be no less stringent than that which can be achieved by the application of the highest level of treatment which will result in benefits, including the incremental benefits to the receiving waters, having a reasonable relationship to the cost to the petitioner to apply such treatment, as determined by the evidence; provided, however, in no event shall these standards be less stringent than the level attainable with the application by the petitioner of those effluent standards and limitations determined or promulgated by the United States Environmental Protection Agency pursuant to section 301 of the Federal Water Pollution Control Act; provided, further, that no revision shall be granted which would endanger human health or safety. (1979, c. 929; 1987, c. 827, s. 154.)

**Management of Water Quality in the Jordan Watershed.** — For provisions pertaining to water quality rule-making for the Jordan Watershed pursuant to Session Laws 2009-216, ss. 1 and 3-8, as amended by Session Laws 2009-484, ss. 6(b), (c), 7, and 8, see the note at G.S. 143-214.7.

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For article, "The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation," see 29 Campbell L. Rev. 535 (2007).

## § 143-214.4. Certain cleaning agents containing phosphorus prohibited.

(a) No person may manufacture, store, sell, use, or distribute for sale or use any cleaning agent containing phosphorus in the State, except as otherwise provided in this section.

(b) As used in this section, "cleaning agent" means a laundry detergent, dishwashing compound, household cleaner, metal cleaner or polish, industrial cleaner, or other substance that is used or intended for use for cleaning purposes.

(c) This section shall not apply to cleaning agents which are used:

(1) In agricultural or dairy production;
(2) To clean commercial food or beverage processing equipment or containers;
(3) As industrial sanitizers, metal brighteners, or acid cleaners, including those containing phosphoric acid or trisodium phosphate;
(4) In industrial processes for metal, fabric or fiber cleaning and conditioning;
(5) In hospitals, clinics, nursing homes, other health care facilities, or veterinary hospitals or clinics;
(6) By a commercial laundry or textile rental service company or any other commercial entity: (i) to provide laundry service to hospitals, clinics, nursing homes, other health care facilities, or veterinary hospitals or clinics; (ii) to clean textile products supplied to industrial or commercial users of the products on a rental basis; or (iii) to clean professional, industrial or commercial work uniforms;
(7) In the manufacture of health care or veterinary supplies;
(8) In any medical, biological, chemical, engineering or other such laboratory, including those associated with any academic or research facility;
(9) As water softeners, antiscale agents, or corrosion inhibitors, where such use is in a closed system such as a boiler, air conditioner, cooling tower, or hot water heating system;
(10) To clean hard surfaces including windows, sinks, counters, floors, ovens, food preparation surfaces, and plumbing fixtures.

(d) This section shall not apply to cleaning agents which:

(1) Contain phosphorus in an amount not exceeding five-tenths of one percent (0.5%) by weight which is incidental to manufacturing;
(2) Contain phosphorus in an amount not exceeding eight and seven-tenths percent (8.7%) by weight and which are intended for use in a commercial or household dishwashing machine;
(3) Are manufactured, stored, sold, or distributed for use solely outside the State.

(e) The Commission may permit the use of a cleaning agent which contains phosphorus in an amount exceeding five-tenths of one percent (0.5%) but not exceeding eight and seven-tenths percent (8.7%) by weight upon a finding that there is no adequate substitute for such cleaning agent, or that compliance with this section would otherwise be unreasonable or create a significant hardship on the user. The Commission shall adopt rules to administer this subsection.

(f) Any person who manufactures, sells or distributes any cleaning agent in violation of this section shall be guilty of a Class 3 misdemeanor punishable only by a fine not to exceed fifty dollars ($50.00).

(g) Any person who uses any cleaning agent in violation of the provisions of this section shall be responsible for an infraction for which the sanction is a penalty of not more than ten dollars ($10.00). Notwithstanding G.S. 14-3.1(a), the clear proceeds of infractions pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1987, c. 111, s. 1; c. 817; c. 827, s. 154; 1993, c. 539, s. 1017; 1994, Ex. Sess., c. 24, s. 14(c); 1998-215, s. 61; 2006-203, s. 88.)

**Editor's Note.** — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 88, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "G.S. 14-3.1(a)" for "G.S. 143-3.1(a)" in subsection (g).

## § 143-214.5. Water supply watershed protection.

(a) Policy Statement. — This section provides for a cooperative program of water supply watershed management and protection to be administered by local governments consistent with minimum statewide management requirements established by the Commission. If a local government fails to adopt a water supply watershed protection program or does not adequately carry out its responsibility to enforce the minimum water supply watershed management requirements of its approved program, the Commission shall administer and enforce the minimum statewide requirements. The reduction of agricultural nonpoint source discharges shall be accomplished primarily through the Agriculture Cost Share Program for Nonpoint Source Pollution Control.

(b) Development and Adoption of Water Supply Watershed Classifications and Management Requirements. — The Commission shall adopt rules for the classification of water supply watersheds and that establish minimum statewide water supply watershed protection requirements applicable to each classification to protect surface water supplies by (i) controlling development density, (ii) providing for performance-based alternatives to development density controls that are based on sound engineering principles, or (iii) a combination of both (i) and (ii). The Commission may designate water supply watersheds or portions thereof as critical water supply watersheds and impose management requirements that are more stringent than the minimum statewide water supply watershed management requirements. The Commission may adopt rules that require that any permit issued by a local government for a development or construction activity conducted by that local government within a designated water supply watershed be approved by the Department prior to issuance. Any variance from the minimum statewide water supply watershed management requirements must be approved by the Commission prior to the issuance of a permit by a local government. Except as provided by G.S. 153A-347 and G.S. 160A-392, the power to implement this section with respect to development or construction activities that are conducted by State agencies is vested exclusively in the Commission.

(c) Classification of Water Supply Watersheds. — The Commission shall assign to each water supply watershed in the State the appropriate classification with the applicable minimum management requirements. The Commission may reclassify water supply watersheds as necessary to protect future water supplies or improve protection at existing water supplies. A local government shall not be required to submit a revised water supply watershed protection program to the Commission earlier than 270 days after it receives notice of a reclassification from the Commission.

(d) Mandatory Local Programs. — The Department shall assist local governments to develop water supply watershed protection programs that comply with this section. Local government compliance programs shall include an implementing local ordinance and shall provide for maintenance, inspection, and enforcement procedures. As part of its assistance to local governments, the Commission shall approve and make available a model local water supply watershed management and protection ordinance. The model management and protection ordinance adopted by the Commission shall, at a minimum, include as options (i) controlling development density, (ii) providing for performance-based alternatives to development density controls that are based on sound engineering principles, and (iii) a combination of both (i) and (ii). Local governments shall administer and enforce the minimum management requirements. Every local government that has within its jurisdiction all or a portion of a water supply watershed shall submit a local water supply watershed management and protection ordinance to the Commission for approval. Local governments may adopt such ordinances pursuant to their general police power, power to regulate the subdivision of land, zoning power, or any combination of such powers. In adopting a local ordinance that imposes water supply watershed management requirements that are more stringent than those adopted by the Commission, a county must comply with the notice provisions of G.S. 153A-343 and a municipality must comply with the notice provisions of G.S. 160A-384. This section shall not be construed to affect the validity of any local ordinance adopted for the protection of water supply watersheds prior to completion of the review of the ordinance by the Commission or prior to the assumption by the Commission of responsibility for a local water supply watershed protection program. Local governments may create or designate agencies to administer and enforce such programs. The Commission shall approve a local program only if it determines that the requirements of the program equal or exceed the minimum statewide water supply watershed management requirements adopted pursuant to this section.

(d1) A local ordinance adopted to implement the minimum statewide water supply watershed management requirements applicable to agriculture and silviculture activities shall be no more restrictive than those adopted by the Commission. In adopting minimum statewide water supply watershed management requirements applicable to agriculture activities, the Commission shall consider the policy regarding agricultural nonpoint source discharges set out in subsection (a) of this section. The Commission may by rule designate another State agency to administer the minimum statewide water supply watershed management requirements applicable to agriculture and silviculture activities. If the Commission designates another State agency to administer the minimum statewide water supply watershed management requirements applicable to agriculture and silviculture activities, management requirements adopted by local governments shall not apply to such activities.

(e) Assumption of Local Programs. — The Commission shall assume responsibility for water supply watershed protection, within all or the affected portion of a water supply watershed, if a local government fails to adopt a program that meets the requirements of this section or whenever a local government fails to adequately administer and enforce the provisions of its program. The Commission shall not assume responsibility for an approved local water supply watershed protection program until it or its designee notifies the local government in writing by certified mail, return receipt requested, of local program deficiencies, recommendations for changes and improvements in the local program, and the deadline for compliance. The Commission shall allow a local government a minimum of 120 days to bring its program into compliance. The Commission shall order assumption of an approved local program if it finds that the local government has made no substantial progress toward compliance. The Commission may make such finding at any time between 120 days and 365 days after receipt of notice under this subsection by the local government, with no further notice. Proceedings to review such orders by the Commission shall be conducted by the superior court pursuant to Article 4 of Chapter 150B of the General Statutes based on the agency record submitted to the Commission by the Secretary.

(f) State Enforcement Authority. — The Commission may take any appropriate preventive or remedial enforcement action authorized by this Part against any person who violates any minimum statewide water supply watershed management requirement.

(g) Civil Penalties. — A local government that fails to adopt a local water supply watershed protection program as required by this section or willfully fails to administer or enforce the provisions of its program in substantial compliance with the minimum statewide water supply watershed management requirements shall be subject to a civil penalty pursuant to G.S. 143-215.6A(e). In any area of the State that is not covered by an approved local water supply watershed protection program, any person who violates or fails to act in accordance with any minimum statewide water supply watershed management requirement or more stringent management requirement adopted by the Commission for a critical water supply watershed established pursuant to this section shall be subject to a civil penalty as specified in G.S. 143-215.6A(a)(7).

The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(h) Planning Grants to Local Governments. — The Secretary may make annual grants to local governments for the purpose of assisting in the development of local water supply watershed protection programs. The Secretary shall develop and administer generally applicable criteria under which local governments may qualify for such assistance. Such criteria shall give priority to local governments that are not then administering zoning ordinances in affected water supply watershed areas.

(i) Every State agency shall act in a manner consistent with the policies and purposes of this section, and shall comply with the minimum statewide water supply watershed management requirements adopted by the Commission and with all water supply watershed management and protection ordinances adopted by local governments. (1989, c. 426, s. 1; 1991, c. 342, s. 9; c. 471, s. 2; c. 579, s. 1; 1991 (Reg. Sess., 1992), c. 890, s. 14; 1998-215, s. 62.)

**Management of Water Quality in the Jordan Watershed.** — For provisions pertaining to water quality rule-making for the Jordan Watershed pursuant to Session Laws 2009-216, ss. 1 and 3-8, as amended by Session Laws 2009-484, ss. 6(b), (c), 7, and 8, see the note at G.S. 143-214.7.

**Editor's Note.** — Session Laws 1989, c. 426, s. 7 provided: "This act shall not affect the validity of any local ordinance relating to watershed protection adopted prior to the effective date of this act [June 23, 1989]."

Session Laws 1989, c. 426, s. 7.1 provided: "Nothing herein contained shall be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act."

Session Laws 1995, c. 301, provides that, since certain water supply watersheds meet the standards of more than one classification under the water supply watershed protection program, the Environmental Management Commission shall reexamine, under G.S. 143-214.5, the classification of any water supply watershed that was classified as a WS-III water supply watershed on March 1, 1995, and that meets certain other criteria; that reclassification of any such watershed shall reduce the land area affected; that any watershed that is reclassified as a WS-IV watershed shall not thereafter be reclassified to a more restrictive classification; and that if the Commission fails to reexamine the classification of and watershed that meets the criteria of this section by October 1, 1995, that watershed shall automatically be reclassified as WS-IV watershed on that date.

Session Laws 2005-97, s. 1, provides: "The Environmental Management Commission shall initiate a rule-making proceeding no later than 1 September 2005 to adopt rules to reclassify the entire watersheds of all creeks that drain to the north shore of Fontana Lake between Eagle and Forney Creeks, including Eagle and Forney Creeks, as outstanding resource waters pursuant to G.S. 143-214.1."

Session Laws 2005-97, s. 2, provides: "Pending the outcome of the rule-making proceeding required by Section 1 of this act, the minimum management strategies set out in 15A NCAC 2B.0225(c) shall apply to the watersheds described in Section 1 of this act."

**Legal Periodicals.** — For comment, "Legal Analysis of the Constitutionality of the Water Supply Watershed Protection Act of 1989 and the Hyde Bill," see 29 Wake Forest L. Rev. 1279 (1994).

### CASE NOTES

**Constitutionality.** — The Water Supply Water Protection Act (WSWPA) does not violate the Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 19 of the Constitution of North Carolina because it is not applied equally throughout the state, as the unconstitutional 1993 amendment may be expunged, leaving the WSWPA intact. Town of Spruce Pine v. Avery County, 346 N.C. 787, 488 S.E.2d 144 (1997).

**Purpose of Subsection (b).** — Subsection (b) provides for the management of watersheds by controlling development density, performance-based alternatives, or a combination of both. Town of Spruce Pine v. Avery County, 346 N.C. 787, 488 S.E.2d 144 (1997).

**County had standing and was entitled to challenge the constitutionality** of the Water Supply Watershed Protection Act. Town of Spruce Pine v. Avery County, 123 N.C. App. 704, 475 S.E.2d 233 (1996), rev'd on other grounds, 346 N.C. 787, 488 S.E.2d 144 (1997).

## § 143-214.6: Repealed by Session Laws 2004-195, s. 3.1, effective August 17, 2004.

## § 143-214.7. Stormwater runoff rules and programs.

(a) Policy, Purpose and Intent. — The Commission shall undertake a continuing planning process to develop and adopt a statewide plan with regard to establishing and enforcing stormwater rules for the purpose of protecting the surface waters of the State. It is the purpose and intent of this section that, in developing stormwater runoff rules and programs, the Commission may utilize stormwater rules established by the Commission to protect classified shellfish waters, water supply watersheds, and outstanding resource waters; and to control stormwater runoff disposal in coastal counties and other nonpoint sources. Further, it is the intent of this section that the Commission phase in the stormwater rules on a priority basis for all sources of pollution to the water. The plan shall be applied evenhandedly throughout the State to address the State's water quality needs. The Commission shall continually monitor water quality in the State and shall revise stormwater runoff rules as necessary to protect water quality. As necessary, the stormwater rules shall be modified to comply with federal regulations.

(b) The Commission shall implement stormwater runoff rules and programs for point and nonpoint sources on a phased-in statewide basis. The Commission shall consider standards and best management practices for the protection of the State's water resources in the following order of priority:

(1) Classified shellfish waters.
(2) Water supply watersheds.
(3) Outstanding resource waters.
(4) High quality waters.
(5) All other waters of the State to the extent that the Commission finds control of stormwater is needed to meet the purposes of this Article.

(c) The Commission shall develop model stormwater management programs that may be implemented by State agencies and units of local government. Model stormwater management programs shall be developed to protect existing water uses and assure compliance with water quality standards and classifications. A State agency or unit of local government may submit to the Commission for its approval a stormwater control program for implementation within its jurisdiction. To this end, State agencies may adopt rules, and units of local government are authorized to adopt ordinances and regulations necessary to establish and enforce stormwater control programs. Units of local government are authorized to create or designate agencies or subdivisions to administer and enforce the programs. Two or more units of local government are authorized to establish a joint program and to enter into any agreements that are necessary for the proper administration and enforcement of the program.

(c1) Any land-use restriction providing for the maintenance of stormwater best management practices or site consistency with approved stormwater project plans filed pursuant to a rule of the Commission, local ordinance, or permit approved by the Commission shall be enforced by any owner of the land on which the best management practice or project is located, any adjacent property owners, any downstream property owners who would be injured by failure to enforce the land-use restriction, any local government having jurisdiction over any part of the land on which the best management practice or project is located, or the Department through the remedies provided by any provision of law that is implemented or enforced by the Department or by means of a civil action, without first having exhausted any available administrative remedies. A land-use restriction providing for the maintenance of stormwater best management practices or site consistency with approved stormwater project plans filed pursuant to a rule of the Commission, local ordinance, or permit approved by the Commission shall not be declared unenforceable due to lack of privity of estate or contract, due to lack of benefit to particular land, or due to lack of any property interest in particular land. Any person who owns or leases a property subject to a land-use restriction under this section shall abide by the land-use restriction.

(d) The Commission shall review each stormwater management program submitted by a State agency or unit of local government and shall notify the State agency or unit of local government that submitted the program that the program has been approved, approved with modifications, or disapproved. The Commission shall approve a program only if it finds that the standards of the program equal or exceed those of the model program adopted by the Commission pursuant to this section.

(d1) A retail merchant shall not use more than 400 square feet of impervious surface area within the portion of the merchant's premises that is designed to be used for vehicular parking for the display and sale of nursery stock, as that term is defined by the Board of Agriculture pursuant to G.S. 106-423. This subsection shall not apply to a retail merchant that either:

(1) Collects and treats stormwater on-site using a treatment system that is designed to remove at least eighty-five percent (85%) of total suspended solids. For purposes of this subdivision, a treatment system includes, but is not limited to, a filtration system or a detention system.

(2) Collects and stores stormwater for reuse on-site for irrigation or other purposes.

(3) Collects and discharges stormwater to a local or regional stormwater collection and treatment system.

(d2) Repealed by Session Laws 2008-198, s. 8(a), effective August 8, 2008.

(e) The Commission shall annually report to the Environmental Review Commission on the implementation of this section, including the status of any stormwater control programs administered by State agencies and units of local government, on or before 1 October of each year. (1989, c. 447, s. 2; 1995, c. 507, s. 27.8(q); 1997-458, s. 7.1; 2004-124, s. 6.29(a); 2006-246, s. 16(b); 2007-323, s. 6.22(a); 2008-198, s. 8(a).)

**Temporary Implementation of Federal Phase II Stormwater Management Requirements.** — Session Laws 2004-163, s. 14, as amended by 2005-386, s. 1.10, provides: "Notwithstanding G.S. 164-10, the Revisor of Statutes shall not codify any of the provisions of this act. The Revisor of Statutes shall set out the text of Sections 1 through 13 of this act as a note to G.S. 143-214.7 and may make notes concerning this act to other sections of the General Statutes as the Revisor of Statutes deems appropriate. The Revisor of Statutes shall set out the text of the Stormwater Management Rule, as defined in Section 12 of this act, and the text of Section 6 of the temporary rule adopted by the Environmental Management Commission on 10 October 2002 as notes to G.S. 143-214.7."

Session Laws 2004-163, ss. 1-13, reads as follows:

"SECTION 1. Phase II Stormwater Permit Application and Standards. — An application for a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management submitted by an owner or operator of a small municipal separate storm sewer system (MS4) located in whole or in part within an urbanized area as designated by the 1990 or 2000 census by the Bureau of the Census shall be deemed timely received if the application was submitted to the Department in accordance with the application schedule set out in Section 6 of the temporary rule adopted by the Environmental Management Commission on 10 October 2002. To obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management under this section, an applicant shall develop, implement, and enforce a stormwater management plan approved by the Commission that satisfies the six minimum control measures required by 40 Code of Federal Regulations § 122.34(b) (1 July 2003 Edition). The evaluation of the postconstruction stormwater management measures required by 40 Code of Federal Regulations § 122.34(b)(5) (1 July 2003 Edition) shall be conducted as provided in the Stormwater Management Rule. A municipality with a population of less than 1,000, including a municipality designated by the 1990 or 2000 census, is not required to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management unless the municipality is shown to be contributing to an impairment of State waters, as determined under the requirements of 33 U.S.C. § 1313(d).

"SECTION 2. New Development and Redevelopment in Unincorporated Areas of Counties. —

"(1) New development or redevelopment located in the unincorporated area of a county shall comply with the standards set forth in the Stormwater Management Rule beginning 1 July 2006 if the new development or redevelopment is located in:

"a. An area that is designated as an urbanized area under the 1990 or 2000 census by the Bureau of the Census.

"b. The unincorporated area of a county outside of a municipality designated as an urbanized area under the 1990 or 2000 census by the Bureau of the Census that:

"1. Extends one mile beyond the corporate limits of a municipality with a population of less than 10,000 individuals.

"2. Extends two miles beyond the corporate limits of a municipality with a population of 10,000 or more individuals but less than 25,000 individuals.

"3. Extends three miles beyond the corporate limits of a municipality with a population of 25,000 or more individuals.

"c. An area delineated pursuant to subdivision (2) of this section.

"d. A county in which the unduplicated sum of: (i) the area that is designated as an urbanized area under the 1990 or 2000 census by the Bureau of the Census; (ii) the area described in sub-subdivision b. of this subdivision; (iii) the area delineated pursuant to subdivision 2 of this section; (iv) the jurisdiction of a regulated entity designated pursuant to Section 7 of this act; and (v) the area that is regulated by a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management required pursuant to Section 8 of this act equals or exceeds eighty-five percent (85%) of the total geographic area of the county.

"(2) Delineation process. — The Commission shall delineate regulated coverage areas as provided in this subdivision.

"a. Schedule. — The Commission shall implement the delineation process in accordance with the schedule for review and revision of basinwide water quality management plans as provided in G.S. 143-215.8B(c).

"b. Potential candidate coverage areas. — A potential candidate coverage area is the unincorporated area of a county that is outside a municipality designated as a regulated entity pursuant to subdivisions (2) and (3) of Section 7 of this act that:

"1. Extends one mile beyond the corporate limits of a municipality with a population of less than 10,000 individuals.

"2. Extends two miles beyond the corporate limits of a municipality with a population of 10,000 or more individuals but less than 25,000 individuals.

"3. Extends three miles beyond the corporate limits of a municipality with a population of 25,000 or more individuals.

"c. Identification of candidate coverage areas. — The Commission shall identify an area within a potential candidate coverage area described in sub-subdivision b. of this subdivision as a candidate coverage area if the discharge of stormwater within or from the unincorporated area has the potential to adversely impact water quality. An adverse impact on water quality includes any activity that violates water quality standards, including, but not limited to, any activity that impairs designated uses or that has a significant biological or habitat impact.

"d. Notice and comment on candidacy. — The Commission shall notify each public entity that is located in whole or in part in a candidate coverage area. After notification of each public entity, the Commission shall publish a map of the unincorporated areas within the river basin that have been identified as candidates for delineation as regulated coverage areas. The Commission shall accept public comment on the proposed delineation of a candidate coverage area as a regulated coverage area for a period of not less than 30 days.

"e. Delineation of regulated coverage areas. — After review of public comment, the Commission shall delineate regulated coverage areas. The Commission shall delineate a candidate coverage area as a regulated coverage area only if the Commission determines that the discharge of stormwater within or from the candidate coverage area either:

"1. Adversely impacts water quality.

"2. Results in a significant contribution of pollutants to sensitive receiving waters, taking into account the effectiveness of other applicable water quality protection programs. To determine the effectiveness of other applicable water quality protection programs, the Commission shall consider the water quality of the receiving waters and whether the waters support the uses set out in subsections (c), (d), and (e) of 15A NCAC 2B.0101 (Procedures for Assignment of Water Quality Standards — General Procedures) and the specific classification of the waters set out in 15A NCAC 2B.0300, et seq. (Assignment of Stream Classifications).

"f. Notice of delineation. — The Commission shall provide written notice to each public entity that is located in whole or in part in a candidate coverage area of its delineation determination. The notice shall state the basis for the determination.

"(3) Except as provided in this subdivision and Section 5 of this act, the Commission shall administer and enforce the standards for new development and redevelopment in the regulated coverage areas. To the extent that the new development or redevelopment is located in a municipal planning jurisdiction, the municipality shall administer and enforce the standards. A public entity may request that the Commission delegate administration and enforcement of the stormwater management program to the public entity as provided in Section 5 of this act.

"SECTION 3. Coordination of Phase II and Other Stormwater Management Programs. — In any circumstance where any stormwater control requirement under a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management conflicts or overlaps with any stormwater control requirement under any other water quality program, the most stringent requirement shall apply. The Secretary of Environment and Natural Resources or the Secretary's designee shall resolve any dispute as to whether there is a conflict or overlap between or among stormwater management requirements and shall determine which requirement shall be deemed the most stringent.

"SECTION 4. General Permit.— The Commission shall develop and issue a Phase II National Pollutant Discharge Elimination System (NPDES) general permit for stormwater management. The general permit requirements for postconstruction stormwater management measures required by 40 Code of Federal Regulations § 122.34(b)(5) (1 July 2003 Edition) shall require a permittee to meet the standards set out in the Stormwater Management Rule but shall not impose any requirement on the permittee that exceeds the standards set out in the Stormwater Management Rule. After the Commission has issued a Phase II National Pollutant Discharge Elimination System (NPDES) general permit for stormwater management, a public entity that has applied for a permit under Section 1 of this act may submit a notice of intent to becovered under the general permit to the Commission. The Commission shall treat an application for a permit under Section 1 of this act as an application for an individual permit unless the applicant submits a notice of intent to be covered under a general permit under this section.

"SECTION 5. Delegation. — A public entity that does not administer a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management throughout the entirety of its planning jurisdiction and whose planning jurisdiction includes a regulated coverage area under Section 2 of this act may submit a stormwater management program for its regulated coverage area or a portion of its regulated coverage area to the Commission for approval pursuant to G.S. 143-214.7(c). An ordinance or regulation adopted by a public entity shall at least meet and may exceed the minimum requirements of this act and the six minimum control measures required by 40 Code of Federal Regulations § 122.34(b) (1 July 2003 Edition). Two or more public entities are authorized to establish a joint program and to enter into any agreements that are necessary for the proper administration and enforcement of the program. The resolution, memorandum of agreement, or other document that establishes any joint program must be duly recorded in the minutes of the governing body of each public entity participating in the program, and a certified copy of each resolution must be filed with the Commission. The Commission shall review each proposed program submitted to it to determine whether the submission is complete. Within 90 days after the receipt of a complete submission, the

Commission shall notify the public entity submitting the program that it has been approved, approved with modifications, or disapproved. The Commission shall only approve a program upon determining that its standards equal or exceed those of this act and the six minimum control measures required by 40 Code of Federal Regulations § 122.34(b) (1 July 2003 Edition). If the Commission determines that any public entity is failing to administer or enforce an approved stormwater management program, it shall notify the public entity in writing and shall specify the deficiencies of administration and enforcement. If the public entity has not taken corrective action within 30 days of receipt of notification from the Commission, the Commission shall assume administration and enforcement of the program until such time as the public entity indicates its willingness and ability to resume administration and enforcement of the program.

"SECTION 6. Phase II Stormwater Implementation Deadlines.

"(1) For an application for a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management submitted by an owner or operator of a small municipal separate storm sewer system (MS4) located in whole or in part within an urbanized area as designated by the 1990 census by the Bureau of the Census, the Commission shall send a draft permit decision to public notice by 1 November 2004.

"(2) For an application for a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management submitted by an owner or operator of a small municipal separate storm sewer system (MS4) located in whole or in part within an urbanized area as designated by the 2000 census by the Bureau of the Census, the Commission shall send a draft permit decision to public notice by 1 May 2005.

"(3) A public entity designated as a regulated entity pursuant to 40 Code of Federal Regulations § 122.32 (1 July 2003 Edition) shall develop and implement postconstruction stormwater management measures within 24 months of the date on which its Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management is issued.

"(4) A public entity designated as a regulated entity pursuant to subdivisions (2) and (3) of Section 7 of this act shall develop and implement postconstruction stormwater management measures within 36 months of the date on which its Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management is issued.

"SECTION 7. Designation of Regulated Entities. — A public entity that owns or operates a municipal separate storm sewer system (MS4) may be designated as a regulated entity through federal designation, through a State designation process, or under a total maximum daily load (TMDL) implementation plan as provided in this section.

"(1) Federal designation. — A public entity that owns or operates a municipal separate storm sewer system (MS4) may be designated as a regulated entity pursuant to 40 Code of Federal Regulations § 122.32 (1 July 2003 Edition).

"(2) State designation process. — The Commission shall designate a public entity that owns or operates a municipal separate storm sewer system (MS4) as a regulated entity as provided in this subdivision.

"a. Designation schedule. — The Commission shall implement the designation process in accordance with the schedule for review and revision of basinwide water quality management plans as provided in G.S. 143-215.8B(c).

"b. Identification of candidate regulated entities. — The Commission shall identify a public entity as a candidate for designation as a regulated entity if the municipal separate storm sewer system (MS4) either:

"1. Discharges stormwater that has the potential to adversely impact water quality. An adverse impact on water quality includes any activity that violates water quality standards, including, but not limited to, any activity that impairs designated uses or that has a significant biological or habitat impact.

"2. Serves a public entity that has not been designated pursuant to subdivision (1) of this section and that has a population of more than 10,000 and a population density of 1,000 people per square mile or more.

"c. Notice and comment on candidacy. — The Commission shall notify each public entity identified as a candidate for designation as a regulated entity. After notification of each public entity, the Commission shall publish a list of all public entities within a river basin that have been identified as candidates for designation. The Commission shall accept public comment on the proposed designation of a public entity as a regulated entity for a period of not less than 30 days.

"d. Designation of regulated entities. — After review of the public comment, the Commission shall make a determination on designation for each of the candidate public entities. The Commission shall designate a candidate public entity that owns or operates a municipal separate storm sewer system (MS4) as a regulated public entity only if the Commission determines either that:

"1. The public entity has an actual population growth rate that exceeds 1.3 times the State population growth rate for the previous 10 years.

"2. The public entity has a projected population growth rate that exceeds 1.3 times the projected State population growth rate for the next 10 years.

"3. The public entity has an actual population increase that exceeds fifteen percent (15%) of its previous population for the previous two years.

"4. The municipal separate storm sewer system (MS4) discharges stormwater that adversely impacts water quality.

"5. The municipal separate storm sewer system (MS4) either discharges stormwater that results in a significant contribution of pollutants to sensitive receiving waters, taking into account the effectiveness of other applicable water quality protection programs. To determine the effectiveness of other applicable water quality protection programs, the Commission shall consider the water quality of the receiving waters and whether the waters support the uses set out in subsections (c), (d), and (e) of 15A NCAC 2B.0101 (Procedures for Assignment of Water Quality Standards — General Procedures) and the specific classification of the waters set out in 15A NCAC 2B.0300, et seq. (Assignment of Stream Classifications).

"e. Notice of designation. — The Commission shall provide written notice to each public entity of its designation determination. For a public entity designated as a regulated entity, the notice shall state the basis for the designation and the date on which an application for a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management must be submitted to the Commission.

"f. Application schedule. — A public entity that has been designated as a regulated entity pursuant to this subdivision must submit its application for a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management within 18 months of the date of notification.

"(3) Designation under a total maximum daily load (TMDL) implementation plan. — The Commission shall designate an owner or operator of a small municipal separate storm sewer system (MS4) as a regulated entity if the municipal separate storm sewer system (MS4) is specifically listed by name as a source of pollutants for urban stormwater in a total maximum daily load (TMDL) implementation plan developed in accordance with subsections (d) and (e) of 33 U.S.C. § 1313. The Commission shall provide written notice to each public entity of its designation determination. For a public entity designated as a regulated entity, the notice shall state the basis for the designation and the date on which an application for a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management must be submitted to the Commission. A public entity that has been designated as a regulated entity pursuant to this subdivision must submit its application for a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management within 18 months of the date of notification.

"SECTION 8. Petition Process.— A petition may be submitted to the Commission to request that an owner or operator of a municipal separate storm sewer system (MS4) or a person who discharges stormwater be required to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management as follows:

"(1) Connected discharge petition. — An owner or operator of a permitted municipal separate storm sewer system (MS4) may submit a petition to the Commission to request that a person who discharges into the permitted municipal separate storm sewer system (MS4) be required to obtain a separate Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management. The Commission shall grant the petition and require the person to obtain a separate Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management if the petitioner shows that the person's discharge flows or will flow into the permitted municipal separate storm sewer system (MS4).

"(2) Adverse impact petition. — Any person may submit a petition to the Commission to request that an owner or operator of a municipal separate storm sewer system (MS4) or a person who discharges stormwater be required to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management.

"a. Petition review. — The Commission shall grant the petition and require the owner or operator of the municipal separate storm sewer system (MS4) or the person who discharges stormwater to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management if the petitioner shows any of the following:

"1. The municipal separate storm sewer system (MS4) or the discharge discharges or has the potential to discharge stormwater to sensitive receiving waters in an area with: (i) an actual population growth rate that exceeds 1.3 times the State population growth rate for the previous 10 years; (ii) a projected population growth rate that exceeds 1.3 times the projected State population growth rate for the next 10 years; or (iii) an actual population increase that exceeds fifteen percent (15%) of its previous population for the previous two years.

"2. The municipal separate storm sewer system (MS4) or the discharge provides a significant contribution of pollutants to sensitive receiving waters.

"3. The municipal separate storm sewer system (MS4) or the discharge is specifically listed by name as a source of pollutants for urban stormwater in a total maximum daily load (TMDL) implementation plan developed in accordance with subsections (d) and (e) of 33 U.S.C. § 1313.

"b. Types of evidence for required showing. — Petitioners may make the required showing by providing to the Commission the following information:

"1. Monitoring data that includes, at a minimum, representative sampling of the municipal separate storm sewer system (MS4) or discharge and information describing how the sampling is representative. The petitioner must notify the owner or operator of the municipal separate storm sewer system (MS4) or the person who discharges stormwater of its intent to conduct monitoring activities prior to conducting those activities.

"2. Scientific or technical literature that supports the sampling methods.

"3. Study and technical information on land uses in the drainage area and the characteristics of stormwater runoff from these land uses.

"4. A map that delineates the drainage area of the petitioned entity; the location of sampling stations; the location of the stormwater outfalls in the adjacent area of the sampling locations; general features, including, but not limited to, surface waters, major roads, and political boundaries; and areas of concern regarding water quality.

"5. For stormwater discharges to impaired waters, documentation that the receiving waters are impaired or degraded and monitoring data that demonstrates that the municipal separate storm sewer system (MS4) or discharge contributes pollutants for which the waters are impaired or degraded.

"6. For stormwater discharges to nonimpaired waters, monitoring data that demonstrates that the owner or operator of the municipal separate storm sewer system (MS4) or the person who discharges stormwater is a significant contributor of pollutants to the receiving waters.

"c. Water quality protection program offset. — If the petitioner makes the required showing, the Commission shall review the effectiveness of any existing water quality protection programs that may offset the need to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management. To determine the effectiveness of other applicable water quality protection programs, the Commission shall consider the water quality of the receiving waters and whether the waters support the uses set out in subsections (c), (d), and (e) of 15A NCAC 2B.0101 (Procedures for Assignment of Water Quality Standards — General Procedures) and the specific classification of the waters set out in 15A NCAC 2B.0300, et seq. (Assignment of Stream Classifications). The Commission may deny the petition if it finds that existing water quality protection programs are adequate to address stormwater impacts on sensitive receiving waters and to insure compliance with a TMDL implementation plan.

"(3) Petition administration. — The Commission shall process petitions in the following manner:

"a. The Commission shall only accept petitions submitted on Department forms.

"b. A separate petition must be filed for each municipal separate storm sewer system (MS4) or discharge.

"c. The Commission shall evaluate only complete petitions. The Commission shall make a determination on the completeness of a petition within 90 days of receipt of the petition, or it shall be deemed complete. If the Commission requests additional information, the petitioner may submit additional information; and the Commission will determine, within 90 days of receipt of the additional information, whether the information completes the petition.

"d. The petitioner shall provide a copy of the petition and a copy of any subsequent additional information submitted to the Commission to the chief administrative officer of the municipal separate storm sewer system (MS4) or the person in control of the discharge within 48 hours of each submittal.

"e. The Commission shall post all petitions on the Division Web site and maintain copies available for inspection at the Division's office. The Commission shall accept and consider public comment for at least 30 days from the date of posting.

"f. The Commission may hold a public hearing on a petition and shall hold a public hearing on a petition if it receives a written request for a public hearing within the public comment period, and the Commission determines that there is a significant public interest in holding a public hearing. The Commission's determination to hold a public hearing shall be made no less than 15 days after the close of the public comment period. The Commission shall schedule the hearing to be held within 45 days of the close of the initial public comment period and shall accept and consider additional public comment through the date of the hearing.

"g. An additional petition for the same municipal separate storm sewer system (MS4) or discharge received during the public comment period shall be considered as comment on the original petition. An additional petition for the same municipal separate storm sewer system (MS4) or discharge received after the public comment period ends and before the final determination is made shall be considered incomplete and held pending a final determination on the original petition.

"1. If the Commission determines that the owner or operator of the municipal separate storm sewer system (MS4) or the person who discharges stormwater is required to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management, any petitions for that municipal separate storm sewer system (MS4) or discharge that were held shall be considered in the development of the Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management.

"2. If the Commission determines that the owner or operator of the municipal separate storm sewer system (MS4) or the person who discharges stormwater is not required to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management, an additional petition for the municipal separate storm sewer system (MS4) or discharge must present new information or demonstrate that conditions have changed in order to be considered. If new information is not provided, the petition shall be returned as substantially incomplete.

"h. The Commission shall evaluate a petition within 180 days of the date on which it is determined to be complete. If the Commission determines that the owner or operator of the municipal separate storm sewer system (MS4) or the person who discharges stormwater is required to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management, the Commission shall notify the owner or operator of the municipal separate storm sewer system (MS4) or the person who discharges stormwater within 30 days of the requirement to obtain the permit. The owner or operator of the municipal separate storm sewer system (MS4) or the person who discharges stormwater must submit its application for a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management within 18 months of the date of notification. If the owner or operator of a municipal separate storm sewer system is a municipality with a population of less than 5,000, the municipality must submit an application for a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management within 24 months of the date of notification.

"SECTION 9. Model Ordinance. — Pursuant to G.S. 143-214.7(c), the Environmental Management Commission shall develop a model ordinance in cooperation with local governments and other interested parties that shall allow the use of both structural and nonstructural best management practices adequate to meet the standards. The model ordinance shall be completed by 1 July 2005. In the development of the model ordinance, the Commission shall provide for options that take into consideration differences among local governments in the State, including, but not limited to, population, financial resources, and human resources.

"SECTION 10. Design Manual. — Consistent with G.S. 150B-2(8a)h., the Division, in consultation with the Division of Land Resources of the Department, the Division of Soil and Water Conservation of the Department, and North Carolina State University, shall develop or revise a design manual to provide assistance in determining which controls are best suited to the unique characteristics of the permittee, including, but not limited to, hydrology, topography, climate, soils, and receiving waters. The development or revision of the design manual shall be completed by 1 July 2005.

"SECTION 11. Federal and State Development or Redevelopment Projects. — A federal or State agency may apply to the Commission for a Phase I or Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management that applies to all of the activities of the agency or that applies to a particular development or redevelopment project. The Commission shall have exclusive jurisdiction to establish stormwater management requirements with respect to a particular project that is not under the jurisdiction of a federal or State agency that holds a Phase I or Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management that applies to all of the activities of the agency or that applies to the particular development or redevelopment project. If a federal or State agency does not hold a Phase I or Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management that applies to the particular development or redevelopment project, then the project is subject to the stormwater management requirements of this act as implemented by the Commission or by a local government. The provisions of G.S. 153A-347 and G.S. 160A-392 apply to the implementation of this act.

"SECTION 12. Definitions. — The following definitions apply to this act and its implementation:

"(1) The definitions set out in 40 Code of Federal Regulations § 122.2 (Definitions) and § 122.26(b) (Storm Water Discharges) (1 July 2003 Edition).

"(2) The definitions set out in G.S. 143-212 and G.S. 143-213.

"(3) The definitions set out in 15A NCAC 2H.0103 (Definitions of Terms).

"(4) '1-year, 24-hour storm' means the surface runoff resulting from a 24-hour rainfall of an intensity expected to be equaled or exceeded, on average, once in 12 months and with a duration of 24 hours.

"(5) 'Built-upon area' means that portion of a development project that is covered by impervious or partially impervious surface including, but not limited to, buildings; pavement and gravel areas such as roads, parking lots, and paths; and recreation facilities such as tennis courts. 'Built-upon area' does not include a wooden slatted deck, the water area of a swimming pool, or pervious or partially pervious paving material to the extent that the paving material absorbs water or allows water to infiltrate through the paving material.

"(6) 'Division' means the Division of Water Quality in the Department.

"(7) 'Planning jurisdiction' means the territorial jurisdiction within which a municipality exercises the powers authorized by Article 19 of Chapter 160A of the General Statutes, or a county may exercise the powers authorized by Article 18 of Chapter 153A of the General Statutes.

"(8) 'Public entity' means the United States; the State; a city, village, township, county, school district, public college or university, or single-purpose governmental agency; or any other governing body that is created by federal or State law.

"(9) 'Redevelopment' means any rebuilding activity other than are building activity that results in no net increase in built-upon area and provides equal or greater stormwater control than the previous development.

"(10) 'Regulated coverage area' means an unincorporated area of a county to which the Stormwater Management Rule applies.

"(11) 'Regulated entity' means any public entity that must obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management for its municipal separate storm sewer system (MS4).

"(12) 'Sensitive receiving waters' means any of the following:

"a. Waters that are classified as high quality, outstanding resource, shellfish, trout, or nutrient-sensitive waters in accordance with subsections (d) and (e) of 15A NCAC 2B.0101 (Procedures for Assignment of Water Quality Standards — General Procedures).

"b. Waters that are occupied by or designated as critical habitat for aquatic animal species that are listed as threatened or endangered by the United States Fish and Wildlife Service or the National Marine Fisheries Service under the provisions of the Endangered Species Act of 1973 (Pub. L. No. 93-205; 87 Stat. 884; 16 U.S.C. §§ 1531, et seq.), as amended.

"c. Waters for which the designated use, as described by the classification system set out in subsections (c), (d), and (e) of 15A NCAC 2B.0101 (Procedures for Assignment of Water Quality Standards — General Procedures), have been determined to be impaired in accordance with the requirements of subsection (d) of 33 U.S.C. § 1313.

"(13) 'Significant contributor of pollutants' means a municipal separate storm sewer system (MS4) or a discharge that contributes to the pollutant loading of a water body or that destabilizes the physical structure of a water body such that the contribution to pollutant loading or the destabilization may reasonably be expected to adversely affect the quality and uses of the water body. Uses of a water body shall be determined pursuant to 15A NCAC 2B.0211 through 15A NCAC 2B.0222 (Classifications and Water Quality Standards Applicable to Surface Waters and Wetlands of North Carolina) and 15A NCAC 2B.0300, et seq. (Assignment of Stream Classifications).

"(14) 'Stormwater Management Rule' means Section 10 of the temporary rule adopted by the Environmental Management Commission on 10 October 2002, except that:

"a. In subsection (a), the words 'pursuant to Sub-Item (7)(a)(v) of this Rule.' are deleted and replaced by the words 'set out in 40 Code of Federal Regulations § 122.34(b)(5)(1 July 2003 Edition).'.

"b. Subsections (c) and (d) are deleted.

"c. In the first sentence of subsection (e), the words 'meets the following requirements:' is deleted and replaced by the words 'manages stormwater and protects water quality. The program shall equal or exceed the stormwater management and water quality protection provided by the following model practices:'.

"d. In subdivision (i) of subsection (e), the words 'Sub-Item (10)(B)' are deleted and replaced by the words 'Sub-Item (10)(b)'.

"e. In subdivision (i) of subsection (h), the words 'while still meeting the requirements of Sub-Item (10)(d) of this Rule' are deleted.

"f. In subsection (i), the words 'temperature, while still meeting the requirements of Sub-Item (10)(d) of this Rule.' are deleted and replaced by the word 'temperature.'

"g. In subdivision (i) of subsection (j), the words 'while still meeting the requirements of Sub-Item (10)(d) of this Rule' are deleted.

"h. In subsection (k), the words 'of Item (10)' are deleted.

"i. A new subsection (n) is added to read: '(n) A regulated entity may develop its own comprehensive watershed plan, may use the model ordinance developed by the Commission, may design its own postconstruction practices based on the Department's guidance and engineering standards for best management practices (BMPs), or it may incorporate the postconstruction model practices set out in this rule to fulfill the minimum requirements set out in 40 Code of Federal Regulations § 122.34(b)(5) (1 July 2003 Edition).'.

"(15) 'Total maximum daily load (TMDL) implementation plan' means a written, quantitative plan and analysis for attaining and maintaining water quality standards in all seasons for a specific water body and pollutant.

"SECTION 13. Construction of Act. —

"(1) Nothing in this act shall be construed to limit, expand, or otherwise alter the authority of the Environmental Management Commission or any unit of local government to adopt stormwater management requirements that exceed the requirements of this act.

"(2) This act shall not be construed to affect pending litigation.

"(3) Except as specifically provided in this act, this act shall not be construed to give effect to any temporary or permanent rule related to Phase II stormwater management that has not become effective as provided in G.S. 150B-21.3.

"(4) The exclusions from the requirement to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit set out in 40 Code of Federal Regulations § 122.3 (1 July 2003 Edition), including the exclusions for certain nonpoint source agricultural and silvicultural activities, apply to the provisions of this act.

"(5) This act shall not be construed to affect any vested right to development under any provision of statutory or common law. To the extent that postconstruction measures are implemented by a zoning ordinance, vested rights shall be determined as provided in G.S. 160A-385.1, G.S. 153A-344.1, and other applicable provisions of statutory and common law. To the extent that postconstruction measures are implemented by means other than a zoning ordinance, vested rights shall be determined as provided by applicable statutory and common law. The Commission, the Department, local governments, and other public entities shall implement this act in compliance with the applicable vested rights provisions of statutory and common law.

"(6) This act shall not be construed to affect any delegation of any power or duty by the Commission to the Department or subunit of the Department."

**Text of Stormwater Management Rule, As Defined in Section 12 of Session Laws 2004-163.** — "(10) Post-construction stormwater management. —

"(a) All regulated public entities, required to implement the postconstruction stormwater management minimum measure, must develop, implement and adopt by ordinance a postconstruction stormwater management program for all new development and redevelopment as part of their plan to meet the minimum requirements set out in 40 Code of Federal Regulations § 122.34(b)(5) (1 July 2003 Edition). These ordinances, and subsequent modifications, will be reviewed and approved by the Department prior to implementation. The approval process will establish subsequent timeframes when the Department will review performance under the ordinance(s). The reviews will occur, at a minimum, every five years. Regulated public entities without ordinance making powers, shall demonstrate similar actions taken in their postconstruction stormwater management program to meet the minimum measure requirements.

"(b) The postconstruction program shall apply to all new development projects that cumulatively disturb one acre or more, and to projects less than an acre that are part of a larger common plan of development or sale. The postconstruction program shall apply to all redevelopment projects that cumulatively disturb one acre or more, and to projects less than an acre that are part of a larger common plan of development or sale.

"(c) A postconstruction stormwater management program shall be developed and implemented that manages stormwater and protects water quality. The program shall equal or exceed the stormwater management and water quality protection provided by the following model practices:

"(i) The program shall require all projects as defined in Sub-Item (10)(b) of this Rule to apply for locally issued permit coverage under one of the following stormwater management options:

"(A) Low Density Projects. Projects shall be permitted as low density if the project meets the following:

"(I) No more than 2 dwelling units per acre or 24 percent built-upon area BUA for all residential and non-residential development;

"(II) Stormwater runoff from the development shall be transported from the development by vegetated conveyances to the maximum extent practicable;

"(III) All BUA shall be at a minimum of 30 feet landward of all perennial and intermittent surface waters. For the purpose of this Rule, a surface water shall be present if the feature is approximately shown on either the most recent version of the soil survey map prepared by the Natural Resources Conservation Service of the United States Department of Agriculture or the most recent version of the 1:24,000 scale (7.5 minute) quadrangle topographic maps prepared by the United States Geologic Survey (USGS). An exception to this requirement may be allowed when surface waters are not present in accordance with the provisions of 15A NCAC 2B.0233 (3)(a); and

"(IV) The permit shall require recorded deed restrictions and protective covenants to ensure that development activities maintain the development consistent with the approved project plans.

"(B) High Density Projects. Projects exceeding the low density threshold established in Sub-Item (10)(e)(i)(A) of this Rule shall implement stormwater control measures that:

"(I) Control and treat the difference in stormwater runoff volume leaving the project site between the pre- and post-development conditions for the 1 year 24 hour storm. Runoff volume drawdown time shall be a minimum of 24 hours, but not more than 120 hours;

"(II) All structural stormwater treatment systems used to meet the requirements of the program shall be designed to have an 85% average annual removal for Total Suspended Solids;

"(III) General Engineering Design Criteria for all projects shall be in accordance with 15A NCAC 2H.1008(c);

"(IV) All BUA shall be at a minimum of 30 feet landward of all perennial and intermittent surface waters. For the purpose of this Rule, a surface water shall be present if the feature is approximately shown on either the most recent version of the soil survey map prepared by the Natural Resources Conservation Service of the United States Department of Agriculture or the most recent version of the 1:24,000 scale (7.5 minute) quadrangle topographic maps prepared by the United States Geologic Survey (USGS). An exception to this requirement may be allowed when surface waters are not present in accordance with the provisions of 15A NCAC 2B.0233 (3)(a); and

"(V) The permit shall require recorded deed restrictions and protective covenants to ensure that development activities maintain the development consistent with the approved project plans;

"(f) The program shall include an operation and maintenance component that ensures the adequate long-term operation of the structural BMP's required by the program. The program shall include a requirement that the owner of a permitted structural BMP, submit annually to the local program, a maintenance inspection report on each structural BMP. The inspection must be conducted by a qualified professional; and

"(g) A program shall be developed to control, to the maximum extent practicable, the sources of fecal coliform. At a minimum, the program shall include the development and implementation of an oversight program to ensure proper operation and maintenance of on-site wastewater treatment systems for domestic wastewater. For municipalities, this program should be coordinated with the local county health department.

"(h) For programs with development/redevelopment draining to SA waters, the following additional requirements must be incorporated into their program:

"(i) A local ordinance shall be developed, adopted and implemented to ensure that the best practice for reducing fecal coliform loading is selected. The best practice shall be the practice that results in the highest degree of fecal die off and controls to the maximum extent practicable sources of fecal coliform. The local ordinance(s) shall incorporate a program to control the sources of fecal coliform to the maximum extent practical, including:

"(A) Implementation of a pet waste management program. Appropriate revisions to an existing litter ordinance can be used to meet this requirement; and

"(B) Implementation of an oversight program to ensure proper operation and maintenance of on-site wastewater treatment systems for domestic wastewater. For municipalities, this program should be coordinated with the local county health department; and

"(ii) New direct points of stormwater discharge to SA waters or expansion of existing points of discharge to any constructed stormwater conveyance system, or constructed system of conveyances that discharge to SA waters, shall not be allowed. Expansion is defined as an increase in drainage area or an increase in impervious surface within the drainage area resulting in a net increase in peak flow or volume from the 1 year 24 hour storm. Overland sheetflow of stormwater or stormwater discharge to a wetland, vegetated buffer or other natural area capable of providing treatment or absorption will not be considered a direct point of stormwater discharge for the purposes of this Rule.

"(i) For programs with development/redevelopment draining to trout (Tr) waters, the following additional requirements must be incorporated into their program: A local ordinance shall be developed, adopted and implemented to ensure that the best management practices selected do not result in a sustained increase in the receiving water temperature.

"(j) For programs with development/redevelopment draining to Nutrient Sensitive waters, the following additional requirements must be incorporated into their program:

"(i) A local ordinance shall be developed, adopted and implemented to ensure that the best management practice for reducing nutrient loading is selected. Where a Department approved NSW Urban Stormwater Management Program is in place, the provisions of that program fulfill this requirement; and

"(ii) A nutrient application (both inorganic fertilizer and organic nutrients) management program shall be developed and included in the stormwater management program.

"(k) Public bodies may develop and implement comprehensive watershed protection plans that may be used to meet part, or all, of the requirements of this Rule.

"(*l*) The department may require more stringent stormwater management measures on a case-by-case basis where it is determined that additional measures are required to protect water quality and maintain existing and anticipated uses of these waters.

"(m) The Department may develop guidance on the scientific and engineering standards for best management practices that shall be used to meet the post construction elements of this Rule. Alternative design criteria may be approved by the Department where a demonstration is made that the alternative design will provide:

"(i) Equal or better management of the stormwater;

"(ii) Equal or better protection of the waters of the state; and

"(iii) No increased potential for nuisance conditions.

"(n) A regulated entity may develop its own comprehensive watershed plan, may use the model ordinance developed by the Commission, may design its own postconstruction practices based on the Department's guidance and engineering standards for best management practices (BMPs), or it may incorporate the postconstruction model practices set out in this rule to fulfill the minimum requirements set out in 40 Code of Federal Regulations § 122.34(b)(5) (1 July 2003 Edition)."

**Section 6 of the Temporary Phase II Stormwater Management Rules Adopted by the Environmental Management Commission on 10 October 2002.** — "(6) Application schedule. Regulated public entities must submit applications on department approved forms. Designated small MS4 applications shall include program descriptions for the minimum measures identified in Item (7) of this Rule. The application for regulated public entities that do not own or operate a small MS4 shall certify the lack of ownership or operation of a small MS4. Regulated public entities that do not own or operate a small MS4 may elect to implement a stormwater management program pursuant the options available in this Rule.

"(a) The application deadline will not be less than 18 months from the date of designation notification, except for:

"(i) 1990 Decennial Census regulated public entities, which must apply by March 10, 2003.

"(ii) Municipally operated industrial activities, which must apply by March 10, 2003.

"(b) Regulated public entities that are newly identified based upon the 2000 Decennial Census, or a future decennial census, must apply for permit coverage within 18 months of State notification. The Department, within 3 months of federal verification of decennial census data, will notify in writing all the public entities identified."

**Implementation of Federal Phase II Stormwater Management Requirements and Protection of Water Quality, as Recommended by Environmental Review Commission.** — Session Laws 2006-246, s. 19, directs the Revisor of Statutes not to codify this act, except for the provisions of ss. 16 and 17, but to set out as a note under this section. The text of the act follows.

Session Laws 2006-246, s. 1(a), effective retroactively to July 1, 2006, reads as follows:

"1(a). Disapproval of Certain Rules. — Pursuant to G.S. 150B-21.3 and S.L. 2003-229, the following rules, as adopted by the Environmental Management Commission and approved by the Rules Review Commission on 17 November 2005, are disapproved:

"15A NCAC 2H.1014 (Stormwater Management for Urbanizing Areas)

"15A NCAC 2H.1015 (Urbanizing Area Definitions)

"15A NCAC 2H.1016 (Urbanizing County Designations)

"15A NCAC 2H.1017 (Application Schedule and Required Contents)

"15A NCAC 2H.1018 (Post-Construction Model Practices)

"15A NCAC 2H.1019 (Exceptions)

"15A NCAC 2H.0126 (Stormwater Discharges)

"15A NCAC 2H.0150 (Definitions)

"15A NCAC 2H.0151 (Public Entity Designations)

"15A NCAC 2H.0152 (Petitions)

"15A NCAC 2H.0153 (Application Schedule and Required Contents)

"15A NCAC 2H.0154 (Implementation Schedule)

"15A NCAC 2H.0155 (Post-Construction Model Practices)

"15A NCAC 2H.0156 (Exceptions)"

Session Laws 2006-246, ss. 2-13, as amended by Session Laws 2008-198, s. 6(b), effective retroactively to July 1, 2006, and expiring when permanent rules to replace those sections become effective, provide:

"2. Definitions. — The following definitions apply to this act and its implementation:

"(1) The definitions set out in 40 Code of Federal Regulations § 122.2 (Definitions) and § 122.26(b) (Storm Water Discharges) (1 July 2003 Edition).

"(2) The definitions set out in G.S. 143-212 and G.S. 143-213.

"(3) The definitions set out in 15A NCAC 2H.0103 (Definitions of Terms).

"(4) The definitions set out in 15A NCAC 2H.1002 (Definitions), except for the definitions of 'Built-upon area', 'Development', and 'Redevelopment', which are defined below.

"(5) 'One-year, 24-hour storm' means a rainfall of an intensity expected to be equaled or exceeded, on average, once in 12 months and with a duration of 24 hours.

"(6) 'BMP' means Best Management Practice.

"(7) 'Built-upon area' means that portion of a project that is covered by impervious or partially impervious surface including, but not limited to, buildings; pavement and gravel areas such as roads, parking lots, and paths; and recreation facilities such as tennis courts. 'Built-upon area' does not include a wooden slatted deck, the water area of a swimming pool, or pervious or partially pervious paving material to the extent that the paving material absorbs water or allows water to infiltrate through the paving material.

"(8) 'Development' means any land-disturbing activity that increases the amount of built-upon area or that otherwise decreases the infiltration of precipitation into the soil.

"(9) 'Division' means the Division of Water Quality in the Department.

"(10) 'Planning jurisdiction' means the territorial jurisdiction within which a municipality exercises the powers authorized by Article 19 of Chapter 160A of the General Statutes, or a county may exercise the powers authorized by Article 18 of Chapter 153A of the General Statutes.

"(11) 'Public entity' means the United States; the State; a city, village, township, county, school district, public college or university, or single-purpose governmental agency; or any other governing body that is created by federal or State law.

"(12) 'Redevelopment' means any land-disturbing activity that does not result in a net increase in built-upon area and that provides greater or equal stormwater control than the previous development.

"(13) 'Regulated entity' means any public entity that must obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management for its municipal separate storm sewer system (MS4).

"(14) 'Sensitive receiving waters' means any of the following:

"a. Waters that are classified as high quality, outstanding resource, shellfish, trout, or nutrient-sensitive waters in accordance with subsections (d) and (e) of 15A NCAC 2B.0101 (Procedures for Assignment of Water Quality Standards — General Procedures).

"b. Waters that are occupied by or designated as critical habitat for aquatic animal species that are listed as threatened or endangered by the United States Fish and Wildlife Service or the National Marine Fisheries Service under the provisions of the Endangered Species Act of 1973 (Pub. L. No. 93-205; 87 Stat. 884; 16 U.S.C. §§ 1531, et seq.), as amended.

"c. Waters for which the designated use, as described by the classification system set out in subsections (c), (d), and (e) of 15A NCAC 2B.0101 (Procedures for Assignment of Water Quality Standards — General Procedures), have been determined to be impaired in accordance with the requirements of subsection (d) of 33 U.S.C. § 1313.

"(15) 'Shellfish resource waters' means Class SA waters that contain an average concentration of 500 parts per million of natural chloride ion. Average concentration is determined by averaging the chloride concentrations of five water samples taken one-half mile downstream from the project site that are taken on separate days, within one hour of high tide, and not within 48 hours following a rain event. The chloride ion concentrations are to be determined by a State-certified laboratory.

"(16) 'Significant contributor of pollutants' means a municipal separate storm sewer system (MS4) or a discharge that contributes to the pollutant loading of a water body or that destabilizes the physical structure of a water body such that the contribution to pollutant loading or the destabilization may reasonably be expected to adversely affect the quality and uses of the water body. Uses of a water body shall be determined pursuant to 15A NCAC 2B.0211 through 15A NCAC 2B.0222 (Classifications and Water Quality Standards Applicable to Surface Waters and Wetlands of North Carolina) and 15A NCAC 2B.0300, et seq. (Assignment of Stream Classifications).

"(17) 'Total maximum daily load (TMDL) implementation plan' means a written, quantitative plan and analysis for attaining and maintaining water quality standards in all seasons for a specific water body and pollutant.

"3. Program Implementation. — The Commission shall implement the federal Phase II stormwater management requirements set out in 40 Code of Federal Regulations §§ 122.21, 122.26, and 122.28 through 122.37 (1 July 2003 Edition).

"4(a) Development in Unincorporated Areas of Counties. —

"(a) Development that cumulatively disturbs one acre or more of land located in the unincorporated area of a county shall comply with the standards set forth in Section 9 of this act beginning 1 July 2007 if the development is located in:

"(1) An area that is designated as an urbanized area under the most recent federal decennial census.

"(2) The unincorporated area of a county outside of a municipality designated as an urbanized area under the most recent federal decennial census that extends:

"a. One mile beyond the corporate limits of a municipality with a population of less than 10,000 individuals.

"b. Two miles beyond the corporate limits of a municipality with a population of 10,000 or more individuals but less than 25,000 individuals.

"c. Three miles beyond the corporate limits of a municipality with a population of 25,000 or more individuals.

"(3) An area delineated pursuant to subsection (b) of this section.

"(4) A county that contains an area that is designated as an urbanized area under the most recent federal decennial census in which the unduplicated sum of: (i) the area that is designated as an urbanized area under the most recent federal decennial census; (ii) the area described in subdivision (2) of subsection (a) of this section; (iii) the area delineated pursuant to subsection (b) of this section; (iv) the jurisdiction of a regulated entity designated pursuant to Section 5 of this act; (v) the area that is regulated by a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management required pursuant to Section 6 of this act; and (vi) areas in the county that are subject to any of the stormwater management programs administered by the Division equal or exceed seventy-five percent (75%) of the total geographic area of the county. For purposes of this subdivision, the stormwater programs administered by the Division are:

"a. Water Supply Watershed I (WS-I) — 15A NCAC 2B.0212.

"b. Water Supply Watershed II (WS-II) — 15A NCAC 2B.0214.

"c. Water Supply Watershed III (WS-III) — 15A NCAC 2B.0215.

"d. Water Supply Watershed IV (WS-IV) — 15A NCAC 2B.0216.

"e. High Quality Waters (HQW) — 15A NCAC 2H.1006.

"f. Outstanding Resource Waters (ORW) — 15A NCAC 2H.1007.

"g. The Coastal Stormwater Program — 15A NCAC 2H.1005.

"h. The Neuse River Basin Nutrient Sensitive Waters (NSW) Management Strategy — 15A NCAC 2B.0235.

"i. The Tar-Pamlico River Basin Nutrient Sensitive (NSW) Management Strategy — 15A NCAC 2B.0258.

"j. The Randleman Lake Water Supply Watershed Nutrient Management Strategy — 15A NCAC 2B.0251.

"k. Other Environmental Management Commission Nutrient Sensitive Waters (NSW) Classifications — 15A NCAC 2B.0223.

"(5) A county that contains an area that is designated as an urbanized area under the 1990 or 2000 federal decennial census and that has an actual population growth rate that exceeded the State population growth rate for the period 1995 through 2004.

"(b) Delineation Process. — The Commission shall delineate regulated coverage areas as provided in this subsection.

"(1) Schedule. — The Commission shall implement the delineation process in accordance with the schedule for review and revision of basinwide water quality management plans as provided in G.S. 143-215.8B(c).

"(2) Potential candidate coverage areas. — A potential candidate coverage area is the unincorporated area of a county that is outside a municipality designated as a regulated entity pursuant to subdivisions (2) and (3) of Section 5 of this act that:

"a. Extends one mile beyond the corporate limits of a municipality with a population of less than 10,000 individuals.

"b. Extends two miles beyond the corporate limits of a municipality with a population of 10,000 or more individuals but less than 25,000 individuals.

"c. Extends three miles beyond the corporate limits of a municipality with a population of 25,000 or more individuals.

"(3) Identification of candidate coverage areas. — The Commission shall identify an area within a potential candidate coverage area described in sub-subdivision b. of subdivision (2) of this subsection as a candidate coverage area if the discharge of stormwater within or from the unincorporated area has the potential to adversely impact water quality. An adverse impact on water quality includes any activity that violates water quality standards, including, but not limited to, any activity that impairs designated uses or that has a significant biological or habitat impact.

"(4) Notice and comment on candidacy. — The Commission shall notify each public entity that is located in whole or in part in a candidate coverage area. After notification of each public entity, the Commission shall publish a map of the unincorporated areas within the river basin that have been identified as candidates for delineation as regulated coverage areas. The Commission shall accept public comment on the proposed delineation of a candidate coverage area as a regulated coverage area for a period of not less than 30 days.

"(5) Delineation of regulated coverage areas. — After review of public comment, the Commission shall delineate regulated coverage areas. The Commission shall delineate a candidate coverage area as a regulated coverage area only if the Commission determines that the discharge of stormwater within or from the candidate coverage area either:

"a. Adversely impacts water quality.

"b. Results in a significant contribution of pollutants to sensitive receiving waters, taking into account the effectiveness of other applicable water quality protection programs. To determine the effectiveness of other applicable water quality protection programs, the Commission shall consider the water quality of the receiving waters and whether the waters support the uses set out in subsections (c), (d), and (e) of 15A NCAC 2B.0101 (Procedures for Assignment of Water Quality Standards — General Procedures) and the specific classification of the waters set out in 15A NCAC 2B.0300, et seq. (Assignment of Stream Classifications).

"(6) Notice of delineation. — The Commission shall provide written notice to each public entity that is located in whole or in part in a candidate coverage area of its delineation determination. The notice shall state the basis for the determination.

"(c) Except as provided in this subsection and Section 10 of this act, the Commission shall administer and enforce the standards for development in the regulated coverage areas. To the extent authorized by law, where the development is located in a municipal planning jurisdiction, the municipality shall administer and enforce the standards. A public entity may request that the Commission delegate administration and enforcement of the stormwater management program to the public entity as provided in Section 10 of this act.

"4(b) Development in Non-Phase II Incorporated Areas in Certain Counties. — Development that cumulatively disturbs one acre or more of land located in the incorporated areas of a county described in subdivisions (4) and (5) of subsection (a) of this section, that are not designated as an urbanized area under the most recent federal decennial census, shall comply with the standards set forth in Section 9 of this act beginning 1 July 2007. The Commission shall administer and enforce the standards for development unless the public entity requests that the Commission delegate administration and enforcement of the stormwater management program to the public entity as provided in Section 10 of this act.

"5. Designation of Regulated Entities. — A public entity that owns or operates a municipal separate storm sewer system (MS4) may be designated as a regulated entity through federal designation, through a State designation process, or under a total maximum daily load (TMDL) implementation plan as provided in this section.

"(1) Federal designation. — A public entity that owns or operates a municipal separate storm sewer system (MS4) may be designated as a regulated entity pursuant to 40 Code of Federal Regulations § 122.32 (1 July 2003 Edition).

"(2) State designation process. — The Commission shall designate a public entity that owns or operates a municipal separate storm sewer system (MS4) as a regulated entity as provided in this subdivision.

"a. Designation schedule. — The Commission shall implement the designation process in accordance with the schedule for review and revision of basinwide water quality management plans as provided in G.S. 143-215.8B(c).

"b. Identification of candidate regulated entities. — The Commission shall identify a public entity as a candidate for designation as a regulated entity if the municipal separate storm sewer system (MS4) either:

"1. Discharges stormwater that has the potential to adversely impact water quality. An adverse impact on water quality includes any activity that causes or contributes to a violation of water quality standards, including, but not limited to, any activity that impairs designated uses or that has a significant biological or habitat impact.

"2. Serves a public entity that has not been designated pursuant to subdivision (1) of this section and that has either a population of more than 10,000 or more than 4,000 housing units and either a population density of 1,000 people per square mile or more or more than 400 housing units per square mile.

"c. Notice and comment on candidacy. — The Commission shall notify each public entity identified as a candidate for designation as a regulated entity. After notification of each public entity, the Commission shall publish a list of all public entities within a river basin that have been identified as candidates for designation. The Commission shall accept public comment on the proposed designation of a public entity as a regulated entity for a period of not less than 30 days.

"d. Designation of regulated entities. — After review of the public comment, the Commission shall make a determination on designation for each of the candidate public entities. The Commission shall designate a candidate public entity that owns or operates a municipal separate storm sewer system (MS4) as a regulated public entity only if the Commission determines either that:

"1. The public entity has an actual population growth rate that exceeds 1.3 times the State population growth rate for the previous 10 years.

"2. The public entity has a projected population growth rate that exceeds 1.3 times the projected State population growth rate for the next 10 years.

"3. The public entity has an actual population increase that exceeds fifteen percent (15%) of its previous population for the previous two years.

"4. The municipal separate storm sewer system (MS4) discharges stormwater that adversely impacts water quality.

"5. The municipal separate storm sewer system (MS4) discharges stormwater that results in a significant contribution of pollutants to receiving waters, taking into account the effectiveness of other applicable water quality protection programs. To determine the effectiveness of other applicable water quality protection programs, the Commission shall consider the water quality of the receiving waters and whether the waters support the uses set out in subsections (c), (d), and (e) of 15A NCAC 2B.0101 (Procedures for Assignment of Water Quality Standards — General Procedures) and the specific classification of the waters set out in 15A NCAC 2B.0300, et seq. (Assignment of Stream Classifications).

"e. Notice of designation. — The Commission shall provide written notice to each public entity of its designation determination. For a public entity designated as a regulated entity, the notice shall state the basis for the designation and the date on which an application for a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management must be submitted to the Commission.

"f. Application schedule. — A public entity that has been designated as a regulated entity pursuant to this subdivision must submit its application for a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management within 18 months of the date of notification.

"(3) Designation under a total maximum daily load (TMDL) implementation plan. — The Commission shall designate an owner or operator of a small municipal separate storm sewer system (MS4) as a regulated entity if the municipal separate storm sewer system (MS4) is specifically listed by name as a source of pollutants for urban stormwater in a total maximum daily load (TMDL) implementation plan developed in accordance with subsections (d) and (e) of 33 U.S.C. § 1313. The Commission shall provide written notice to each public entity of its designation determination. For a public entity designated as a regulated entity, the notice shall state the basis for the designation and the date on which an application for a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management must be submitted to the Commission. A public entity that has been designated as a regulated entity pursuant to this subdivision must submit its application for a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management within 18 months of the date of notification.

"6. Petition Process. — A petition may be submitted to the Commission to request that an owner or operator of a municipal separate storm sewer system (MS4) or a person who discharges stormwater be required to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management as follows:

"(1) Connected discharge petition. — An owner or operator of a permitted municipal separate storm sewer system (MS4) may submit a petition to the Commission to request that a person who discharges into the permitted municipal separate storm sewer system (MS4) be required to obtain a separate Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management. The Commission shall grant the petition and require the person to obtain a separate Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management if the petitioner shows that the person's discharge flows or will flow into the permitted municipal separate storm sewer system (MS4).

"(2) Adverse impact petition. — Any person may submit a petition to the Commission to request that an owner or operator of a municipal separate storm sewer system (MS4) or a person who discharges stormwater be required to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management.

"a. Petition review. — The Commission shall grant the petition and require the owner or operator of the municipal separate storm sewer system (MS4) or the person who discharges stormwater to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management if the petitioner shows any of the following:

"1. The municipal separate storm sewer system (MS4) or the discharge discharges or has the potential to discharge stormwater that may cause or contribute to a water quality standard violation.

"2. The municipal separate storm sewer system (MS4) or the discharge provides a significant contribution of pollutants to receiving waters.

"3. The municipal separate storm sewer system (MS4) or the discharge is specifically listed by name as a source of pollutants for urban stormwater in a total maximum daily load (TMDL) implementation plan developed in accordance with subsections (d) and (e) of 33 U.S.C. § 1313.

"b. Types of evidence for required showing. — Petitioners may make the required showing by providing to the Commission the following information:

"1. Monitoring data that includes, at a minimum, representative sampling of the municipal separate storm sewer system (MS4) or discharge and information describing how the sampling is representative. The petitioner must notify the owner or operator of the municipal separate storm sewer system (MS4) or the person who discharges stormwater of its intent to conduct monitoring activities prior to conducting those activities.

"2. Scientific or technical literature that supports the sampling methods.

"3. Study and technical information on land uses in the drainage area and the characteristics of stormwater runoff from these land uses.

"4. A map that delineates the drainage area of the petitioned entity; the location of sampling stations; the location of the stormwater outfalls in the adjacent area of the sampling locations; general features, including, but not limited to, surface waters, major roads, and political boundaries; and areas of concern regarding water quality.

"5. For stormwater discharges to impaired waters, documentation that the receiving waters are impaired or degraded and monitoring data that demonstrates that the municipal separate storm sewer system (MS4) or discharge contributes pollutants for which the waters are impaired or degraded.

"6. For stormwater discharges to nonimpaired waters, monitoring data that demonstrates that the owner or operator of the municipal separate storm sewer system (MS4) or the person who discharges stormwater is a significant contributor of pollutants to the receiving waters.

"c. Water quality protection program offset. — If the petitioner makes the required showing, the Commission shall review the effectiveness of any existing water quality protection programs that may offset the need to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management. To determine the effectiveness of other applicable water quality protection programs, the Commission shall consider the water quality of the receiving waters and whether the waters support the uses set out in subsections (c), (d), and (e) of 15A NCAC 2B.0101 (Procedures for Assignment of Water Quality Standards — General Procedures) and the specific classification of the waters set out in 15A NCAC 2B.0300, et seq. (Assignment of Stream Classifications). The Commission may deny the petition if it finds that existing water quality protection programs are adequate to address stormwater impacts on sensitive receiving waters and to ensure compliance with a TMDL implementation plan.

"(3) Petition administration. — The Commission shall process petitions in the following manner:

"a. The Commission shall only accept petitions submitted on Department forms.

"b. A separate petition must be filed for each municipal separate storm sewer system (MS4) or discharge.

"c. The Commission shall evaluate only complete petitions. The Commission shall make a determination on the completeness of a petition within 90 days of receipt of the petition, or it shall be deemed complete. If the Commission requests additional information, the petitioner may submit additional information; and the Commission will determine, within 90 days of receipt of the additional information, whether the information completes the petition.

"d. The petitioner shall provide a copy of the petition and a copy of any subsequent additional information submitted to the Commission to the chief administrative officer of the municipal separate storm sewer system (MS4) or the person in control of the discharge within 48 hours of each submittal.

"e. The Commission shall post all petitions on the Division Web site and maintain copies available for inspection at the Division's office. The Commission shall accept and consider public comment for at least 30 days from the date of posting.

"f. The Commission may hold a public hearing on a petition and shall hold a public hearing on a petition if it receives a written request for a public hearing within the public comment period, and the Commission determines that there is a significant public interest in holding a public hearing. The Commission's determination to hold a public hearing shall be made no less than 15 days after the close of the public comment period. The Commission shall schedule the hearing to be held within 45 days of the close of the initial public comment period and shall accept and consider additional public comment through the date of the hearing.

"g. An additional petition for the same municipal separate storm sewer system (MS4) or discharge received during the public comment period shall be considered as comment on the original petition. An additional petition for the same municipal separate storm sewer system (MS4) or discharge received after the public comment period ends and before the final determination is made shall be considered incomplete and held pending a final determination on the original petition.

"1. If the Commission determines that the owner or operator of the municipal separate storm sewer system (MS4) or the person who discharges stormwater is required to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management, any petitions for that municipal separate storm sewer system (MS4) or discharge that were held shall be considered in the development of the Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management.

"2. If the Commission determines that the owner or operator of the municipal separate storm sewer system (MS4) or the person who discharges stormwater is not required to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management, an additional petition for the municipal separate storm sewer system (MS4) or discharge must present new information or demonstrate that conditions have changed in order to be considered. If new information is not provided, the petition shall be returned as substantially incomplete.

"h. The Commission shall evaluate a petition within 180 days of the date on which it is determined to be complete. If the Commission determines that the owner or operator of the municipal separate storm sewer system (MS4) or the person who discharges stormwater is required to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management, the Commission shall notify the owner or operator of the municipal separate storm sewer system (MS4) or the person who discharges stormwater within 30 days of the requirement to obtain the permit. The owner or operator of the municipal separate storm sewer system (MS4) or the person who discharges stormwater must submit its application for a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management within 18 months of the date of notification.

"7. Permit Standards. — To obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management, an applicant shall, to the extent authorized by law, develop, implement, and enforce a stormwater management plan approved by the Commission that satisfies the six minimum control measures required by 40 Code of Federal Regulations § 122.34(b)(1 July 2003 Edition). The evaluation of the post-construction stormwater management measures required by 40 Code of Federal Regulations § 122.34(b)(5)(1 July 2003 Edition) shall be conducted as provided in Section 9 of this act. Regulated entities may propose using any existing State or local program that relates to the minimum measures to meet, either in whole or in part, the requirements of the minimum measures.

"8. Exclusions from Post-Construction Practices. — The post-construction practices required by Section 9 of this act shall not apply to any of the following:

"(1) Development in an area where the requirements of Section 9 of this act are applicable that is conducted pursuant to one of the following authorizations, provided that the authorization was obtained prior to the effective date of the post-construction stormwater control requirements in the area and the authorization is valid, unexpired, unrevoked, and not otherwise terminated:

"a. A building permit pursuant to G.S. 153A-357 or G.S. 160A-417.

"b. A site-specific development plan as defined by G.S. 153A-344.1(b)(5) and G.S. 160A-385.1(b)(5).

"c. A phased development plan approved pursuant to G.S. 153A-344.1 for a project located in the unincorporated area of a county that is subject to the requirements of Section 9 of this act, if the Commission is responsible for implementation of the requirements of Section 9 of this act, that shows:

"1. For the initial or first phase of development, the type and intensity of use for a specific parcel or parcels, including at a minimum, the boundaries of the project and a subdivision plan that has been approved pursuant to G.S. 153A-330 through G.S. 153A-335.

"2. For any subsequent phase of development, sufficient detail so that implementation of the requirements of Section 9 of this act to that phase of development would require a material change in that phase of the plan.

"d. A vested right to the development under G.S. 153A-344(b), 153A-344.1, 160A-385(b), or 160A-385.1 issued by a local government that implements Section 9 of this act.

"e. A vested right to the development pursuant to common law.

"(2) Redevelopment."

Session Laws 2006-246, s. 9, as amended by Session Laws 2008-198, s. 6(b), effective October 1, 2008, and expiring when permanent rules to replace this section become effective, provides: "9. Post-Construction Practices. —

"(a) For post-construction requirements, a program will be deemed compliant for the areas where it is implementing any of the following programs:

"(1) Water Supply Watershed I (WS-I) — 15A NCAC 2B.0212.

"(2) Water Supply Watershed II (WS-II) — 15A NCAC 2B.0214.

"(3) Water Supply Watershed III (WS-III) — 15A NCAC 2B.0215.

"(4) Water Supply Watershed IV (WS-IV) — 15A NCAC 2B.0216.

"(5) Freshwater High Quality Waters (HQW) — 15A NCAC 2H.1006.

"(6) Freshwater Outstanding Resource Waters (ORW) — 15A NCAC 2H.1007.

"(7) The Neuse River Basin Nutrient Sensitive Waters (NSW) Management Strategy — 15A NCAC 2B.0235.

"(8) The Tar-Pamlico River Basin Nutrient Sensitive (NSW) Management Strategy — 15A NCAC 2B.0258.

"(9) The Randleman Lake Water Supply Watershed Nutrient Management Strategy — 15A NCAC 2B.0251.

"(b) In order to fulfill the post-construction minimum measure program requirement, a permittee, delegated program, or regulated entity may use the Department's model ordinance, design its own post-construction practices based on the Department's guidance on scientific and engineering standards for best management practices (BMPs), incorporate the post-construction model practices described in this act, or develop its own comprehensive watershed plan that is determined by the Department to meet the post-construction stormwater management measure required by 40 Code of Federal Regulations § 122.34(b)(5) (July 1, 2003, Edition).

"(c) Permittees, delegated programs, and regulated entities must require stormwater controls for a project that disturbs one acre or more of land, including a project that disturbs less than one acre of land that is part of a larger common plan of development or sale. The stormwater controls shall be appropriate to the project's level of density as follows:

"(1) Post-construction model practices for low-density projects. — A project that is located within one-half mile of and draining to Shellfish Resource Waters is a low-density project if it contains no more than twelve percent "(12%) built-upon area. A project that is not located within one-half mile of Shellfish Resource Waters is a low-density project if it contains no more than twenty-four percent (24%) built-upon area or no more than two dwelling units per acre. Low-density projects must use vegetated conveyances to the maximum extent practicable to transport stormwater runoff from the project. On-site stormwater treatment devices such as infiltration areas, bioretention areas, and level spreaders may also be used as added controls for stormwater runoff. A project with an overall density at or below the low-density thresholds, but containing areas with a density greater than the overall project density, may be considered low density as long as the project meets or exceeds the post-construction model practices for low-density projects and locates the higher density in upland areas and away from surface waters and drainageways to the maximum extent practicable.

"(2) Post-construction model practices for high-density projects. — A project that is located within one-half mile of and draining to Shellfish Resource Waters is a high-density project if it contains more than twelve percent (12%) built-upon area. A project that is not located within one-half mile of Shellfish Resource Waters is a high-density project if it contains more than twenty-four percent (24%) built-upon area or more than two dwelling units per acre. High-density projects must use structural stormwater management systems that will control and treat runoff from the first one inch of rain unless the project is in a county that is subject to the Coastal Area Management Act of 1974, in which case the project must use structural stormwater management systems that will control and treat runoff from the first one and one-half inches of rain. In addition, projects that are located within one-half mile and draining to Shellfish Resource Waters must control and treat the difference in the stormwater runoff from the predevelopment and post-development conditions for the one-year, 24-hour storm. The structural stormwater management system must also meet the following design standards:

"a. Draw down the treatment volume no faster than 48 hours, but no slower than 120 hours.

"b. Discharge the storage volume at a rate equal to or less than the predevelopment discharge rate for the one-year, 24-hour storm.

"c. Remove an eighty-five percent (85%) average annual amount of Total Suspended Solids.

"d. Meet the General Engineering Design Criteria set out in 15A NCAC 02H.1008(c).

"e. Wet detention ponds designed in accordance with the requirements of subsection (h) of this section may be used for projects draining to Class SA waters.

"(d) Permittees, delegated programs, and regulated entities must require built-upon areas to be located at least 30 feet landward of all perennial and intermittent surface waters. For purposes of this section, a surface water shall be present if the feature is shown on either the most recent version of the soil survey map prepared by the Natural Resources Conservation Service of the United States Department of Agriculture or the most recent version of the 1:24,000 scale (7.5 minute) quadrangle topographic maps prepared by the United States Geologic Survey (USGS). Relief from this requirement may be allowed when surface waters are not present in accordance with the provisions of 15A NCAC 02B.0233(3)(a). In addition, an exception to this requirement may be pursued in accordance with subsection (a) of Section 11 of this act.

"(e) Permittees, delegated programs, and regulated entities must implement or require a fecal coliform reduction program that controls, to the maximum extent practicable, the sources of fecal coliform. At a minimum, the program shall include the development and implementation of an oversight program to ensure proper operation and maintenance of on-site wastewater treatment systems for domestic wastewater. For municipalities, this program may be coordinated with local county health departments.

"(f) Permittees, delegated programs, and regulated entities must impose or require recorded restrictions and protective covenants to be recorded on the property in the Office of the Register of Deeds in the county where the property is located prior to the issuance of a certificate of occupancy in order to ensure that development activities will maintain the project consistent with approved plans.

"(g) Permittees, delegated programs, and regulated entities must implement or require an operation and maintenance plan that ensures the adequate long-term operation of the structural BMPs required by the program. The operation and maintenance plan must require the owner of each structural BMP to submit a maintenance inspection report on each structural BMP annually to the local program.

"(h) For areas draining to Class SA waters, permittees, delegated programs, and regulated entities must:

"(1) Use BMPs that result in the highest degree of fecal coliform die-off and control to the maximum extent practicable sources of fecal coliform while still incorporating the stormwater controls required by the project's density level.

"(2) Implement a program to control the sources of fecal coliform to the maximum extent practicable, including a pet waste management component, which may be achieved by revising an existing litter ordinance, and an on-site domestic wastewater treatment systems component to ensure proper operation and maintenance of such systems, which may be coordinated with local county health departments.

"(3) Prohibit new points of stormwater discharge to Class SA waters and prohibit both increases in the volume of stormwater flow through conveyances and increases in capacity of conveyances in existing stormwater conveyance systems that drain to Class SA waters. Any modification or redesign of a stormwater conveyance system within the contributing drainage basin must not increase the net amount or rate of stormwater discharge through existing outfalls to Class SA waters. Diffuse flow of stormwater at a nonerosive velocity to a vegetated buffer or other natural area capable of providing effective infiltration of the runoff from the one-year, 24-hour storm shall not be considered a direct point of stormwater discharge. Consideration shall be given to soil type, slope, vegetation, and existing hydrology when evaluating infiltration effectiveness.

"(i) For areas draining to Trout Waters, permittees, delegated programs, and regulated entities must:

"(1) Use BMPs that avoid a sustained increase in the receiving water temperature, while still incorporating the stormwater controls required for the project's density level.

"(2) Allow on-site stormwater treatment devices such as infiltration areas, bioretention areas, and level spreaders as added controls.

"(j) For areas draining to Nutrient Sensitive Waters, permittees, delegated programs, and regulated entities must:

"(1) Use BMPs that reduce nutrient loading, while still incorporating the stormwater controls required for the project's density level. In areas where the Department has approved a Nutrient Sensitive Water Urban Stormwater Management Program, the provisions of that program fulfill the nutrient loading reduction requirement. Nutrient Sensitive Water Urban Stormwater Management Program requirements are found in 15A NCAC 02B.0200.

"(2) Implement a nutrient application management program for both inorganic fertilizer and organic nutrients to reduce nutrients entering waters of the State.

"(k) For BMPs that require a separation from the seasonal high-water table, the separation shall be provided by at least 12 inches of naturally occurring soil above the seasonal high-water table.

"(l) Nothing in this section shall limit, expand, or alter the requirement that a discharge fully comply with all applicable State or federal water quality standards."

"10. Delegation. — A public entity that does not administer a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management throughout the entirety of its planning jurisdiction and whose planning jurisdiction includes a regulated coverage area under Section 4 of this act may submit a stormwater management program for its regulated coverage area or a portion of its regulated coverage area to the Commission for approval pursuant to G.S. 143-214.7(c). An ordinance or regulation adopted by a public entity shall at least meet and may exceed the minimum requirements of Section 9 of this act. Two or more public entities are authorized to establish a joint program and to enter into any agreements that are necessary for the proper administration and enforcement of the program. The resolution, memorandum of agreement, or other document that establishes any joint program must be duly recorded in the minutes of the governing body of each public entity participating in the program, and a certified copy of each resolution must be filed with the Commission. The Commission shall review each proposed program submitted to it to determine whether the submission is complete. Within 90 days after the receipt of a complete submission, the Commission shall notify the public entity submitting the program that it has been approved, approved with modifications, or disapproved. The Commission shall only approve a program upon determining that its standards equal or exceed those of Section 9 of this act. If the Commission determines that any public entity is failing to administer or enforce an approved stormwater management program, it shall notify the public entity in writing and shall specify the deficiencies of administration and enforcement. If the public entity has not taken corrective action within 30 days of receipt of notification from the Commission, the Commission shall assume administration and enforcement of the program until such time as the public entity indicates its willingness and ability to resume administration and enforcement of the program.

"11(a) Exceptions. — The Department or an appropriate local authority, pursuant to Article 18 of G.S. 153A or Article 19 of G.S. 160A, may grant exceptions from the 30-foot landward location of built-upon area requirement as well as the deed restrictions and protective covenants requirement as follows:

"(1) An exception may be granted if the application meets all of the following criteria:

"a. Unnecessary hardships would result from strict application of the act.

"b. The hardships result from conditions that are peculiar to the property, such as the location, size, or topography of the property.

"c. The hardships did not result from actions taken by the petitioner.

"d. The requested exception is consistent with the spirit, purpose, and intent of this act; will protect water quality; will secure public safety and welfare; and will preserve substantial justice. Merely proving that the exception would permit a greater profit from the property shall not be considered adequate justification for an exception.

"(2) Notwithstanding subdivision (1) of this section, exceptions shall be granted in any of the following instances:

"a. When there is a lack of practical alternatives for a road crossing, railroad crossing, bridge, airport facility, or utility crossing as long as it is located, designed, constructed, and maintained to minimize disturbance, provide maximum nutrient removal, protect against erosion and sedimentation, have the least adverse effects on aquatic life and habitat, and protect water quality to the maximum extent practicable through the use of BMPs.

"b. When there is a lack of practical alternatives for a stormwater management facility; a stormwater management pond; or a utility, including, but not limited to, water, sewer, or gas construction and maintenance corridor, as long as it is located 15 feet landward of all perennial and intermittent surface waters and as long as it is located, designed, constructed, and maintained to minimize disturbance, provide maximum nutrient removal, protect against erosion and sedimentation, have the least adverse effects on aquatic life and habitat, and protect water quality to the maximum extent practicable through the use of BMPs.

"c. A lack of practical alternatives may be shown by demonstrating that, considering the potential for a reduction in size, configuration, or density of the proposed activity and all alternative designs, the basic project purpose cannot be practically accomplished in a manner which would avoid or result in less adverse impact to surface waters.

"(3) Reasonable and appropriate conditions and safeguards may be imposed upon any exception granted.

"(4) Local authorities must document the exception procedure and submit an annual report to the Department on all exception proceedings.

"(5) Appeals of the Department's exception decisions must be filed with the Office of Administrative Hearings, under G.S. 150B-23. Appeals of a local authority's exception decisions must be made to the appropriate Board of Adjustment or other appropriate local governing body, under G.S. 160A-388 or G.S. 153A-345.

"11(b) Exemption. — A municipality with a population of less than 1,000, including a municipality designated as an urbanized area under the most recent federal decennial census, is not required to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit for stormwater management unless the municipality is shown to be contributing to an impairment of State waters, as determined under the requirements of 33 U.S.C. § 1313(d).

"11(c) Waiver. — The Department may waive the Phase II National Pollutant Discharge Elimination System (NPDES) permit requirement pursuant to 40 Code of Federal Regulations §§ 122.32(d) or (e) (July 1, 2003, Edition).

"12. Implementation Schedule. — The requirements of this act shall be implemented as follows:

"(1) A regulated entity must apply within 18 months of notification by the Department that the regulated entity is subject to regulation pursuant to Sections 4, 5, or 6 of this act.

"(2) Public education and outreach minimum measures shall be implemented no later than 12 months from date of permit issuance.

"(3) A regulated entity must implement its post-construction program no later than 24 months from the date the permit is issued.

"(4) The Department shall include permit conditions that establish schedules for implementation of each minimum measure of the regulated entity's stormwater management program based on the submitted application so that the regulated entity fully implements its permitted program within five years from permit issuance.

"13. Federal and State Projects. — The Commission shall have jurisdiction, to the exclusion of local governments, to issue a National Pollutant Discharge Elimination System (NPDES) permit for stormwater management to a federal or State agency that applies to all or part of the activities of the agency or that applies to the particular project. If a federal or State agency does not hold a Phase I or Phase II National Pollutant Discharge Elimination System (NPDES) permit for management that applies to the particular project, then the project is subject to the stormwater management requirements of this act as implemented by the Commission or by a local government. The provisions of G.S. 153A-347 and G.S. 160A-392 apply to the implementation of this act."

Session Laws 2006-246, ss. 14 and 15, effective retroactively to July 1, 2006, provide: "14. General Permit. — The Commission shall develop and issue a Phase II National Pollutant Discharge Elimination System (NPDES) general permit for stormwater management. The general permit requirements for post-construction stormwater management measures required by 40 Code of Federal Regulations § 122.34(b)(5) (July 1, 2003, Edition) shall require a permittee to meet the standards set out in Section 9 of this act but shall not impose any requirement on the permittee that exceeds the standards set out in Section 9 of this act. After the Commission has issued a Phase II National Pollutant Discharge Elimination System (NPDES) general permit for stormwater management, a public entity that has applied for a permit may submit a notice of intent to be covered under the general permit to the Commission. The Commission shall treat an application for a permit as an application for an individual permit unless the applicant submits a notice of intent to be covered under a general permit under this section.

"15. Additional Rule Making. — The Commission may adopt rules to replace the rules that are disapproved as provided in subsection (a) of Section 1 of this act. If the Commission adopts rules pursuant to this section, notwithstanding G.S. 150B-19(4), the rules shall be substantively identical to the provisions of Sections 2 through 13 of this act. The Commission may reorganize or renumber any of the rules to which this section applies at its discretion. Rules adopted pursuant to this section are not subject to G.S. 150B-21.9 through G.S. 150B-21.14. Rules adopted pursuant to this section shall become effective as provided in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2)."

Session Laws 2006-246, s. 18, as amended by Session Laws 2008-211, s. 6, effective August 9, 2008, provides: "18. Construction of Act. —

"(1) Except as specifically provided in Section 15 of this act, nothing in this act shall be construed to limit, expand, or otherwise alter the authority of the Environmental Management Commission or any unit of local government.

"(2) The exclusions from the requirement to obtain a Phase II National Pollutant Discharge Elimination System (NPDES) permit set out in 40 Code of Federal Regulations § 122.3 (July 1, 2003, Edition), including the exclusions for certain nonpoint source agricultural and silvicultural activities, apply to the provisions of this act.

"(3) This act shall not be construed to affect any delegation of any power or duty by the Commission to the Department or subunit of the Department.

"(4) The definitions of 'development' and 'redevelopment' set out in this act do not alter or amend the definition of 'redevelopment' set out in G.S. 113A-103 and do not apply to the Coastal Area Management Act of 1974, Article 7 of Chapter 113A of the General Statutes.

"(5) As used in Section 9 of this act, the phrase 'common plan of development or sale' shall be interpreted and implemented in a manner consistent with the memorandum referenced as 'Guidance Interpreting Phase II Stormwater Requirements' from the Director of the Division of Water Quality of the Department of Environment and Natural Resources to Interested Parties dated 24 July 2006, and for these purposes the memorandum shall be considered a part of this act and as such shall be printed as a part of the Session Laws."

**Improvements in the Management of Stormwater in the Coastal Counties in order to Protect Water Quality — Supercession of Rule.** — Session Laws 2008-211, s. 7, directs the Revisor of Statutes not to codify any of the provisions of Session Law 2008-211, notwithstanding G.S. 164-10, but to set out its text as an editor's note under this section.

Session Laws 2008-211, s. 1(a), effective August 9, 2008, provides: "1.(a) Disapprove Rule. — Pursuant to G.S. 150B-21.3(b1), 15A NCAC 02H.1005 (Stormwater Requirements: Coastal Counties), as adopted by the Environmental Management Commission on 10 January 2008 and approved by the Rules Review Commission on 20 March 2008, is disapproved."

Session Laws 2008-211, ss. 1(b), 2(a)-(f), and (3), as amended by Session Laws 2008-198, s. 6(a), effective October 1, 2008, provide: "1.(b) Supersede Rule. — 15A NCAC 02H.1005 (Stormwater Requirements: Coastal Counties), effective 1 September 1995, is superseded by this act. References in the North Carolina Administrative Code to 15A NCAC 02H.1005 shall be deemed to refer to the equivalent provisions of this act.

"2.(a) Definitions. — The following definitions apply to this act and its implementation:

"(1) The definitions set out in 15A NCAC 02H.1002 (Definitions).

"(2) The definitions set out in G.S. 143-212 and G.S. 143-213.

"(3) 'Built upon area' has the same meaning as in Session Law 2006-246 and means that portion of a project that is covered by impervious or partially impervious surface including, but not limited to, buildings; pavement and gravel areas such as roads, parking lots, and paths; and recreation facilities such as tennis courts. 'Built upon area' does not include a wooden slatted deck, the water area of a swimming pool, or pervious or partially pervious paving material to the extent that the paving material absorbs water or allows water to infiltrate through the paving material.

"(4) 'Permeable pavement' means paving material that absorbs water or allows water to infiltrate through the paving material. Permeable pavement materials include porous concrete, permeable interlocking concrete pavers, concrete grid pavers, porous asphalt, and any other material with similar characteristics. Compacted gravel shall not be considered permeable pavement.

"(5) 'Residential development activities' has the same meaning as in 15A NCAC 02B.0202(54).

"(6) 'Vegetative buffer' has the same meaning as in 15A NCAC 02H.1002(22) and means an area of natural or established vegetation directly adjacent to surface waters through which stormwater runoff flows in a diffuse manner to protect surface waters from degradation due to development activities.

"(7) 'Vegetative conveyance' means a permanent, designed waterway lined with vegetation that is used to convey stormwater runoff at a non-erosive velocity within or away from a developed area.

"2.(b) Requirements for Certain Nonresidential and Residential Development in the Coastal Counties. — All nonresidential development activities that occur within the Coastal Counties that will add more than 10,000 square feet of built upon area or that require a Sedimentation and Erosion Control Plan, pursuant to G.S. 113A-57 or a Coastal Area Management Act (CAMA) Major Development Permit, pursuant to G.S. 113A-118 and all residential development activities within the Coastal Counties that require a Sedimentation and Erosion Control Plan, pursuant to G.S. 113A-57 or a Coastal Area Management Act (CAMA) Major Development Permit, pursuant to G.S. 113A-118 shall manage stormwater runoff as provided in this subsection. A development activity or project requires a Sedimentation and Erosion Control Plan if the activity or project disturbs one acre or more of land, including an activity or project that disturbs less than one acre of land that is part of a larger common plan of development. Whether an activity or project that disturbs less than one acre of land is part of a larger common plan of development shall be determined in a manner consistent with the memorandum referenced as 'Guidance Interpreting Phase 2 Stormwater Requirements' from the Director of the Division of Water Quality of the Department of Environment and Natural Resources to Interested Parties dated 24 July 2006.

"(1) Development Near Outstanding Resource Waters (ORW). — Development activities within the Coastal Counties and located within 575 feet of the mean high waterline of areas designated by the Commission as Outstanding Resource Waters (ORW) shall meet the requirements of 15A NCAC 02H.1007 (Stormwater Requirements: Outstanding Resource Waters) and shall be permitted as follows:

"a. Low-Density Option. — Development shall be permitted pursuant to 15A NCAC 02H.1003(d)(1) if the development meets all of the following requirements:

"1. The development has a built upon area of twelve percent (12%) or less. A development project with an overall density at or below the low-density threshold, but containing areas with a density greater than the overall project density, shall be considered low-density as long as the project meets or exceeds the requirements for low-density development and locates the higher density development in upland areas and away from surface waters and drainageways to the maximum extent practicable.

"2. Stormwater runoff from the development is transported primarily by vegetated conveyances. As used in this sub-sub-subdivision, 'conveyance system' shall not include a stormwater collection system. Stormwater runoff from built upon areas that is directed to flow through any wetlands shall flow into and through these wetlands at a non-erosive velocity.

"3. The development contains a 50-foot-wide vegetative buffer for new development activities and a 30-foot-wide vegetative buffer for redevelopment activities. The width of a buffer is measured horizontally from the normal pool elevation of impounded structures, from the bank of each side of streams or rivers, and from the mean high waterline of tidal waters, perpendicular to the shoreline. The vegetative buffer may be cleared or graded, but must be planted with and maintained in grass or any other vegetative or plant material. The Division of Water Quality may, on a case-by-case basis, grant a minor variance from the vegetative buffer requirements of this section pursuant to the procedures set out in 15A NCAC 02B.0233(9)(b). Vegetative buffers and filters required by this section and any other buffers or filters required by State water quality or coastal management rules or local government requirements may be met concurrently and may contain, in whole or in part, coastal, isolated, or 404 jurisdictional wetlands that are located landward of the normal waterline.

"b. High-Density Option. — Development shall be permitted pursuant to 15A NCAC 02H.1003(d)(2) if the development meets all of the following requirements:

"1. The development has a built upon area of greater than twelve percent (12%).

"2. The development has no direct outlet channels or pipes to Class SA waters unless permitted in accordance with 15A NCAC 02H.0126. Stormwater runoff from built upon areas that is directed to flow through any wetlands shall flow into and through these wetlands at a non-erosive velocity.

"3. The development utilizes control systems that are any combination of infiltration systems, bioretention systems, constructed stormwater wetlands, sand filters, rain barrels, cisterns, rain gardens or alternative low impact development stormwater management systems designed in accordance with 15A NCAC 02H.1008 to control and treat the runoff from all surfaces generated by one and one-half inches of rainfall, or the difference in the stormwater runoff from all surfaces from the predevelopment and postdevelopment conditions for a one-year, 24-hour storm, whichever is greater. Wet detention ponds may be used as a stormwater control system to meet the requirements of this sub-sub-subdivision, provided that the stormwater control system fully complies with the requirements of this sub-subdivision. If a wet detention pond is used within one-half mile of Class SA waters, installation of a stormwater best management practice in series with the wet detention pond shall be required to treat the discharge from the wet detention pond. Secondary stormwater best management practices that are used in series with another stormwater best management practice do not require any minimum separation from the seasonal high water table. Alternatives as described in 15A NCAC 02H.1008(h) may also be approved if they meet the requirements of this sub-subdivision.

"4. Stormwater runoff from the development that is in excess of the design volume must flow overland through a vegetative filter designed in accordance with 15A NCAC 02H.1008 with a minimum length of 50 feet measured from mean high water of Class SA waters.

"5. The development contains a 50-foot-wide vegetative buffer for new development activities and a 30-foot-wide vegetative buffer for redevelopment activities. The width of a buffer is measured horizontally from the normal pool elevation of impounded structures, from the bank of each side of streams or rivers, and from the mean high waterline of tidal waters, perpendicular to the shoreline. The vegetative buffer may be cleared or graded, but must be planted with, and maintained in, grass or any other vegetative or plant material. Furthermore, stormwater control best management practices (BMPs), or stormwater control structures, with the exception of wet detention ponds, may be located within this vegetative buffer. The Division of Water Quality may, on a case by case basis, grant a minor variance from the vegetative buffer requirements of this section pursuant to the procedures set out in 15A NCAC 02B.0233(9)(b). Vegetative buffers and filters required by this section and any other buffers or filters required by State water quality or coastal management rules or local government requirements may be met concurrently and may contain, in whole or in part, coastal, isolated, or 404 jurisdictional wetlands that are located landward of the normal waterline.

"c. Stormwater Discharges Prohibited. — All development activities, including both low- and high-density projects, shall prohibit new points of stormwater discharge to Class SA waters or an increase in the volume of stormwater flow through conveyances or increase in capacity of conveyances of existing stormwater conveyance systems that drain to Class SA waters. Any modification or redesign of a stormwater conveyance system within the contributing drainage basin must not increase the net amount or rate of stormwater discharge through existing outfalls to Class SA waters. The following shall not be considered a direct point of stormwater discharge:

"1. Infiltration of the stormwater runoff from the design storm as described in sub-sub-subdivision 3. of sub-subdivision b. of subdivision (1) of this subsection.

"2. Diffuse flow of stormwater at a nonerosive velocity to a vegetated buffer or other natural area, that is capable of providing effective infiltration of the runoff from the design storm as described in sub-sub-subdivision 3. of sub-subdivision b. of subdivision (1) of this subsection. Notwithstanding the other requirements of this section, the infiltration mandated in this sub-sub-subdivision does not require a minimum separation from the seasonal high-water table.

"3. The discharge from a wet detention pond that is treated by a secondary stormwater best management practice, provided that both the wet detention pond and the secondary stormwater best management practice meet the requirements of this sub-subdivision.

"d. Limitation on the Density of Development. — Development shall be limited to a built upon area of twenty-five percent (25%) or less.

"(2) Development Near Class SA Waters. — Development activities within one-half mile of and draining to those waters classified by the Commission as Class SA waters or within one-half mile of waters classified by the Commission as Class SA waters and draining to unnamed freshwater tributaries to Class SA waters shall meet the requirements of sub-subdivisions a., b., and c. of subdivision (1) of this subsection. The extent of Class SA waters is limited to those waters that are determined to be at least an intermittent stream based on a site stream determination made in accordance with the procedures that are delineated in the Division of Water Quality's 'Identification Methods for the Origin of Intermittent and Perennial Streams' prepared pursuant to Session Law 2001-404.

"(3) Other Coastal Development. — Development activities within the Coastal Counties except those areas described in subdivisions (1) and (2) of this subsection shall meet all of the following requirements:

"a. Low-Density Option: Development shall be permitted pursuant to 15A NCAC 02H.1003(d)(1) if the development meets all of the following requirements:

"1. The development has a built upon area of twenty-four percent (24%) or less. A development project with an overall density at or below the low-density threshold, but containing areas with a density greater than the overall project density, shall be considered low density as long as the project meets or exceeds the requirements for low-density development and locates the higher density in upland areas and away from surface waters and drainageways to the maximum extent practicable.

"2. Stormwater runoff from the development is transported primarily by vegetated conveyances. As used in this sub-sub-subdivision, 'conveyance system' shall not include a stormwater collection system. Stormwater runoff from built upon areas that is directed to flow through any wetlands shall flow into and through these wetlands at a non-erosive velocity.

"3. The development contains a 50-foot-wide vegetative buffer for new development activities and a 30-foot-wide vegetative buffer for redevelopment activities. The width of a buffer is measured horizontally from the normal pool elevation of impounded structures, from the bank of each side of streams or rivers, and from the mean high waterline of tidal waters, perpendicular to the shoreline. The vegetative buffer may be cleared or graded, but must be planted with, and maintained in, grass or any other vegetative or plant material. The Division of Water Quality may, on a case-by-case basis, grant a minor variance from the vegetative buffer requirements of this section pursuant to the procedures set out in 15A NCAC 02B.0233(9)(b). Vegetative buffers and filters required by this section and any other buffers or filters required by State water quality or coastal management rules or local government requirements may be met concurrently and may contain, in whole or in part, coastal, isolated, or 404 jurisdictional wetlands that are located landward of the normal waterline.

"b. High-Density Option: Higher density developments shall be permitted pursuant to 15A NCAC 02H.1003(d)(2) if the development meets all of the following requirements:

"1. The development has a built upon area of greater than twenty-four percent (24%).

"2. The development uses control systems that are any combination of infiltration systems, wet detention ponds, bioretention systems, constructed stormwater wetlands, sand filters, rain barrels, cisterns, rain gardens or alternative stormwater management systems designed in accordance with 15A NCAC 02H.1008.

"3. Control systems must be designed to store, control, and treat the stormwater runoff from all surfaces generated by one and one-half inch of rainfall.

"4. Stormwater runoff from built upon areas that is directed to flow through any wetlands shall flow into and through these wetlands at a non-erosive velocity.

"5. A 50-foot-wide vegetative buffer for new development activities and a 30-foot-wide vegetative buffer for redevelopment activities. The width of a buffer is measured horizontally from the normal pool elevation of impounded structures, from the bank of each side of streams or rivers, and from the mean high waterline of tidal waters, perpendicular to the shoreline. The vegetative buffer may be cleared or graded, but must be planted with, and maintained in, grass or any other vegetative or plant material. Furthermore, stormwater control best management practices (BMPs), or stormwater control structures, with the exception of wet detention ponds, may be located within this vegetative buffer. The Division of Water Quality may, on a case by case basis, grant a minor variance from the vegetative buffer requirements of this section pursuant to the procedures set out in 15A NCAC 02B.0233(9)(b). Vegetative buffers and filters required by this section and any other buffers or filters required by State water quality or coastal management rules or local government requirements may be met concurrently and may contain, in whole or in part, coastal, isolated, or 404 jurisdictional wetlands that are located landward of the normal waterline.

"(4) Requirements for Structural Stormwater Controls. — Structural stormwater controls required under this section shall meet all of the following requirements:

"a. Remove an eighty-five percent (85%) average annual amount of Total Suspended Solids.

"b. For detention ponds, draw down the treatment volume no faster than 48 hours, but no slower than 120 hours.

"c. Discharge the storage volume at a rate equal to or less than the predevelopment discharge rate for the one-year, 24-hour storm.

"d. Meet the General Engineering Design Criteria set forth in 15A NCAC 02H.1008(c).

"e. For structural stormwater controls that are required under this section and that require separation from the seasonal high-water table, a minimum separation of two feet is required. Where a separation of two feet from the seasonal highwater table is not practicable, the Division of Water Quality may grant relief from the separation requirement pursuant to the Alternative Design Criteria set out in 15A NCAC 02H.1008(h). No minimum separation from the seasonal highwater table is required for a secondary stormwater best management practice that is used in a series with another stormwater best management practice.

"(5) Certain Wetlands Excluded From Density Calculation. — For the purposes of this section, areas defined as Coastal Wetlands under 15A NCAC 07H.0205, as measured landward from the normal high waterline, shall not be included in the overall project area to calculate impervious surface density. Wetlands that are not regulated as coastal wetlands pursuant to 15A NCAC 07H.0205 and that are located landward of the normal high waterline may be included in the overall project area to calculate impervious surface density.

"2.(c) Requirements for Limited Residential Development in Coastal Counties. — For residential development activities within the 20 Coastal Counties that are located within one-half mile and draining to Class SA waters, that have a built upon area greater than twelve percent (12%), that do not require a stormwater management permit under subsection (b) of this section, and that will add more than 10,000 square feet of built upon area, a one-time, nonrenewable stormwater management permit shall be obtained. The permit shall require recorded deed restrictions or protective covenants to be recorded on the property in the Office of the Register of Deeds in the county where the property is located prior to the issuance of a certificate of occupancy in order to ensure that the plans and specifications approved in the permit are maintained. Under this permit, stormwater runoff shall be managed using any one or combination of the following practices:

"(1) Install rain cisterns or rain barrels designed to collect all rooftop runoff from the first one and one-half inches of rain. Rain barrels and cisterns shall be installed in such a manner as to facilitate the reuse of the collected rain water on site and shall be installed in such a manner that any overflow from these devices is directed to a vegetated area in a diffuse flow. Construct all uncovered driveways, uncovered parking areas, uncovered walkways, and uncovered patios out of permeable pavement or other pervious materials.

"(2) Direct rooftop runoff from the first one and one-half inches of rain to an appropriately sized and designed rain garden. Construct all uncovered driveways, uncovered parking areas, uncovered walkways, and uncovered patios out of permeable pavement or other pervious materials.

"(3) Install any other stormwater best management practice that meets the requirements of 15A NCAC 02H.1008 to control and treat the stormwater runoff from all built upon areas of the site from the first one and one-half inches of rain.

"2.(d) Exclusions. — The requirements of this section shall not apply to any of the following:

"(1) Activities of the North Carolina Department of Transportation that are regulated in accordance with the provisions of the Department's National Pollutant Discharge Elimination System (NPDES) Stormwater Permit.

"(2) Development activities that are conducted pursuant to and consistent with one of the following authorizations, or any timely renewal thereof, shall be regulated by those provisions and requirements of 15A NCAC 02H.1005 that were effective at the time of the original issuance of the following authorizations:

"a. State Stormwater Permit issued under the provisions of 15A NCAC 02H.1005.

"b. Stormwater Certification issued pursuant to 15A NCAC 02H.1000 prior to 1 December 1995.

"c. A Coastal Area Management Act Major Permit.

"d. 401 Certification that contains an approved Stormwater Management Plan.

"e. A building permit pursuant to G.S. 153A-357 or G.S. 160A-417.

"f. A site-specific development plan as defined by G.S. 153A-344.1(b)(5) and G.S. 160A-385.1(b)(5).

"g. A phased development plan approved pursuant to G.S. 153A-344.1 or G.S. 160A-385.1 that shows:

"1. For the initial or first phase of development, the type and intensity of use for a specific parcel or parcels, including at a minimum, the boundaries of the project and a subdivision plan that has been approved pursuant to G.S. 153A-330 through G.S. 153A-335 or G.S. 160A-371 through G.S. 160A-376.

"2. For any subsequent phase of development, sufficient detail so that implementation of the requirements of this section to that phase of development would require a material change in that phase of the plan.

"h. A vested right to the development pursuant to common law.

"(3) Redevelopment activities that result in no net increase in built upon area and provide stormwater control equal to the previous development.

"(4) Development activities for which a complete Stormwater Permit Application has been accepted by the Division of Water Quality prior to the effective date of this act, shall be regulated by the provisions and requirements of 15A NCAC 02H.1005 that were effective at the time that this application was accepted as complete by the Division of Water Quality. For purposes of this subsection, a Stormwater Permit Application is deemed accepted as complete by the Division of Water Quality when the application is assigned a permit number in the Division's Basinwide Information Management System.

"(5) Development activities for which only a minor modification of a State Stormwater Permit is required shall be regulated by the provisions and requirements of 15A NCAC 02H.1005 that were effective at the time of the original issuance of the State Stormwater Permit. For purposes of this subsection, a minor modification of a State Stormwater Permit is defined as a modification that does not increase the net area of built upon area within the project site or does not increase the overall size of the stormwater controls that have been previously approved for that development activity.

"(6) Municipalities designated as a National Pollutant Discharge Elimination System (NPDES) Phase 2 municipality located within the 20 Coastal Counties until such time as the NPDES Phase 2 Stormwater Permit expires and is subject to renewal. Upon renewal of the

NPDES Phase 2 Stormwater Permits for municipalities located within the 20 Coastal Counties, the Department shall review the permits to determine whether the permits should be amended to include the provisions of this section.

"2.(e) Exemptions From Vegetative Buffer Requirements. — The following activities are exempt from the vegetative buffer requirements of this section:

"(1) Development in urban waterfronts that meets the requirements of 15A NCAC 07H.0209(g),

"(2) Development in a new urban waterfront area that meets the requirements of Session Law 2004-117,

"(3) Those activities listed in 15A NCAC 07H.0209(d)(10)(A) through 15A NCAC 07H.0209(d)(10)(H),

"(4) Those activities listed in 15A NCAC 07H.0209(d)(10)(A) through 15A NCAC 07H.0209(d)(10)(H),

"2.(f) Compliance with Other Rules. — In addition to the requirements specified in this section, activities regulated under this section must also comply with any requirements of any other applicable law or rule.

"3. Rescission of Phase 2 Designations. — All designations of local governments within the 20 Coastal Counties as Phase 2 municipalities by the Environmental Management Commission under Section 5 of Session Law 2006-246 that occurred after 16 August 2006 are rescinded. The provisions of this section do not preclude any future designations of these areas as Phase 2 municipalities by the Environmental Management Commission under Section 5 of Session Law 2006-246."

Session Laws 2008-211, s. 4(a), effective August 9, 2008, provides: "4.(a) Additional Rule Making. — The Commission may adopt rules to replace the rules that are disapproved or superseded as provided in Section 1 of this act. If the Commission adopts rules pursuant to this section, notwithstanding G.S. 150B-19(4), the rules shall be substantively identical to the provisions of Section 2 of this act. The Commission may reorganize or renumber any of the rules to which this section applies at its discretion. Rules adopted pursuant to this section are not subject to G.S. 150B-21.9 through G.S. 150B-21.14. Rules adopted pursuant to this section shall become effective as provided in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2)."

Session Laws 2008-211, s. 4(b), as added by Session Laws 2008-198, s. 5, effective August 8, 2008, provides: "4.(b) Temporary Limitation on Additional Rule Making. —

"(1) In order to provide sufficient time for full implementation of this act, to provide sufficient time for accumulation and evaluation of data as to the effect of implementation of this act on coastal water quality, to provide time for additional scientific study of factors that impact coastal water quality, to allow for the development of proposals for improvements to the provisions of Section 2 of this act based on careful consideration of the foregoing, and to provide a period of predictability for persons who may be affected by the provisions of Section 2 of this act; except as may be specifically required by federal law and except as provided in subsection (a) of this section; the Environmental Management Commission shall not begin a procedure to adopt any additional temporary or permanent rule governing the management of stormwater runoff in the Coastal Counties pursuant to subdivisions (1) and (3) of G.S. 143-214.7(b) prior to 1 October 2011.

"(2) Before the Environmental Management Commission begins a procedure to adopt any additional temporary or permanent rule governing the management of stormwater runoff in the Coastal Counties pursuant to subdivisions (1) and (3) of G.S. 143-214.7(b), the Environmental Management Commission shall submit a report to the Environmental Review Commission that details the effect of the implementation of Section 2 of this act on coastal water quality. The report shall include information on improvements in coastal water quality, remaining deficiencies in coastal water quality, and the measures that the Environmental Management Commission believes may be necessary to maintain and further improve coastal water quality.

"(3) Any additional rules that the Environmental Management Commission may adopt governing the management of stormwater runoff in the Coastal Counties pursuant to subdivisions (1) and (3) of G.S. 143-214.7(b) shall not become effective prior to 1 October 2013.

"(4) If the Environmental Management Commission adopts a temporary or permanent rule pursuant to the authority of any provision of State law other than subdivisions (1) and (3) of G.S. 143-214.7(b) that governs the management of stormwater runoff in the Coastal Counties, the provisions of that rule shall not apply within the Coastal Counties until 1 October 2011 except as may be specifically required by federal law and except as provided in subsection (a) of this section."

Session Laws 2008-211, ss. 5, 7 and 8, effective August 9, 2008, provide: "5. Construction of Act. —

"(1) Except as specifically provided in Section 4 of this act, nothing in this act shall be construed to limit, expand, or otherwise alter the authority of the Environmental Management Commission or any unit of local government.

"(2) This act shall not be construed to affect any delegation of any power or duty by the Commission to the Department or subunit of the Department.

"(3) As used in subsection (b) of Section 2 of this act, the phrase 'common plan of development' shall be interpreted and implemented in a manner consistent with the memorandum referenced as 'Guidance Interpreting Phase 2 Stormwater Requirements' from the Director of the Division of Water Quality of the Department of Environment and Natural Resources to Interested Parties dated 24 July 2006, and for these purposes the memorandum shall be considered a part of this act and as such shall be printed as a part of the Session Laws.

"7. Provisions of Act Not Codified; Set Out As Note. — Notwithstanding G.S. 164-10, the Revisor of Statutes shall not codify any of the provisions of this act. The Revisor of Statutes shall set out the text of this act as a note to G.S. 143-214.7 and may make notes concerning this act to other sections of the General Statutes as the Revisor of Statutes deems appropriate.

"8. Effective Date. — Subsection (b) of Section 1 of this act and Sections 2 and 3 of this act become effective 1 October 2008. All other sections of this act are effective when this act becomes law [August 9, 2008]."

**Management of Water Quality in the Jordan Watershed.** — Session Laws 2009-216, s. 9, as amended by Session Laws 2009-484, s. 8, provides, in part, that the Revisor of Statutes shall set out the text of Session Laws 2009-216, ss. 3-6, as a note to G.S. 143-214.7. Sections 1 and 3 through 8 of Session Laws 2009-216, as amended by Session Laws 2009-484, ss. 6(b), (c), 7, and 8, effective June 30, 2009, provide: "SECTION 1. Definitions. — The following definitions apply to this act and its implementation:

"(1) The definitions set out in G.S. 143-212 and G.S. 143-213.

"(2) The definitions set out in 15A NCAC 02B.0262 (Jordan Water Supply Nutrient Strategy: Purpose and Scope) and 15A NCAC 02B.0263 (Jordan Water Supply Nutrient Strategy: Definitions).

"(3) 'Existing Development Rule 15A NCAC 02B.0266' means 15A NCAC 02B.0266 (Jordan Water Supply Nutrient Strategy: Stormwater Management for Existing Development), adopted by the Commission on May 8, 2008, and approved by the Rules Review Commission on November 20, 2008.

"(4) 'Wastewater Discharge Rule 15A NCAC 02B.0270' means 15A NCAC 02B.0270 (Jordan Water Supply Nutrient Strategy: Wastewater Discharge Requirements) adopted by the Commission on May 8, 2008, and approved by the Rules Review Commission on October 16, 2008.

"SECTION 3.(a) Existing Development Rule 15A NCAC 02B.0266 Disapproved. — Pursuant to G.S. 150B-21.3(b1), Existing Development Rule 15A NCAC 02B.0266, as adopted by the Environmental Management Commission on May 8, 2008, and approved by the Rules Review Commission on November 20, 2008, is disapproved.

"(b) References in the North Carolina Administrative Code to the rule cited in Section 3(a) of this act shall be deemed to refer to the equivalent provisions of this act.

"(c) Nutrient Monitoring. — The Department shall maintain an ongoing program to monitor water quality in each arm of Jordan Reservoir. The Department shall also accept water quality sampling data from a monitoring program implemented by a local government or nonprofit organization if the data meets quality assurance standards established by the Department. On March 1, 2014, the Department shall report the results of monitoring in each arm of Jordan Reservoir to the Environmental Review Commission. The Department shall submit an updated monitoring report under this section every three years thereafter until such time as the lake is no longer impaired by nutrient pollution.

"(d) Control of Nutrient Loading From Existing Development. — The Department shall require implementation of reasonable nutrient load reduction measures for existing development in each subwatershed of the Jordan Reservoir, as provided in this act. The Department shall determine whether nutrient load reduction measures for existing development are necessary in each subwatershed of Jordan Reservoir and require implementation of reasonable nutrient reduction measures in accordance with an adaptive management program as follows:

"(1) Stage 1 Adaptive Management Program to Control Nutrient Loading From Existing Development. —

"a. Municipalities and counties located in whole or in part in the Jordan watershed shall implement a Stage 1 adaptive management program to control nutrient loading from existing development in the Jordan watershed. The Stage 1 adaptive management program shall meet the requirements set out in 40 C.F.R. § 122.34 as applied by the Department in the NPDES General Permit for municipal separate storm sewer systems in effect on July 1, 2009. The Stage 1 adaptive management program shall include all of the following measures:

"1. A public education program to inform the public of the impacts of nutrient loading and measures that can be implemented to reduce nutrient loading from stormwater runoff from existing development.

"2. A mapping program that includes major components of the municipal separate storm sewer system, including the location of major outfalls, as defined in 40 Code of Federal Regulations § 122.26(b)(5)(July 1, 2008) and the names and location of all waters of the United States that receive discharges from those outfalls, land use types, and location of sanitary sewers.

"3. A program to identify and remove illegal discharges.

"4. A program to identify opportunities for retrofits and other projects to reduce nutrient loading from existing developed lands.

"5. A program to ensure maintenance of best management practices implemented by the local government.

"b. The Department shall accept local government implementation of another stormwater program or programs meeting the standards set out in this section as satisfying one or more of the requirements set forth in sub-subdivision a. of this subdivision. The local government shall provide technical information sufficient to demonstrate the adequacy of the alternative program or program elements.

"c. A Stage 1 adaptive management program to control nutrient loading from existing development shall be implemented as follows:

1. No later than December 31, 2009, each local government shall submit its Stage 1 adaptive management program to the Commission for review and approval.

"2. Within six months following submission of a Stage 1 adaptive management program, the Department shall recommend that the Commission approve or disapprove the program. The Commission shall either approve the program or require changes based on the standards set out in sub-subdivision a. of this subdivision. If the Commission requires changes, the local government shall submit revisions responding to the required changes within two months and the Department shall provide follow-up recommendations to the Commission within two months after receiving revisions.

"3. Within three months following Commission approval of a Stage 1 adaptive management program, the local government shall begin implementation of the program. Each local government shall report annually to the Department on implementation of its program.

"(2) Stage 2 Adaptive Management Program to Control Nutrient Loading From Existing Development. —

"a. If the March 1, 2014 monitoring report or any subsequent monitoring report for the Upper New Hope Creek Arm of Jordan Reservoir required under Section 3(c) of this act shows that nutrient-related water quality standards are not being achieved, a municipality or county located in whole or in part in the subwatershed of that arm of Jordan Reservoir shall develop and implement a Stage 2 adaptive management program to control nutrient loading from existing development within the subwatershed, as provided in this act. If the March 1, 2017 monitoring report or any subsequent monitoring report for the Haw River Arm or the Lower New Hope Creek Arm of Jordan Reservoir required under Section 3(c) of this act shows that nutrient-related water quality standards are not being achieved, a municipality or county located in whole or in part in the subwatershed of that arm of Jordan Reservoir shall develop and implement a Stage 2 adaptive management program to control nutrient loading from existing development within the subwatershed, as provided in this act. The Department shall defer development and implementation of Stage 2 adaptive management programs to control nutrient loading from existing development required in a subwatershed by this subdivision if it determines that additional reductions in nutrient loading from existing development in that subwatershed will not be necessary to achieve nutrient-related water quality standards. In making this determination, the Department shall consider the anticipated effect of measures implemented or scheduled to be implemented to reduce nutrient loading from sources in the subwatershed other than existing development. If any subsequent monitoring report for an arm of Jordan Reservoir required under Section 3(c) of this act shows that nutrient-related water quality standards have not been achieved, the Department shall notify the municipalities and counties located in whole or in part in the subwatershed of that arm of Jordan Reservoir and the municipalities and counties shall develop and implement a Stage 2 adaptive management program as provided in this subdivision.

"b. The Department shall establish a load reduction goal for existing development for each municipality and county required to implement a Stage 2 adaptive management program to control nutrient loading from existing development. The load reduction goal shall be designed to achieve, relative to the baseline period 1997 through 2001, an eight percent (8%) reduction in nitrogen loading and a five percent (5%) reduction in phosphorus loading reaching Jordan Reservoir from existing developed lands within the police power jurisdiction of the local government. The baseline load shall be calculated by applying the Tar-Pamlico Nutrient Export Calculation Worksheet, Piedmont Version, dated October 2004, to acreages of different types of existing development within the police power jurisdiction of the local government during the baseline period. The baseline load may also be calculated using an equivalent or more accurate method acceptable to the Department and recommended by the Scientific Advisory Board established pursuant to Section 4(a) of this act. The baseline load for a municipality or county shall not include nutrient loading from lands under State or federal control or lands in agriculture or forestry. The load reduction goal shall be adjusted to account for nutrient loading increases from lands developed subsequent to the baseline period but prior to implementation of new development stormwater programs.

"c. Based on findings under sub-subdivision a. of this subdivision, the Department shall notify the local governments in each subwatershed that either:

"1. Implementation of a Stage 2 adaptive management program to control nutrient loading from existing development will be necessary to achieve water quality standards in an arm of the reservoir and direct the municipalities and counties in the subwatershed to develop a load reduction program in compliance with this section.

"2. Implementation of a Stage 2 adaptive management program to control nutrient loading from existing development is not necessary at that time but will be reevaluated in three years based on the most recent water quality monitoring information.

"d. A local government receiving notice of the requirement to develop and implement a Stage 2 adaptive management program to control nutrient loading from existing development under this section shall not be required to submit a program if the local government demonstrates that it has already achieved the reductions in nutrient loadings required by sub-subdivision b. of this subdivision.

"e. Within six months after receiving notice to develop and implement a Stage 2 adaptive management program to control nutrient loading from existing development, each local government shall submit to the Commission a program that is designed to achieve the reductions in nutrient loadings established by the Department pursuant to sub-subdivision b. of this subdivision. A local government program may include nutrient management strategies that are not included in the model program developed pursuant to Section 3(e) of this act in addition to or in place of any component of the model program. In addition, a local government may satisfy the requirements of this subdivision through reductions in nutrient loadings from other sources in the same subwatershed to the extent those reductions go beyond measures otherwise required by statute or rule. A local government may also work with other local governments within the same subwatershed to collectively meet the required reductions in nutrient loadings from existing development within their combined jurisdictions. Any credit for reductions achieved or obtained outside of the police power jurisdiction of a local government shall be adjusted based on transport factors established by the Department document Nitrogen and Phosphorus Delivery from Small Watersheds to Jordan Lake, dated June 30, 2002.

"f. Within six months following submission of a local government's Stage 2 adaptive management program to control nutrient loading from existing development, the Department shall recommend that the Commission approve or disapprove the program. The Commission shall approve the program if it meets the requirements of this subdivision, unless the Commission finds that the local government can, through the implementation of reasonable and cost-effective measures not included in the proposed program, meet the reductions in nutrient loading established by the Department pursuant to sub-subdivision b. of this subdivision by a date earlier than that proposed by the local government. If the Commission finds that there are additional or alternative reasonable and cost-effective measures, the Commission may require the local government to modify its proposed program to include such measures to achieve the required reductions by the earlier date. If the Commission requires such modifications, the local government shall submit a modified program within two months. The Department shall recommend that the Commission approve or disapprove the modified program within three months after receiving the local government's modified program. In determining whether additional or alternative load reduction measures are reasonable and cost effective, the Commission shall consider factors including, but not limited to, the increase in the per capita cost of a local government's stormwater management program that would be required to implement such measures and the cost per pound of nitrogen and phosphorus removed by such measures. The Commission shall not require additional or alternative measures that would require a local government to:

"1. Install or require installation of a new stormwater collection system in an area of existing development unless the area is being redeveloped.

"2. Acquire developed private property.

"3. Reduce or require the reduction of impervious surfaces within an area of existing development unless the area is being redeveloped.

"g. Within three months after the Commission's approval of a Stage 2 adaptive management program to control nutrient loading from existing development, the local government shall complete adoption and begin implementation of its program.

"h. Each local government implementing a Stage 2 adaptive management program to control nutrient loading from existing development shall submit an annual report to the Department summarizing its activities in implementing its program.

"i. If at any time the Department finds, based on water quality monitoring, that an arm of the Jordan Reservoir has achieved compliance with water quality standards, the Department shall notify the local governments in the subwatershed. Subject to the approval of the Commission, a local government may modify its Stage 2 adaptive management program to control nutrient loading from existing development to maintain only those measures necessary to prevent increases in nutrient loading from existing development.

"(e) Model Stage 2 Adaptive Management Program to Control Nutrient Loading From Existing Development. — No later than July 1, 2013, the Department shall submit a model Stage 2 adaptive management program to control nutrient loading from existing development to the Commission for approval. The model program shall identify specific load reduction practices and programs and reduction credits associated with each practice or program and shall provide that a local government may obtain additional or alternative load-reduction credits based on site-specific monitoring data. In developing the model program, the Department shall consider the findings and recommendations of the Scientific Advisory Board established pursuant to Section 4(a) of this act and comments submitted by municipalities and counties identified in 15A NCAC 02B.0262(7)(Jordan Water Supply Nutrient Strategy: Purpose and Scope). The Commission shall review the model program and either approve the program or return it to the Department with requested changes. The Department shall revise the model program to address changes requested by the Commission. The Commission shall approve a final model program no later than December 31, 2013.

"(f) Additional Measures to Reduce Nitrogen Loading From Existing Development in the Upper New Hope Creek Arm of the Jordan Reservoir. — If the March 1, 2023, monitoring report or any subsequent monitoring report for the Upper New Hope Creek Arm of Jordan Reservoir shows that nutrient-related water quality standards are not being achieved, a municipality or county located in whole or in part in the Upper New Hope Creek Subwatershed shall modify its Stage 2 adaptive management program to control nutrient loading from existing development to achieve additional reductions in nitrogen loading from existing development. The modified Stage 2 adaptive management program shall be designed to achieve a total reduction in nitrogen loading from existing development of thirty-five percent (35%) relative to the baseline period 1997 through 2001. The Department shall notify local governments of the requirement to submit a modified Stage 2 adaptive management program. Submission, review and approval, and implementation of a modified Stage 2 adaptive management program shall follow the process, timeline, and standards set out in sub-subdivisions e. through g. of subdivision (2) of Section 3(d) of this act.

"(g) Enforcement. — The Department shall enforce the provisions of this act as provided in G.S. 143-215.6A, 143-215.6B, and 143-215.6C.

"(h) Collective Compliance. — Local governments that are subject to regulation under this act may establish collective programs to comply with the requirements of this act.

"(i) Report. — The Department shall report annually to the Commission regarding the implementation of adaptive management programs to control nutrient loading from existing development in the Jordan watershed.

"(j) Additional Rule-Making Authority. — The Commission shall adopt a rule to replace Sections 3(c) through 3(i) of this act. Notwithstanding G.S. 150B-19(4), the rule adopted by the Commission pursuant to this section shall be substantively identical to the provisions of Sections 3(c) through 3(f) of this act. Rules adopted pursuant to this section are not subject to G.S. 150B-21.9 through G.S. 150B-21.14. Rules adopted pursuant to this section shall become effective as provided in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2).

"(k) Sections 3(c) through 3(i) of this act expire on the date that rules adopted pursuant to Section 3(j) of this act become effective.

"(*l*) No Change to Existing Regulatory Authority. — Nothing in this act shall be construed to limit, expand, or modify the authority of the Commission to undertake alternative regulatory actions otherwise authorized by State or federal law, including, but not limited to, the reclassification of waters of the State pursuant to G.S. 143-214.1, the revision of water quality standards pursuant to G.S. 143-214.3, and the granting of variances pursuant to G.S. 143-215.3."

"SECTION 4.(a) Scientific Advisory Board for Nutrient-Impaired Waters Established. — No later than July 1, 2010, the Secretary shall establish a Nutrient Sensitive Waters Scientific Advisory Board. The Scientific Advisory Board shall consist of no fewer than five and no more than 10 members with the following expertise or experience:

"(1) Representatives of one or more local governments in the Jordan Reservoir watershed. Local government representatives shall have experience in stormwater management, flood control, or management of a water or wastewater utility.

"(2) One member with at least 10 years of professional or academic experience relevant to the management of nutrients in impaired water bodies and possessing a graduate degree in a related scientific discipline, such as aquatic science, biology, chemistry, geology, hydrology, environmental science, engineering, economics, or limnology.

"(3) One professional engineer with expertise in stormwater management, hydrology, or flood control.

"(4) One representative of the Department of Transportation with expertise in stormwater management.

"(5) One representative of a conservation organization with expertise in stormwater management, urban landscape design, nutrient reduction, or water quality.

"(b) Duties. — No later than July 1, 2012, the Scientific Advisory Board shall do all of the following:

"(1) Identify management strategies that can be used by local governments to reduce nutrient loading from existing development.

"(2) Evaluate the feasibility, costs, and benefits of implementing the identified management strategies.

"(3) Develop an accounting system for assignment of nutrient reduction credits for the identified management strategies.

"(4) Identify the need for any improvements or refinements to modeling and other analytical tools used to evaluate water quality in nutrient-impaired waters and nutrient management strategies.

"(c) Report; Miscellaneous Provisions. — The Scientific Advisory Board shall also advise the Secretary on any other issue related to management and restoration of nutrient-impaired water bodies. The Scientific Advisory Board shall submit an annual report to the Secretary no later than July 1 of each year concerning its activities, findings, and recommendations. Members of the Scientific Advisory Board shall be reimbursed for reasonable travel expenses to attend meetings convened by the Department for the purposes set out in this section.

"SECTION 5.(a) Definition. — As used in this section, "New Development Rule 15A NCAC 02B.0265" means 15A NCAC 02B.0265 (Jordan Water Supply Nutrient Strategy: Stormwater Management for New Development) adopted by the Commission on May 8, 2008, and approved by the Rules Review Commission on November 20, 2008.

"(b) New Development Rule 15A NCAC 02B.0265. — Until the effective date of the revised permanent rule that the Commission is required to adopt pursuant to Section 5(d) of this act, the Commission and the Department shall implement New Development Rule 15A NCAC 02B.0265, as provided in Section 5(c) of this act.

"(c) Implementation. — Notwithstanding sub-subdivision (vii) of sub-subdivision (a) of subdivision (3) of New Development Rule 15A NCAC 02B.0265, New Development Rule 15A NCAC 02B.0265 shall be implemented as follows:

"(1) New development that would exceed the nitrogen or phosphorus loading rate targets set out in sub-subdivision (i) of sub-subdivision (a) of subdivision (3) of New Development Rule 15A NCAC 02B.0265 without the use of engineered stormwater controls and that is not subject to more stringent stormwater requirements under S.L. 2006-246 or rules adopted pursuant to G.S. 143-214.5 shall have engineered stormwater controls that meet the design requirements set out in sub-subdivision (iv) of sub-subdivision (a) of subdivision (3) of New Development Rule 15A NCAC 02B.0265 and achieve eighty-five percent (85%) removal of total suspended solids.

"(2) A developer may offset part of the nitrogen and phosphorus load from a new development by implementing or funding off-site management measures in accordance with this subdivision. New development shall comply with requirements for engineered stormwater controls as set out in this act and in New Development Stormwater Rule 15A NCAC 02B.0265. On-site stormwater controls shall achieve a maximum nitrogen loading rate that does not exceed six pounds per acre per year for single-family detached and duplex residential development and 10 pounds per acre per year for other development, including multifamily residential, commercial, and industrial. Off-site management measures may be used to offset the difference between the nitrogen and phosphorus loading rates achieved through compliance with the stormwater control requirements of this act and the loading rate targets set out in sub-subdivision (i) of sub-subdivision (a) of subdivision (3) of New Development Rule 15A NCAC 02B.0265. Off-site offsetting measures shall achieve at least the reduction in nitrogen and phosphorus loading equivalent to the remaining reduction needed to comply with the loading rate targets set out in sub-subdivision (i) of sub-subdivision (a) of subdivision (3) of New Development Rule 15A NCAC 02B.0265. A developer may make offset payments to the North Carolina Ecosystem Enhancement Program contingent upon acceptance of payments by that Program. A developer may use an offset option provided by the local government in which the development activity occurs. A developer may propose other offset measures to the local government, including providing his or her own off-site offset or utilizing a private seller. All offset measures identified above shall meet the requirements of subdivisions (2) through (4) of 15A NCAC 02B.0273.

"(d) Additional Rule-Making Authority. — The Commission shall adopt a rule to replace New Development Rule 15A NCAC 02B.0265. Notwithstanding G.S. 150B-19(4), the rule adopted by the Commission pursuant to this section shall be substantively identical to the provisions of Section 5(c) of this act. Rules adopted pursuant to this section are not subject to G.S. 150B-21.9 through G.S. 150B-21.14. Rules adopted pursuant to this section shall become effective as provided in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2).

"(e) Sunset. — Section 5(c) of this act expires on the date that rules adopted pursuant to Section 5(d) of this act become effective.

"SECTION 6.(a) Definitions. — The following definitions apply to this section and its implementation:

"(1) The definitions set out in G.S. 143-212 and G.S. 143-213.

"(2) The definitions set out in 15A NCAC 02B.0262 (Jordan Water Supply Nutrient Strategy: Purpose and Scope) and 15A NCAC 02B.0263 (Jordan Water Supply Nutrient Strategy: Definitions).

"(3) 'State and Federal Rule 15A NCAC 02B.0271' means 15A NCAC 02B.0271 (Jordan Water Supply Nutrient Strategy: Stormwater Requirements for State and Federal Entities), adopted by the Commission on May 8, 2008, and approved by the Rules Review Commission on October 16, 2008.

"(4) 'Riparian Buffer Rule 15A NCAC 02B.0267' means 15A NCAC 02B.0267 (Jordan Water Supply Nutrient Strategy: Protection of Existing Riparian Buffers), adopted by the Commission on May 8, 2008, and approved by the Rules Review Commission on November 20, 2008.

"(b) State and Federal Rule 15A NCAC 02B.0271. — Until the effective date of the revised permanent rule that the Commission is required to adopt pursuant to Section 6(d) of this act, the Commission and the Department shall implement the State and Federal Rule 15A NCAC 02B.0271, as provided in Section 6(c) of this act.

"(c) Implementation. — Notwithstanding State and Federal Rule 15A NCAC 02B.0271, the Commission shall implement the State and Federal Rule 15A NCAC 02B.0271 as follows:

"(1) The load reduction goal for existing North Carolina Department of Transportation roadway and nonroadway development shall be established as provided in this subdivision. The load reduction goal shall be designed to achieve, relative to the baseline period 1997 through 2001, an eight percent (8%) reduction in nitrogen loading and a five percent (5%) reduction in phosphorus loading reaching Jordan Reservoir from existing roadway and nonroadway development in the Upper New Hope and Haw subwatersheds. The load reduction goal for the Lower New Hope arm shall be designed to maintain no increases in nitrogen and phosphorus loads from existing roadway and nonroadway development relative to the baseline period 1997 through 2001. Load reduction goals for each subwatershed shall be calculated from baseline loads for existing North Carolina Department of Transportation development present during the baseline period. Baseline loads shall be established for roadways and industrial facilities using stormwater runoff nutrient load characterization data collected through the National Pollutant Discharge Elimination System (NPDES) Research Program under NCS0000250 Permit Part II Section G. Baseline loads for other nonroadway development shall be calculated by applying the Tar-Pamlico Nutrient Export Calculation Worksheet, Piedmont Version, dated October 2004, to acreages of nonroadway development under the control of North Carolina Department of Transportation during the baseline period. The baseline load for other nonroadway development may also be calculated using an equivalent or more accurate method acceptable to the Department and recommended by the Scientific Advisory Board established pursuant to Section 4(a) of S.L. 2009-216. The load reduction goal shall be adjusted to account for nutrient loading increases from existing roadway and nonroadway development subsequent to the baseline period but prior to implementation of new development stormwater programs pursuant to 15A NCAC 02B.0271(4)(c).

"(2) Sub-subdivision (b) of subdivision (3) and sub-subdivision (d) of subdivision (4) of State and Federal Rule 15A NCAC 02B.0271 shall be implemented as follows:

"a. If the March 1, 2014, monitoring report or any subsequent monitoring report for the Upper New Hope Creek Arm of Jordan Reservoir required under Section 3(c) of S.L. 2009-216 shows that nutrient-related water quality standards are not being achieved, State and federal entities shall develop and implement a program to control nutrient loading from existing development within the subwatershed, as provided in this section and State and Federal Rule 15A NCAC 02B.0271. If the March 1, 2017, monitoring report or any subsequent monitoring report for the Haw River Arm or the Lower New Hope Creek Arm of Jordan Reservoir required under Section 3(c) of S.L. 2009-216 shows that nutrient-related water quality standards are not being achieved, State and federal entities shall develop and implement a program to control nutrient loading from existing development within the subwatershed, as provided in this section and State and Federal Rule 15A NCAC 02B.0271. The Department shall defer development and implementation of a program to control nutrient loading from existing development required in a subwatershed by this sub-subdivision if it determines that additional reductions in nutrient loading from existing development in that subwatershed will not be necessary to achieve nutrient-related water quality standards. In making this determination, the Department shall consider the anticipated effect of measures implemented or scheduled to be implemented to reduce nutrient loading from sources in the subwatershed other than existing development. If any subsequent monitoring report for an arm of Jordan Reservoir required under Section 3(c) of S.L. 2009-216 shows that nutrient-related water quality standards have not been achieved, the Department shall notify each State and federal entity, and each entity shall develop and implement a program to control nutrient loading from existing development as provided in this section and State and Federal Rule 15A NCAC 02B.0271.

"b. If the Commission requires additional reductions in nutrient loading from local governments pursuant to Section 3(f) of S.L. 2009-216, the Commission shall require State and federal entities to modify their nutrient reduction programs for the Upper New Hope Creek subwatershed to achieve a total reduction in nitrogen loading from existing roadway and nonroadway development in nitrogen loading from existing development of thirty-five percent (35%) relative to the baseline period 1997-2001.

"(3) Notwithstanding sub-subdivision (d) of subdivision (4) of State and Federal Rule 15A NCAC 02B.0271, the North Carolina Department of Transportation may achieve the nutrient load reduction goal in subdivision (1) of this section for existing roadway and nonroadway development under its control by development of a load reduction program that addresses both roadway and nonroadway development in the watershed for each arm of Jordan Reservoir. A combined program to address roadway and nonroadway development may include stormwater retrofits and other load-reducing measures in the watershed including, but not limited to, illicit discharge removal; street sweeping; source control activities such as pet waste reduction and fertilizer management at NCDOT facilities; improvement of existing stormwater structures; alternative stormwater practices such as use of rain barrels and cisterns; stormwater capture and reuse; and purchase of nutrient reduction credits. NCDOT may meet minimum implementation rate and schedule requirements by implementing a combination of three stormwater retrofits per year for existing roadway development in the Jordan Lake watershed and other load-reducing measures identified in the program to control nutrient loading from existing development developed pursuant to State and Federal Entities Rule 15A NCAC 02B.0271 and this act and approved by the Commission.

"(d) Additional Rule-Making Authority. — The Commission shall adopt a rule to replace State and Federal Rule 15A NCAC 02B.0271. Notwithstanding G.S. 150B-19(4), the rule adopted by the Commission pursuant to this section shall be substantively identical to the provisions of Section 6(c) of this act. Rules adopted pursuant to this section are not subject to G.S. 150B-21.9 through G.S. 150B-21.14. Rules adopted pursuant to this section shall become effective as provided in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2).

"(e) Sunset. — Section 6(c) of this act expires on the date that rules adopted pursuant to Section 6(d) of this act become effective.

"(f) Riparian Buffer Rule 15A NCAC 02B.0267. — Until the effective date of the revised permanent rule that the Commission is required to adopt pursuant to Section 6(h) of this act, the Commission and the Department shall implement the Riparian Buffer Rule 15A NCAC 02B.0267, as provided in Section 6(g) of this act.

"(g) Implementation. — Notwithstanding Riparian Buffer Rule 15A NCAC 02B.0267, the Commission shall implement Riparian Buffer Rule 15A NCAC 02B.0267 as provided in this section.

"(1) For purposes of implementing Riparian Buffer Rule 15A NCAC 02B.0267, the Commission may only use one of the following types of maps for purposes of identifying a water body subject to the riparian buffer protection requirements of Riparian Buffer Rule 15A NCAC 02B.0267:

"a. The most recent version of the soil survey map prepared by the Natural Resources Conservation Service of the United State Department of Agriculture.

"b. The most recent version of the 1:24,000 scale (7.5 minute) quadrangle topographic maps prepared by the United States Geological Survey.

"c. A map approved by the Geographic Information Coordinating Council and by the Commission. Prior to approving a map under this sub-subdivision, the Commission shall provide a 30-day public notice and opportunity for comment.

"(2) Alternative maps approved by the Commission under subdivision (1) of this section shall not be used for buffer delineation on projects that are existing and ongoing within the meaning of subdivision (6) of Riparian Buffer Rule 15A NCAC 02B.0267.

"(3) Sub-subdivision a. of subdivision (4) of Riparian Buffer Rule 15A NCAC 02B.0267 shall be interpreted to prohibit only those activities conducted outside the buffer that have the effect of altering the hydrology in violation of the diffuse flow requirements set out in subdivision (8) of Riparian Buffer Rule 15A NCAC 02B.0267.

"(h) Additional Rule-Making Authority. — The Commission shall adopt a rule to replace Riparian Buffer Rule 15A NCAC 02B.0267. Notwithstanding G.S. 150B-19(4), the rule adopted by the Commission pursuant to this section shall be substantively identical to the provisions of Section 6(g) of this act. Rules adopted pursuant to this section are not subject to G.S. 150B-21.9 through G.S. 150B-21.14. Rules adopted pursuant to this section shall become effective as provided in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2).

"(i) Sunset. — Section 6(g) of this act expires on the date that rules adopted pursuant to Section 6(h) of this act become effective.

"SECTION 7. No Preemption. — A local government may adopt and implement a stormwater management program that contains provisions that are more restrictive than the standards set forth in Sections 2, 3, and 5 of this act or in any rules concerning stormwater management in the Jordan watershed adopted by the Commission. This section shall not be construed to authorize a local government to impose stormwater management requirements on lands in agriculture or forestry.

"SECTION 8. Construction of Act. —

"(1) Except as specifically provided in Sections 2(c), 3(j), 5(d), and 6(h) of this act, nothing in this act shall be construed to limit, expand, or otherwise alter the authority of the Commission or any unit of local government.

"(2) This act shall not be construed to affect any delegation of any power or duty by the Commission to the Department or subunit of the Department."

**Editor's Note.** — Session Laws 2007-323, s. 6.22, which added subsection (d2), was repealed by Session Laws 2008-198, s. 8(a), effective August 8, 2008. As a result, subsection (d2), which was to be effective October 1, 2008, never took effect.

For provisions regarding the implementation of the "Tar-Pamlico River Basin-Nutrient Sensitive Waters Management Strategy: Agricultural Nutrient Control Strategy," see Editor's note under G.S. 143-214.1.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Subsection (d1), added by Session Laws 2004-124 s. 6.29(a), effective January 1, 2005, is applicable only to a retail merchant that first opens a retail premises for business on or after that date or that submits an application for a building permit for the construction or renovation of a retail premises after that date.

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2004-163, s. 15, as amended by Session Laws 2006-246, s. 1(b), provides: "This act is effective when it becomes law and expires 1 July 2006."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2008-107, s. 25.18(a)-(c), provides: "(a) Of funds available to the Department of Transportation, the Department, in cooperation with the Center for Transportation and the Environment at North Carolina State University, shall conduct a pilot study on 50 bridges, located throughout the State in various ecosystems, of the installation of various types of storm water detention, collection, and filtering systems during new bridge construction over waterways. The Department may also retrofit existing bridges as part of its pilot study. Treatments and methods used in the pilot study shall include but not be limited to those treatments found effective by other states and new treatments identified through investigation and research which may be effective. Construction or retrofitting shall be initiated on at least 25 of the 50 bridges by July 1, 2009. Construction or retrofitting shall be initiated on the remaining bridge projects by January 1, 2010.

"(b) An interim report shall be made to the Joint Legislative Transportation Oversight Committee no later than July 1, 2009, that includes information which quantifies stormwater runoff at structures as well as the types of pollutants, the various treatments which will be constructed and evaluated to target these pollutant types, and a measurement and collection plan to determine effectiveness of the evaluated treatments.

"(c) A final report shall be made to the Joint Legislative Transportation Oversight Committee no later than July 1, 2010. The final report shall include as a minimum, the effectiveness of the treatments included in the study, costs of each treatment, and the costs of implementing effective treatments on new bridge construction projects as well as existing bridge retrofit projects for all bridges over waterways in the State."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Session Laws 2008-181, s. 6.3, provides: "Stormwater Permitting — The Commission may study the feasibility of implementing a stormwater management program under G.S. 143-214.7 without requiring the issuance of a State permit prior to construction. The study shall consider the potential for accepting an engineering certification that the stormwater management system complies with stormwater requirements set out in statute or in the rules of the Environmental Management Commission in place of a permit review by the Department of Environment and Natural Resources. The study shall address issues related to enforcement of stormwater requirements; the impact on stormwater programs delegated to and implemented by units of local government; consistency with federal requirements under the Clean Water Act, including limits on non-point source runoff under a Total Maximum Daily Load for impaired waters; the ability to accurately track nutrient reductions under nutrient sensitive waters strategies; implications for other environmental review processes, included related permitting programs; potential impacts on the State's ability to protect water quality and aquatic resources. The study shall also consider the costs and benefits to the property owner or developer."

**Effect of Amendments.** — Session Laws 2007-323, s. 6.22(a), effective October 1, 2008, and applicable to any area designed to be used for vehicular parking for which an application for a building permit, a request for a zoning reclassification, or a subdivision plat is filed in the county or city in which the area is located on or after October 1, 2008, added subsection (d2).

## § 143-214.7A. Stormwater control best management practices.

(a) The Department of Environment and Natural Resources shall establish standard stormwater control best management practices and standard process water treatment processes or equivalent performance standards for composting operations that are required to be permitted by the Division of Water Quality in the Department and the Division of Waste Management in the Department. These practices, processes, and standards shall be developed for the purpose of protecting water quality by controlling and containing stormwater that is associated with composting operations, by reducing the pollutant levels of process water from composting operations, and by reducing the opportunities for generation of such waters.

(b) The Division of Water Quality shall clarify that stormwater is water that does not contact anything considered a feedstock, intermediate product, or final product of composting operations. The Division of Water Quality shall clarify that wastewater is leachate and water that contacts feedstocks, intermediate products, or final product, of composting operations. The clarifications shall incorporate available scientifically valid information obtained from sampling and analyses of North Carolina composting facilities and from valid representative data from other states. In addition, the Division of Water Quality shall establish threshold quantities of feedstocks, intermediate products, and final products above which water quality permitting will be required.

(c) The Department shall establish revised water quality permitting procedures for the composting industry. The revised permitting procedures shall identify the various circumstances that determine which water quality permit is required for various composting activities. The Department shall determine whether selected low-risk subsets of the composting industry may be suitable for expedited or reduced water quality permitting procedures. The determination shall include consideration of the economic impact of regulatory decisions.

(d) In developing the practices, processes, and standards and the revised water quality permitting procedures required by this section, the Department shall review practices, processes, and standards and permitting procedures adopted by other states and similar federal programs.

(e) The Department shall form a Compost Operation Stakeholder Advisory Group composed of representatives from the North Carolina Chapter of the United States Composting Council, the North Carolina Association of County

Commissioners, the North Carolina League of Municipalities, the North Carolina State Agricultural Extension Service, the North Carolina Chapter of the American Water Works Association-Water Environment Federation, the North Carolina Pumper Group, the North Carolina Chapter of the Solid Waste Association of North America, the North Carolina Septic Tank Association, and any individual or group commenting to the Department on issues related to water quality at composting operations. The Compost Operation Stakeholder Advisory Group shall be convened periodically to provide input and assistance to the Department.

(f) The practices, processes, and standards and the revised permitting procedures shall address the site size of an operation, the nature of the feedstocks composted, the type of compost production method employed, the quantity and water quality of the stormwater or process water associated with composting facilities, the water quality of the receiving waters, as well as operation and maintenance requirements for the resulting standard stormwater control best management practices and standard process water treatment processes. (2009-322, s. 1(a)-(f).)

**Editor's Note.** — Session Laws 2009-322, s. 1(a)-(f) was codified as this section at the direction of the Revisor of Statutes, effective July 17, 2009.

Session Laws 2009-322, s. 2, provides: "Not later than December 31, 2009, the Department shall report to the Environmental Review Commission on the progress of the implementation of the provisions of this act and any recommendations from the Compost Operation Stakeholder Advisory Group and other commenters. The Department shall periodically make other progress reports as the Commission may subsequently direct."

Session Laws 2009-322, s. 3(a), provides: "For the period of time between the effective date of this act and phase-in provided by Section 3(d) of this act, permits for composting facilities shall be handled as follows:

"(1) The Division of Water Quality shall issue interim water quality permit extensions to all composting facilities applying for a water quality permit renewal until the revised final water quality permitting procedures are phased in, as provided in Section 3(d) of this act. The issuance of interim water quality permit extensions shall be contingent upon no significant changes to the existing quantities, feedstocks, and composting methods permitted by the Division of Waste Management. For any facility found to be causing or contributing to a violation of water quality standards, the Division of Water Quality may subsequently determine that the facility is ineligible for continued coverage under an interim water quality permit extension.

"(2) For facilities renewing permits issued by the Division of Waste Management prior to the phase-in provided in Section 3(d) of this act, but operating without the appropriate water quality permits, the Division of Water Quality will work with those facilities on a case-by-case basis to establish appropriate permit coverage.

"(3) New water quality permit applications filed after July 1, 2009, shall be handled on a case-by-case basis."

Session Laws 2009-322, s. 3(b), provides: "Not later than January 1, 2010, the Department shall request comments and recommendations from the Compost Operation Stakeholder Advisory Group as to standard stormwater control best management practices, standard process water treatment processes, and performance standards and the elements of the revised water quality permitting procedures."

Session Laws 2009-322, s. 3(c), provides: "Not later than January 1, 2011, the Department shall establish standard stormwater control best management practices and standard process water treatment processes or performance standards, including standard methods for the reduction in volume for both of these waters."

Session Laws 2009-322, s. 3(d), provides: "Not later than January 1, 2011, the Department shall begin the phase-in of the revised water quality permitting procedures for the composting industry. Complete phase in of the revised water quality permitting procedures shall be accomplished not later than October 1, 2012."

Session Laws 2009-322, s. 3(e), provides: "Water quality permits for the composting industry shall include a reopener clause that may be used to revise permit conditions to reflect the results of the stakeholder process."

## § 143-214.8. Ecosystem Enhancement Program: established.

The Ecosystem Enhancement Program is established within the Department of Environment and Natural Resources. The Ecosystem Enhancement Program shall be developed by the Department as a nonregulatory statewide ecosystem enhancement program for the acquisition, maintenance, restoration, enhancement, and creation of wetland and riparian resources that contribute to the protection and improvement of water quality, flood prevention, fisheries, wildlife habitat, and recreational opportunities. The Ecosystem Enhancement Program shall consist of the following components:

(1) Restoration and perpetual maintenance of wetlands.
(2) Development of restoration plans.
(3) Landowner contact and land acquisition.
(4) Evaluation of site plans and engineering studies.
(5) Oversight of construction and monitoring of restoration sites.
(6) Land ownership and management.
(7) Mapping, site identification, and assessment of wetlands functions.
(8) Oversight of private wetland mitigation banks to facilitate the components of the Ecosystem Enhancement Program. (1996, 2nd Ex. Sess., c. 18, s. 27.4(a); 1997-443, s. 11A.119(a); 2005-386, s. 3.1.)

**Editor's Note.** — Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 27.4(c), (d), and (e), provide that the Department of Environment, Health, and Natural Resources (now the Department of Environment and Natural Resources) is directed to negotiate and enter into a Memorandum of Agreement with the United States Army Corps of Engineers regarding the restoration, creation, enhancement, and preservation of wetlands and the compensatory mitigation required of permit applicants under 33 U.S.C. § 1344; for the appropriation of funds for staff and expenses to implement the Wetlands Restoration Program; and that the Environmental Review Commission shall study private mitigation banks and compare with the Wetlands Restoration Program and report to the 1997 General Assembly.

Session Laws 1996, Second Extra Session, c. 18, s. 29.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1996-97 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1996-97 fiscal year."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

## § 143-214.9. Ecosystem Enhancement Program: purposes.

The purposes of the program are as follows:

(1) To restore wetlands functions and values across the State to replace critical functions lost through historic wetlands conversion and through current and future permitted impacts. It is not the policy of the State to destroy upland habitats unless it would further the purposes of the Wetlands Restoration Program.
(2) To provide a consistent and simplified approach to address mitigation requirements associated with permits or authorizations issued by the United States Army Corps of Engineers under 33 U.S.C. § 1344.
(3) To streamline the wetlands permitting process, minimize delays in permit decisions, and decrease the burden of permit applicants of planning and performing compensatory mitigation for wetlands losses.
(4) To increase the ecological effectiveness of compensatory mitigation.
(5) To achieve a net increase in wetland acres, functions, and values in each major river basin.

(6) To foster a comprehensive approach to environmental protection. (1996, 2nd Ex. Sess., c. 18, s. 27.4(a); 2005-386, s. 3.2.)

### § 143-214.10. Ecosystem Enhancement Program: development and implementation of basinwide restoration plans.

Develop Basinwide Restoration Plans. — The Department shall develop basinwide plans for wetlands and riparian area restoration with the goal of protecting and enhancing water quality, flood prevention, fisheries, wildlife habitat, and recreational opportunities within each of the 17 major river basins in the State. The Department shall develop and implement a basinwide restoration plan for each of the 17 river basins in the State in accordance with the basinwide schedule currently established by the Division of Water Quality. (1996, 2nd Ex. Sess., c. 18, s. 27.4(a); 2005-386, s. 3.3.)

### § 143-214.11. Ecosystem Enhancement Program: compensatory mitigation.

(a) Definitions. — The following definitions apply to this section:

(1) "Compensatory mitigation" means the restoration, creation, enhancement, or preservation of jurisdictional waters required as a condition of a permit issued by the Department or by the United States Army Corps of Engineers.

(2) "Government entity" means the State and its agencies and subdivisions, the federal government, and units of local government.

(3) "Hydrologic area" means an eight-digit Cataloging Unit designated by the United States Geological Survey.

(4) "Jurisdictional waters" means wetlands, streams, or other waters of the State or of the United States.

(5) "Unit of local government" means a "local government," "public authority," or "special district" as defined in G.S. 159-7.

(b) Department to Coordinate Compensatory Mitigation. — All compensatory mitigation required by permits or authorizations issued by the Department or by the United States Army Corps of Engineers shall be coordinated by the Department consistent with the basinwide restoration plans and rules developed by the Environmental Management Commission. All compensatory mitigation, whether performed by the Department or by permit applicants, shall be consistent with the basinwide restoration plans. All compensatory mitigation shall be consistent with rules adopted by the Commission for wetland and stream mitigation and for protection and maintenance of riparian buffers.

(c) Compensatory Mitigation Emphasis on Replacing Ecological Function Within Same River Basin. — The emphasis of compensatory mitigation is on replacing functions within the same river basin unless it is demonstrated that restoration of other areas would be more beneficial to the overall purposes of the Ecosystem Enhancement Program.

(d) Compensatory Mitigation Options Available to Government Entities. — A government entity may satisfy compensatory mitigation requirements by the following actions, if those actions are consistent with the basinwide restoration plans and also meet or exceed the requirements of the Department or of the United States Army Corps of Engineers, as applicable:

(1) Payment of a fee established by the Commission into the Ecosystem Restoration Fund established in G.S. 143-214.12.

(2) Donation of land to the Ecosystem Enhancement Program or to other public or private nonprofit conservation organizations as approved by the Department.

(3) Participation in a compensatory mitigation bank that has been approved by the United States Army Corps of Engineers, provided that the Department or the United States Army Corps of Engineers, as applicable, approves the use of such bank for the required compensatory mitigation.

(4) Preparing and implementing a compensatory mitigation plan.

(d1) Compensatory Mitigation Options Available to Applicants Other than Government Entities. — An applicant other than a government entity may satisfy compensatory mitigation requirements by the following actions, if those actions meet or exceed the requirements of the United States Army Corps of Engineers:

(1) Participation in a compensatory mitigation bank that has been approved by the United States Army Corps of Engineers, provided that the Department or the United States Army Corps of Engineers, as applicable, approves the use of such bank for the required compensatory mitigation. This option is only available in a hydrologic area where there is at least one compensatory mitigation bank that has been approved by the United States Army Corps of Engineers.

(2) Payment of a fee established by the Commission into the Ecosystem Restoration Fund established in G.S. 143-214.12. — This option is only available to an applicant who demonstrates that the option under subdivision (1) of this subsection is not available.

(3) Donation of land to the Ecosystem Enhancement Program or to other public or private nonprofit conservation organizations as approved by the Department.

(4) Preparing and implementing a compensatory mitigation plan.

(e) Payment Schedule. — A standardized schedule of compensatory mitigation payment amounts shall be established by the Commission. Compensatory mitigation payments shall be made by applicants to the Ecosystem Restoration Fund established in G.S. 143-214.12. The monetary payment shall be based on the ecological functions and values of wetlands and streams permitted to be lost and on the cost of restoring or creating wetlands and streams capable of performing the same or similar functions, including directly related costs of wetland and stream restoration planning, long-term monitoring, and maintenance of restored areas. Compensatory mitigation payments for wetlands shall be calculated on a per acre basis. Compensatory mitigation payments for streams shall be calculated on a per linear foot basis.

(f) Mitigation Banks. — State agencies and mitigation banks shall demonstrate that adequate, dedicated financial surety exists to provide for the perpetual land management and hydrological maintenance of lands acquired by the State as mitigation banks, or proposed to the State as privately operated and permitted mitigation banks.

(g) Payment for Taxes. — A State agency acquiring land to restore, enhance, preserve, or create wetlands must also pay a sum in lieu of ad valorem taxes lost by the county in accordance with G.S. 146-22.3. (1996, 2nd Ex. Sess., c. 18, s. 27.4(a); 1997-443, s. 11A.119(a); 2004-188, s. 2; 2005-386, s. 3.4; 2008-152, s. 1; 2009-337, s. 1.)

**Editor's Note.** — Session Laws 2009-337, s. 5, provides: "The Department of Environment and Natural Resources shall study whether the preference for compensatory wetland and stream mitigation banks established by S.L. 2008-152, as amended by this act, and the preference for riparian buffer mitigation banks and nutrient offset banks established by this act create a likelihood that the Ecosystem Enhancement Program will be unable to recoup investments made in riparian buffer mitigation and nutrient offset projects. The Department shall document the basis for its findings, including the source, nature, and amount of any prior investments, and may make recommendations for facilitating the recovery of such investments if it concludes that doing so would be in the public interest. The Department shall report its findings and recommendations, if any, to the Environmental Review Commission no later than February 1, 2010."

**Effect of Amendments.** — Session Laws 2008-152, s. 1, effective October 1, 2008, and applicable to applications for a mitigation permit submitted on or after that date, substituted "the North Carolina Department of Transportation. — The North Carolina Department of Transportation" for "Applicant. — An Applicant" in the introductory language of subsection (d); and added subsection (d1).

Session Laws 2009-337, s. 1, effective July 24, 2009, rewrote the section.

## § 143-214.12. Ecosystem Enhancement Program: Ecosystem Restoration Fund.

(a) Ecosystem Restoration Fund. — The Ecosystem Restoration Fund is established as a nonreverting fund within the Department. The Fund shall be treated as a special trust fund and shall be credited with interest by the State Treasurer pursuant to G.S. 147-69.2 and G.S. 147-69.3. The Ecosystem Restoration Fund shall provide a repository for monetary contributions and donations or dedications of interests in real property to promote projects for the restoration, enhancement, preservation, or creation of wetlands and riparian areas and for payments made in lieu of compensatory mitigation as described in subsection (b) of this section. No funds shall be expended from this Fund for any purpose other than those directly contributing to the acquisition, perpetual maintenance, enhancement, restoration, or creation of wetlands and riparian areas in accordance with the basinwide plan as described in G.S. 143-214.10. The cost of acquisition includes a payment in lieu of ad valorem taxes required under G.S. 146-22.3 when the Department is the State agency making the acquisition.

(a1) The Department may distribute funds from the Ecosystem Restoration Fund directly to a federal or State agency, a local government, or a private, nonprofit conservation organization to acquire, manage, and maintain real property or an interest in real property for the purposes set out in subsection (a) of this section. A recipient of funds under this subsection shall grant a conservation easement in the real property or interest in real property acquired with the funds to the Department in a form that is acceptable to the Department. The Department may convey real property or an interest in real property that has been acquired under the Ecosystem Enhancement Program to a federal or State agency, a local government, or a private, nonprofit conservation organization to acquire, manage, and maintain real property or an interest in real property for the purposes set out in subsection (a) of this section. A grantee of real property or an interest in real property under this subsection shall grant a conservation easement in the real property or interest in real property to the Department in a form that is acceptable to the Department.

(b) Authorized Methods of Payment. — A person subject to a permit or authorization issued by the United States Army Corps of Engineers under 33 U.S.C. § 1344 may contribute to the Ecosystem Enhancement Program in order to comply with conditions to, or terms of, the permit or authorization if participation in the Ecosystem Enhancement Program will meet the mitigation requirements of the United States Army Corps of Engineers. The Department shall, at the discretion of the applicant, accept payment into the Ecosystem Restoration Fund in lieu of other compensatory mitigation requirements of any authorizations issued by the United States Army Corps of Engineers under 33 U.S.C. § 1344 if the contributions will meet the mitigation requirements of the United States Army Corps of Engineers. Payment may be made in the form of monetary contributions according to a fee schedule established by the Environmental Management Commission or in the form of donations of real property provided that the property is approved by the

Department as a suitable site consistent with the basinwide wetlands restoration plan.

(c) Accounting of Payments. — The Department shall provide an itemized statement that accounts for each payment into the Fund. The statement shall include the expenses and activities financed by the payment. (1996, 2nd Ex. Sess., c. 18, s. 27.4(a); 1997-496, s. 13; 1999-329, s. 6.1; 2004-188, s. 3; 2005-386, s. 3.5.)

**Management of Water Quality in the Jordan Watershed.** — For provisions pertaining to water quality rule-making for the Jordan Watershed pursuant to Session Laws 2009-216, ss. 1 and 3-8, as amended by Session Laws 2009-484, ss. 6(b), (c), 7, and 8, see the note at G.S. 143-214.7.

**Editor's Note.** — Session Laws 1999-329, s. 13.7 provides that this act shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act. Every State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency.

## § 143-214.13. Ecosystem Enhancement Program: reporting requirement.

(a) The Department of Environment and Natural Resources shall report each year by November 1 to the Environmental Review Commission regarding its progress in implementing the Ecosystem Enhancement Program and its use of the funds in the Ecosystem Restoration Fund. The report shall document statewide wetlands losses and gains and compensatory mitigation performed under G.S. 143-214.8 through G.S. 143-214.12. The report shall also provide an accounting of receipts and disbursements of the Ecosystem Restoration Fund, an analysis of the per-acre cost of wetlands restoration, and a cost comparison on a per-acre basis between the State's Ecosystem Enhancement Program and private mitigation banks. The Department shall also send a copy of its report to the Fiscal Research Division of the General Assembly.

(b) The Department shall maintain an inventory of all property that is held, managed, maintained, enhanced, restored, or used to create wetlands under the Ecosystem Enhancement Program. The inventory shall also list all conservation easements held by the Department. The inventory shall be included in the annual report required under subsection (a) of this section. (1996, 2nd Ex. Sess., c. 18, s. 27.4(a); 1997-443, s. 11A.119(a); 1999-329, s. 6.2; 2005-386, s. 3.6.)

**Editor's Note.** — Session Laws 1999-329, s. 13.7 provides that this act shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act. Every State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency.

## § 143-214.14. Cooperative State-local coalition water quality protection plans.

(a) Definitions. — The following definitions apply in this section:

(1) "Basin" means a river basin as defined in G.S. 143-215.22G or any subbasin or segment thereof.

(2) "Coalition plan" means a water quality protection plan developed by a coalition of local governments for water quality protection of a basin.

(3) "Local government" means a city, county, special district, authority, or other political subdivision of the State.

(4) "Water quality protection" means management of water use, quantity, and quality.

(b) Legislative Findings. — This section establishes a framework to encourage State-local pollutant reduction strategies for basins under the supervision and coordination of the Commission. The General Assembly finds that:

(1) Water quality conditions and sources of water contamination may vary from one basin to another.

(2) Water quality conditions and sources of water contamination may vary within a basin.

(3) Some local governments have demonstrated greater capacity than others to protect and improve water quality conditions.

(4) In some areas of the State artificial alteration of watercourses by surface water impoundments or other means may have a significant effect on water quality.

(5) Imposition of standard basinwide water quality protection requirements and strategies may not equitably address the varying conditions and needs of all areas.

(6) There is a need to develop distinct approaches to address water quality protection in basins in the State, drawing upon the resources of local governments and the State, under the supervision and coordination of the Commission.

(c) Legislative Goals and Policies. — It is the goal of the General Assembly that, to the extent practicable, the State shall adopt water quality protection plans that are developed and implemented in cooperation and coordination with local governments and that the State shall adopt water quality protection requirements that are proportional to the relative contributions of pollution from all sources in terms of both the loading and proximity of those sources. Furthermore, it is the goal of the General Assembly to encourage and support State-local partnerships for improved water quality protection through the provision of technical and financial assistance available through the Clean Water Management Trust Fund, the Ecosystem Enhancement Program, the Ecosystem Restoration Fund, water quality planning and project grant programs, the State's revolving loan and grant programs for water and wastewater facilities, other funding sources, and future appropriations. The Commission shall implement these goals in accordance with the standards, procedures, and requirements set out in this section.

(d) The Commission may, as an alternative method of attaining water quality standards in a basin, approve a coalition plan proposed by a coalition of local governments whose territorial area collectively includes the affected basin in the manner provided by this section. The Commission may approve a coalition plan proposed by a coalition of local governments whose territorial area or water quality protection plan does not include all of an affected basin if the Commission determines that the omission will not adversely affect water quality.

(e) A coalition of local governments choosing to propose a coalition plan to the Commission shall do so through a nonprofit corporation the coalition of local governments incorporates with the Secretary of State.

(f) The Commission may approve a coalition plan only if the Commission first determines that:

(1) The basin under consideration is an appropriate unit for water quality planning.

(2) The coalition plan meets the requirements of subsection (g) of this section.

(3) The coalition of local governments has formed a nonprofit corporation pursuant to subsection (e) of this section.

(4) The coalition plan has been approved by the governing board of each local government that is a member of the coalition of local governments proposing the coalition plan.

(5) The coalition plan will provide a viable alternative method of attaining equivalent compliance with federal and State water quality standards, classifications, and management practices in the affected basin.

(g) A coalition plan shall include all of the following:

(1) An assessment of water quality and related water quantity management in the affected basin.

(2) A description of the goals and objectives for protection and improvement of water quality and related water quantity management in the affected basin.

(3) A workplan that describes proposed water quality protection strategies, including point and nonpoint source programs, for achieving the specified goals and objectives; an implementation strategy including specified tasks, timetables for action, implementation responsibilities of State and local agencies; and sources of funding, where applicable.

(4) A description of the performance indicators and benchmarks that will be used to measure progress in achieving the specified goals and objectives, and an associated monitoring framework.

(5) A timetable for reporting to the Commission on progress in implementing the coalition plan.

(h) A coalition plan shall cover a specified period. The coalition plan may provide for the phasing in of specific strategies, tasks, or mechanisms by specified dates within the period covered by the plan. The Commission may approve one or more successive coalition plan periods. The coalition plan may include strategies that vary among the subareas or jurisdictions of the geographic area covered by the coalition plan.

(i) If a local government chooses to withdraw from a coalition of local governments or fails to implement a coalition plan, the remaining members of a coalition of local governments may prepare and submit a revised coalition plan for approval by the Commission. If the Commission determines that an approved coalition plan no longer provides a viable alternative method of attaining equivalent compliance with federal and State water quality standards, classifications, and management practices, the Commission may suspend or revoke its approval of the coalition plan.

(j) The Commission may approve one or more amendments to a coalition plan proposed by a coalition of local governments through its nonprofit corporation with the approval of the governing board of each local government that is a member of the coalition of local governments that proposed the coalition plan.

(k) With the approval of the Commission, any coalition of local governments with an approved coalition plan may establish and implement a pollutant trading program for specific pollutants between and among point source dischargers and nonpoint pollution sources.

(*l*) The Commission shall submit an annual progress report on the implementation of this section to the Environmental Review Commission on or before 1 October of each year. (1997-493, s. 1; 2005-386, s. 3.7.)

**Legal Periodicals.** — For 1997 legislative survey, see 20 Campbell L. Rev. 450.

**§§ 143-214.15 through 143-214.19:** Reserved for future codification purposes.

## § 143-214.20. Riparian Buffer Protection Program: Alternatives to maintaining riparian buffers; compensatory mitigation fees.

(a) Compensatory Mitigation for Riparian Buffer Loss. — The Commission shall establish a program to provide alternatives for persons who would otherwise be required to maintain riparian buffers and who can demonstrate that they have attempted to avoid and minimize the loss of the riparian buffer and that there is no practical alternative to the loss of the buffer. This program is intended to allow these persons to perform compensatory mitigation in lieu of complying with laws and rules that require that riparian buffers be protected and maintained. All compensatory mitigation for riparian buffer loss shall be consistent with rules adopted by the Commission for protection and maintenance of riparian buffers.

(a1) Compensatory Mitigation Options Available to Government Entities. — A government entity, as defined in G.S. 143-214.11, may satisfy compensatory mitigation requirements by any of the following actions:

(1) Payment of a compensatory mitigation fee into the Riparian Buffer Restoration Fund established in G.S. 143-214.21.

(2) Donation of real property or of an interest in real property to the Department, another State agency, a unit of local government, or a private nonprofit conservation organization if both the donee organization and the donated real property or interest in real property are approved by the Department. The Department may approve a donee organization only if the donee agrees to maintain the real property or interest in real property as a riparian buffer. The Department may approve a donation of real property or an interest in real property only if the real property or interest in real property either:

a. Is a riparian buffer that will provide protection of water quality that is equivalent to or greater than that provided by the riparian buffer that is lost in the same river basin as the riparian buffer that is lost.

b. Will be used to restore, create, enhance, or maintain a riparian buffer that will provide protection of water quality that is equivalent to or greater than that provided by the riparian buffer that is lost in the same river basin as the riparian buffer that is lost.

(3) Restoration or enhancement of an existing riparian buffer that is not otherwise required to be protected, or creation of a new riparian buffer, that will provide protection of water quality that is equivalent to or greater than that provided by the riparian buffer that is lost in the same river basin as the riparian buffer that is lost and that is approved by the Department.

(4) Construction of an alternative measure that reduces nutrient loading as well or better than the riparian buffer that is lost in the same river basin as the riparian buffer that is lost and that is approved by the Department.

(5) Participation in a compensatory mitigation bank if the Department has approved the bank and the Department approves the use of the bank for the required compensatory mitigation.

(a2) Compensatory Mitigation Options Available to Applicants Other than Government Entities. — An applicant other than a government entity, as defined in G.S. 143-214.11, may satisfy compensatory mitigation requirements by any of the following actions:

(1) Participation in a compensatory mitigation bank if the Department has approved the bank and the Department approves the use of the

bank for the required compensatory mitigation. This option is only available in a hydrologic area, as defined in G.S. 143-214.11, where there is at least one compensatory mitigation bank that has been approved by the Department.

(2) Payment of a compensatory mitigation fee into the Riparian Buffer Restoration Fund established in G.S. 143-214.21. This option only is available to an applicant who demonstrates that the option under subdivision (1) of this subsection is not available.

(3) Donation of real property or of an interest in real property to the Department, another State agency, a unit of local government, or a private nonprofit conservation organization if both the donee organization and the donated real property or interest in real property are approved by the Department. The Department may approve a donee organization only if the donee agrees to maintain the real property or interest in real property as a riparian buffer. The Department may approve a donation of real property or an interest in real property only if the real property or interest in real property either:

a. Is a riparian buffer that will provide protection of water quality that is equivalent to or greater than that provided by the riparian buffer that is lost in the same river basin as the riparian buffer that is lost.

b. Will be used to restore, create, enhance, or maintain a riparian buffer that will provide protection of water quality that is equivalent to or greater than that provided by the riparian buffer that is lost in the same river basin as the riparian buffer that is lost.

(4) Restoration or enhancement of an existing riparian buffer that is not otherwise required to be protected, or creation of a new riparian buffer, that will provide protection of water quality that is equivalent to or greater than that provided by the riparian buffer that is lost in the same river basin as the riparian buffer that is lost and that is approved by the Department.

(5) Construction of an alternative measure that reduces nutrient loading as well as or better than the riparian buffer that is lost in the same river basin as the riparian buffer that is lost and that is approved by the Department.

(b) Compensatory mitigation is available for loss of a riparian buffer along an intermittent stream, a perennial stream, or a perennial waterbody.

(c) The Commission shall establish a standard schedule of compensatory mitigation fees for payments to the Riparian Buffer Restoration Fund pursuant to this section. The compensatory mitigation fee schedule shall be based on the area of the riparian buffer that is permitted to be lost and the cost to provide equivalent or greater protection of water quality in the same river basin as that provided by the riparian buffer this is lost by:

(1) Restoration or enhancement of existing riparian buffers.

(2) Acquisition of land for and creation of new riparian buffers.

(3) Maintenance and monitoring of restored, enhanced, or created riparian buffers over time.

(4) Construction of alternative measures that reduce nutrient loading.

(d) The Commission may adopt rules to implement this section. (1999-448, s. 1; 2009-337, s. 2.)

**Water Quality and Quantity in the Upper Neuse River Basin.** — For provisions pertaining to protection and restoration of water quality and quantity in the Upper Neuse River Basin, Falls Lake, and other drinking supply reservoirs pursuant to Session Laws 2009-486, see the notes at G.S. 143-214.1 and G.S. 143-215.

**Editor's Note.** — Session Laws 1999-448 provided: "Whereas, in 1996 the General Assembly established a goal to reduce the average annual load of nitrogen delivered from point and nonpoint sources to the Neuse River Estuary by a minimum of thirty percent (30%) of the average load for the period 1991 through 1995 by the year 2001 and directed the Environmental Management Commission to develop and adopt a plan to achieve this goal; and

"Whereas, in 1997 the General Assembly directed the Environmental Management Commission to develop and implement a basin wide water quality plan for each of the State's 17 major river basins; and

"Whereas, in 1997, in response to these legislative mandates, the Environmental Management Commission adopted a Neuse River Nutrient Sensitive Waters Management Strategy as temporary and permanent rules and adopted revisions to these rules in 1998; and

"Whereas, in 1998 the General Assembly enacted legislation to disapprove 15A NCAC 2B.0233 (Neuse River Nutrient Sensitive Waters Management Strategy: Protection and Maintenance of Riparian Areas with Existing Forest Vegetation) as a permanent rule while continuing this rule in effect as a temporary rule with certain modifications until the Environmental Management Commission adopted a revised temporary and permanent rule; and

"Whereas, the 1998 legislation established a Stakeholder Advisory Committee to assist the Environmental Management Commission with the development of (i) a revised temporary rule, (ii) rules and recommended legislation to provide for compensatory mitigation as an alternative to the maintenance of riparian buffers, and (iii) rules and recommended legislation to authorize the Environmental Management Commission to delegate responsibility for the implementation and enforcement of the State's riparian buffer protection requirements to local governments; and

"Whereas, the Stakeholder Advisory Committee, after many hours of work, submitted a report and recommendations to the Environmental Management Commission; and

"Whereas, that report included recommended legislation pertaining to compensatory mitigation and delegation to local governments; and

"Whereas, at its meeting on 8 April 1999, the Environmental Management Commission accepted these recommendations and forwarded them to the Environmental Review Commission."

Session Laws 2006-215, ss. 1 to 4, as amended by Session Laws 2006-218, s. 1, and as amended by Session Laws 2006-255, s. 5.3, effective August 1, 2006, and expiring September 1, 2007, provide: "1. Notwithstanding the per pound factors for nutrient offset payments established in 15A NCAC 2B.0240, as adopted by the Environmental Management Commission on 12 January 2006, the per pound factors for nutrient offset payments are established as follows:

"(1) Eleven dollars ($11.00) per pound of nitrogen, calculated inaccordance with the method used as of 1 January 2006, for determining pounds of nitrogen per acre.

"(2) Eleven dollars ($11.00) per tenth of a pound of phosphorous.

"1.1 Notwithstanding 15A NCAC 2B.0240 and Section 1 of this act, the Department of Environment and Natural Resources shall not be required to accept a nutrient offset payment for phosphorous as a means of fulfilling any requirement of the nutrient sensitive waters management strategy for the Tar-Pamlico River Basin if the Department finds that the payment is not sufficient to cover the full costs of nutrient reduction measures needed to comply with the nutrient sensitive waters management strategy. If the Department declines to accept a nutrient offset payment for phosphorous, the Department shall provide an estimate of the full cost of the nutrient reduction measures required for compliance with the nutrient sensitive waters management strategy. The Department may negotiate and enter into contracts to provide nutrient reduction measures needed to fulfill any requirement of the nutrient sensitive waters management strategy for phosphorous for the Tar-Pamlico River Basin based on the full cost of providing the nutrient reduction measures.

"2. Study. — The Environmental Review Commission, with the assistance of the Division of Water Quality of the Department of Environment and Natural Resources, shall study issues related to the nutrient offset payment program. The Commission shall specifically study the costs associated with providing nutrient controls that are adequate to offset point source and nonpoint source discharges of nitrogen; whether nutrient offset payments should be authorized for additional nutrients, including phosphorus; and whether the nutrient offset program should be expanded to other areas of the State.

"2.1. A donation of real property or of an interest in real property to the Department of Environment and Natural Resources, another State agency, a unit of local government, or a private nonprofit conservation organization under G.S. 143-214.20 shall be limited to property that is located in the same river basin as the riparian buffer that is lost but shall not be limited to a donation of property located on the same stream as the riparian buffer that is lost.

"3. Report. — The Environmental Review Commission shall report its findings, together with any recommended legislation, to the 2007 General Assembly upon its convening.

"4. The Division of Water Quality of the Department of Environment and Natural Resources must refund any fee paid in excess of the amount established under this act."

Session Laws 2007-438, provides in its preamble: "Whereas, the General Assembly established the Riparian Buffer Protection Program (G.S. 143-214.20) to provide alternatives for persons who would otherwise be required to maintain riparian buffers; and

"Whereas, the General Assembly directed the Environmental Management Commission to establish a compensatory mitigation fee to be paid into the Riparian Buffer Restoration Fund; and

"Whereas, the Environmental Management Commission adopted a revised schedule of compensatory mitigation fees for nutrient loading offsets on 12 January 2006 in accordance with the Administrative Procedure Act; and

"Whereas, the General Assembly enacted S.L. 2006-215, as amended by S.L. 2006-218 and S.L. 2006-255, which established a temporary per pound factor and method of calculation for nutrient offset fees in lieu of the fee schedule adopted by the Environmental Management Commission and directed the Environmental Review Commission to study issues related to the nutrient offset payment program; and

"Whereas, the Environmental Review Commission entered into a contract with Research Triangle Institute, International (RTI), to provide consultant services for a study of the costs associated with providing nutrient controls that are adequate to offset point source and nonpoint source discharges of nitrogen and other nutrients; and

"Whereas, the Environmental Review Commission received the final report from RTI on 11 June 2007; and

"Whereas, the final report from RTI recommended a nutrient offset payment factor for nitrogen in the Neuse River Basin of $25.77 per pound of nitrogen; and

"Whereas, the final report from RTI recommended a nutrient offset payment factor for nitrogen in the Tar-Pamlico River Basin of $19.70 per pound of nitrogen; and

"Whereas, the final report from RTI recommended a nutrient offset payment factor for phosphorous in the Tar-Pamlico River Basin of $26.02 per tenth of a pound of phosphorus; and

"Whereas, the final report from RTI recommended that a 10% fee be added to the nutrient offset payments to cover the costs of program administration; Now, therefore, The General Assembly of North Carolina enacts:"

Session Laws 2007-438, ss. 1 to 3, as amended by Session Laws 2009-484, s. 3(a), provide: "SECTION 1. The per pound factors for nutrient offset payments are established as follows:

"(1) For nitrogen in the Neuse River Basin, twenty-eight dollars and thirty-five cents ($28.35) per pound of nitrogen, calculated in accordance with the method used as of 1 January 2006 for determining pounds of nitrogen per acre.

"(2) For nitrogen in the Tar-Pamlico River Basin, twenty-one dollars and sixty-seven cents ($21.67) per pound of nitrogen, calculated in accordance with the method used as of 1 January 2006 for determining pounds of nitrogen per acre.

"(3) For phosphorous in the Tar-Pamlico River Basin, twenty-eight dollars and sixty-two cents ($28.62) per tenth of a pound of phosphorous.

"SECTION 2. No later than 1 September 2010, the Department of Environment and Natural Resources shall develop and implement a plan to transition the North Carolina Ecosystem Enhancement Program nutrient offset program from a fee-based program to a program based on the actual costs of providing nutrient credits. The new program shall use the least cost alternative for providing nutrient offset credits consistent with rules adopted by the Environmental Management Commission for implementation of nutrient management strategies in the Neuse River Basin and the Tar-Pamlico River Basin.

"SECTION 3. The Department of Environment and Natural Resources shall report on its progress in developing and implementing a new fee structure for the nutrient offset program to the Environmental Review Commission on 1 September 2008 and 1 March 2009."

Session Laws 2007-438, s. 5, as amended by Session Laws 2009-484, s. 3(b), provides: "This act becomes effective 1 September 2007 and applies to all nutrient offset payments, including those set out in 15A NCAC 2B.0240, as adopted by the Environmental Management Commission on 12 January 2006. The fee schedule set out in Section 1 of this act expires 1 September 2010."

Session Laws 2009-337, s. 5, provides: "The Department of Environment and Natural Resources shall study whether the preference for compensatory wetland and stream mitigation banks established by S.L. 2008-152, as amended by this act, and the preference for riparian buffer mitigation banks and nutrient offset banks established by this act create a likelihood that the Ecosystem Enhancement Program will be unable to recoup investments made in riparian buffer mitigation and nutrient offset projects. The Department shall document the basis for its findings, including the source, nature, and amount of any prior investments, and may make recommendations for facilitating the recovery of such investments if it concludes that doing so would be in the public interest. The Department shall report its findings and recommendations, if any, to the Environmental Review Commission no later than February 1, 2010."

**Effect of Amendments.** — Session Laws 2009-337, s. 2, effective July 24, 2009, in subsection (a), added the subsection catchline, and added the present last sentence; redesignated former subdivisions (a)(1) through (a)(4) as present subdivisions (a1)(1) through (a1)(4); in subsection (a1), added the introductory language; in subdivision (a1)(1) added "established in G.S. 143-214.21" at the end, made a minor stylistic change in subdivision (a1)(2)a., and added subdivision (a1)(5); added subsection (a2); and in subsection (c), in the introductory language, added "for payments to the Riparian Buffer Restoration Fund pursuant to this section" at the end of the first sentence.

## § 143-214.21. Riparian Buffer Protection Program: Riparian Buffer Restoration Fund.

The Riparian Buffer Restoration Fund is established as a nonreverting fund within the Department. The Fund shall be treated as a special trust fund and shall be credited with interest by the State Treasurer pursuant to G.S. 147-69.2 and G.S. 147-69.3. The Riparian Buffer Restoration Fund shall provide a repository for monetary contributions to promote projects for the restoration, enhancement, or creation of riparian buffers or to construct approved alternative measures that reduce nutrient loading as well or better than a riparian buffer that is lost and for compensatory mitigation fees paid to the Department. The Fund shall be administered by the Department. Moneys shall be expended from the Fund only for those purposes directly related to the restoration, acquisition, creation, enhancement, and maintenance of riparian buffers or to construct approved alternative measures that reduce nutrient loading as well or better than a riparian buffer. Compensatory mitigation fees paid into the Fund in connection with the loss of riparian buffers in a river basin and the interest earned on those fees may be used only for projects in that river basin. (1998-221, s. 1.5(b); 1999-448, s. 2; 2005-443, s. 1.)

**Management of Water Quality in the Jordan Watershed.** — For provisions pertaining to water quality rule-making for the Jordan Watershed pursuant to Session Laws 2009-216, ss. 1 and 3-8, as amended by Session Laws 2009-484, ss. 6(b), (c), 7, and 8, see the note at G.S. 143-214.7.

**Water Quality and Quantity in the Upper Neuse River Basin.** — For provisions pertaining to protection and restoration of water quality and quantity in the Upper Neuse River Basin, Falls Lake, and other drinking supply reservoirs pursuant to Session Laws 2009-486, see the notes at G.S. 143-214.1 and G.S. 143-215.

**Editor's Note.** — See the Editor's Note under G.S. 143-214.20, relating to Session Laws 1999-448.

Session Laws 2006-215, ss. 1 to 4, as amended by Session Laws 2006-218, s. 1, and as amended by Session Laws 2006-255, s. 5.3, effective August 1, 2006, and expiring September 1, 2007, provide: "1. Notwithstanding the per pound factors for nutrient offset payments established in 15A NCAC 2B.0240, as adopted by the Environmental Management Commission on 12 January 2006, the per pound factors for nutrient offset payments are established as follows:

"(1) Eleven dollars ($11.00) per pound of nitrogen, calculated inaccordance with the method used as of 1 January 2006, for determining pounds of nitrogen per acre.

"(2) Eleven dollars ($11.00) per tenth of a pound of phosphorous.

"1.1 Notwithstanding 15A NCAC 2B.0240 and Section 1 of this act, the Department of Environment and Natural Resources shall not be required to accept a nutrient offset payment for phosphorous as a means of fulfilling any requirement of the nutrient sensitive waters management strategy for the Tar-Pamlico River Basin if the Department finds that the payment is not sufficient to cover the full costs of nutrient reduction measures needed to comply with the nutrient sensitive waters management strategy. If the Department declines to accept a nutrient offset payment for phosphorous, the Department shall provide an estimate of the full cost of the nutrient reduction measures required for compliance with the nutrient sensitive waters management strategy. The Department may negotiate and enter into contracts to provide nutrient reduction measures needed to fulfill any requirement of the nutrient sensitive waters management strategy for phosphorous for the Tar-Pamlico River Basin based on the full cost of providing the nutrient reduction measures.

"2. Study. — The Environmental Review

Commission, with the assistance of the Division of Water Quality of the Department of Environment and Natural Resources, shall study issues related to the nutrient offset payment program. The Commission shall specifically study the costs associated with providing nutrient controls that are adequate to offset point source and nonpoint source discharges of nitrogen; whether nutrient offset payments should be authorized for additional nutrients, including phosphorus; and whether the nutrient offset program should be expanded to other areas of the State.

"2.1. A donation of real property or of an interest in real property to the Department of Environment and Natural Resources, another State agency, a unit of local government, or a private nonprofit conservation organization under G.S. 143-214.20 shall be limited to property that is located in the same river basin as the riparian buffer that is lost but shall not be limited to a donation of property located on the same stream as the riparian buffer that is lost.

"3. Report. — The Environmental Review Commission shall report its findings, together with any recommended legislation, to the 2007 General Assembly upon its convening.

"4. The Division of Water Quality of the Department of Environment and Natural Resources must refund any fee paid in excess of the amount established under this act."

Session Laws 2007-438, provides in its preamble: "Whereas, the General Assembly established the Riparian Buffer Protection Program (G.S. 143-214.20) to provide alternatives for persons who would otherwise be required to maintain riparian buffers; and

"Whereas, the General Assembly directed the Environmental Management Commission to establish a compensatory mitigation fee to be paid into the Riparian Buffer Restoration Fund; and

"Whereas, the Environmental Management Commission adopted a revised schedule of compensatory mitigation fees for nutrient loading offsets on 12 January 2006 in accordance with the Administrative Procedure Act; and

"Whereas, the General Assembly enacted S.L. 2006-215, as amended by S.L. 2006-218 and S.L. 2006-255, which established a temporary per pound factor and method of calculation for nutrient offset fees in lieu of the fee schedule adopted by the Environmental Management Commission and directed the Environmental Review Commission to study issues related to the nutrient offset payment program; and

"Whereas, the Environmental Review Commission entered into a contract with Research Triangle Institute, International (RTI), to provide consultant services for a study of the costs associated with providing nutrient controls that are adequate to offset point source and nonpoint source discharges of nitrogen and other nutrients; and

"Whereas, the Environmental Review Commission received the final report from RTI on 11 June 2007; and

"Whereas, the final report from RTI recommended a nutrient offset payment factor for nitrogen in the Neuse River Basin of $25.77 per pound of nitrogen; and

"Whereas, the final report from RTI recommended a nutrient offset payment factor for nitrogen in the Tar-Pamlico River Basin of $19.70 per pound of nitrogen; and

"Whereas, the final report from RTI recommended a nutrient offset payment factor for phosphorous in the Tar-Pamlico River Basin of $26.02 per tenth of a pound of phosphorus; and

"Whereas, the final report from RTI recommended that a 10% fee be added to the nutrient offset payments to cover the costs of program administration; Now, therefore, The General Assembly of North Carolina enacts:"

Session Laws 2007-438, ss. 1 to 3, as amended by Session Laws 2009-484, s. 3(a), provide: "SECTION 1. The per pound factors for nutrient offset payments are established as follows:

"(1) For nitrogen in the Neuse River Basin, twenty-eight dollars and thirty-five cents ($28.35) per pound of nitrogen, calculated in accordance with the method used as of 1 January 2006 for determining pounds of nitrogen per acre.

"(2) For nitrogen in the Tar-Pamlico River Basin, twenty-one dollars and sixty-seven cents ($21.67) per pound of nitrogen, calculated in accordance with the method used as of 1 January 2006 for determining pounds of nitrogen per acre.

"(3) For phosphorous in the Tar-Pamlico River Basin, twenty-eight dollars and sixty-two cents ($28.62) per tenth of a pound of phosphorous.

"SECTION 2. No later than 1 September 2010, the Department of Environment and Natural Resources shall develop and implement a plan to transition the North Carolina Ecosystem Enhancement Program nutrient offset program from a fee-based program to a program based on the actual costs of providing nutrient credits. The new program shall use the least cost alternative for providing nutrient offset credits consistent with rules adopted by the Environmental Management Commission for implementation of nutrient management strategies in the Neuse River Basin and the Tar-Pamlico River Basin.

"SECTION 3. The Department of Environment and Natural Resources shall report on its progress in developing and implementing a new fee structure for the nutrient offset program to the Environmental Review Commission on 1 September 2008 and 1 March 2009."

Session Laws 2007-438, s. 5, as amended by Session Laws 2009-484, s. 3(b), provides: "This act becomes effective 1 September 2007 and applies to all nutrient offset payments, including those set out in 15A NCAC 2B.0240, as adopted by the Environmental Management Commission on 12 January 2006. The fee schedule set out in Section 1 of this act expires 1 September 2010."

Session Laws 2009-337, s. 5, provides: "The Department of Environment and Natural Resources shall study whether the preference for compensatory wetland and stream mitigation banks established by S.L. 2008-152, as amended by this act, and the preference for riparian buffer mitigation banks and nutrient offset banks established by this act create a likelihood that the Ecosystem Enhancement Program will be unable to recoup investments made in riparian buffer mitigation and nutrient offset projects. The Department shall document the basis for its findings, including the source, nature, and amount of any prior investments, and may make recommendations for facilitating the recovery of such investments if it concludes that doing so would be in the public interest. The Department shall report its findings and recommendations, if any, to the Environmental Review Commission no later than February 1, 2010."

## § 143-214.22. Riparian Buffer Protection Program: Department may accept donations of real property.

The Department may accept donations of real property and interests in real property if the real property or interest in real property is a riparian buffer or will be used to restore, create, enhance, or maintain a riparian buffer that will provide protection of water quality. (1998-221, s. 1.13; 1999-448, s. 3.)

**Editor's Note.** — Session Laws 1998-221, s. 1.13 was codified as this section at the direction of the Revisor of Statutes.

Session Laws 1998-221, s. 1.7, provides: "Recognition of vested development rights. — (a) Vested rights recognized or established under the common law or by G.S. 153A-344(b), 153A-344.1, 160A-385(b), or 160A-385.1 shall include the right as provided in this section, to undertake and complete development in the Neuse River Basin without application of temporary rule 15A NCAC 2B.0233 and the revised temporary rule required by Section 1.8 of this act. The Commission and the Department shall not apply temporary rule 15A NCAC 2B.0233 and the revised temporary rule required by Section 1.8 of this act to development with vested rights recognized or established under G.S. 153A-344(b), 153A-344.1, 160A-385(b), or 160A-385.1 prior to 22 July 1997. The Commission and the Department shall not apply temporary rule 15A NCAC 2B.0233 and the revised temporary rule required by Section 1.8 of this act to development with vested rights recognized or established under the common law prior to the date this Part becomes effective if the Commission has issued a certification pursuant to G.S. 143B-282(a)(1)u. prior to 22 July 1997. See also the Editor's note under G.S. 143-214.20, relating to Session Laws 1999-448.

Session Laws 1998-221, s. 5.2, contains a severability clause.

## § 143-214.23. Riparian Buffer Protection Program: Delegation of riparian buffer protection requirements to local governments.

(a) The Commission may delegate responsibility for the implementation and enforcement of the State's riparian buffer protection requirements to units of local government that have the power to regulate land use. A delegation under this section shall not affect the jurisdiction of the Commission over State agencies and units of local government. Any unit of local government that has the power to regulate land use may request that responsibility for the implementation and enforcement of the State's riparian buffer protection requirements be delegated to the unit of local government. To this end, units of local government may adopt ordinances and regulations necessary to establish and enforce the State's riparian buffer protection requirements.

(b) Within 90 days after the Commission receives a complete application requesting delegation of responsibility for the implementation and enforcement of the State's riparian buffer protection requirement, the Commission shall review the application and notify the unit of local government that submitted the application whether the application has been approved, approved with modifications, or disapproved. The Commission shall not approve a delegation unless the Commission finds that local implementation and enforcement of the State's riparian buffer protection requirements will equal implementation and enforcement by the State.

(c) If the Commission determines that a unit of local government is failing to implement or enforce the State's riparian buffer protection requirements, the Commission shall notify the unit of local government in writing and shall specify the deficiencies in implementation and enforcement. If the local government has not corrected the deficiencies within 90 days after the unit of local government receives the notification, the Commission shall rescind delegation and shall implement and enforce the State's riparian buffer protection program. If the unit of local government indicates that it is willing and able to resume implementation and enforcement of the State's riparian buffer protection requirements, the unit of local government may reapply for delegation under this section.

(d) The Department shall provide technical assistance to units of local government in the development, implementation, and enforcement of the State's riparian buffer protection requirements.

(e) The Department shall provide a stream identification training program to train individuals to determine the existence of surface water for purposes of rules adopted by the Commission for the protection and maintenance of riparian buffers. The Department may charge a fee to cover the full cost of the training program. No fee shall be charged to an employee of the State who attends the training program in connection with the employee's official duties.

(f) The Commission may adopt rules to implement this section. (1999-448, s. 1.)

**Editor's Note.** — Session Laws 1999-448, s. 1, originally enacted this section as G.S. 143-215.23; however, it has been redesignated as G.S. 143-214.23 at the direction of the Revisor of Statutes.

## § 143-214.24. Riparian Buffer Protection Program: Coordination with River Basin Associations.

(a) Prior to drafting temporary or permanent rules that require the preservation of riparian buffers in a river basin, the Department shall consult with major stakeholders who may have an interest in the proposed rules, including the board of directors or representatives designated by the board of directors of any river basin association in the affected river basin that meets all of the following criteria:

(1) The association is a nonprofit corporation, as defined by G.S. 55A-1-40.
(2) The association has as its primary purpose the conservation, preservation, and restoration of the environmental and natural resources of the river basin in which it is located.
(3) Membership in the association is open on a nondiscriminatory basis to all citizens in the river basin.
(4) The membership of the board of directors of the association includes at least one representative from each county with a significant portion of its territory in the river basin.
(5) The membership of the association includes significant representation from each of the following categories of persons:
    a. Elected local officials.
    b. Persons involved in agriculture.
    c. Persons involved in residential and commercial land development.

d. Persons involved in forestry.
e. Representatives of community-based organizations.
f. Representatives of organizations that advocate for protection of the environment and conservation of natural resources.
g. Persons with special training and scientific expertise in protection of water who are affiliated with colleges and universities.
h. Private property owners.
i. Persons with a general interest in water quality protection.

(b) The purpose of the consultation required by subsection (a) of this section is to assure that major stakeholders who may have an interest in the proposed rules have an opportunity to inform the Department of their concerns before the Department drafts the rules. (2000-172, s. 5.1.)

## § 143-214.25. Expired.

**Editor's Note.** — Session Laws 2001-404, s. 2, provides: "In implementing the Surface Water Identification Training and Certification Program established by G.S. 143-214.25, as enacted by Section 1 of this act, the Division of Water Quality of the Department of Environment and Natural Resources shall give priority to training and certifying the most highly qualified and experienced personnel in each agency. The Division of Water Quality shall evaluate the effectiveness of the Surface Water Identification Training and Certification Program and shall submit written reports of its findings and recommendations, if any, to the Environmental Review Commission on or before 1 September 2002, 1 September 2003, and 1 March 2004."

Session Laws 2001-404, s. 3, provides: "This act shall not be construed to obligate the General Assembly to appropriate any funds to implement the provisions of this act. Every agency to which this act applies shall implement the provisions of this act with funds otherwise appropriated or available to the agency."

Session Laws 2001-404, s. 4, made this section effective September 6, 2001, and provided that it expired on September 1, 2004.

## § 143-214.26. Nutrient offset credits.

(a) Nutrient offset credits may be purchased to partially offset nutrient loadings to surface waters as required by the Environmental Management Commission. Nutrient offset projects authorized under this section shall be all of the following:

(1) Consistent with rules adopted by the Commission for implementation of nutrient management strategies.

(2) Located within the same hydrologic area, as defined in G.S. 143-214.11, in which the associated nutrient loading takes place.

(b) A government entity, as defined in G.S. 143-214.11, may purchase nutrient offset credits through either:

(1) Participation in a nutrient offset bank that has been approved by the Department if the Department approves the use of the bank for the required nutrient offsets.

(2) Payment of a nutrient offset fee established by the Department into the Riparian Buffer Restoration Fund established in G.S. 143-214.21.

(c) A party other than a government entity, as defined in G.S. 143-214.11, may purchase nutrient offset credits through either:

(1) Participation in a nutrient offset bank that has been approved by the Department if the Department approves the use of the bank for the required nutrient offsets.

(2) Payment of a nutrient offset fee established by the Department into the Riparian Buffer Restoration Fund established in G.S. 143-214.21. This option is only available to an applicant who demonstrates that the option under subdivision (1) of this subsection is not available. (2009-337, s. 4(a)-(c).)

**Editor's Note.** — Session Laws 2009-337, s. 4(a)-(c) was codified as this section at the direction of the Revisor of Statutes, effective July 24, 2009.

## § 143-215. Effluent standards or limitations.

(a) The Commission is authorized and directed to develop, adopt, modify and revoke effluent standards or limitations and waste treatment management practices as it determines necessary to prohibit, abate, or control water pollution. The effluent standards or limitations and management practices may provide, without limitation, standards or limitations or management practices for any point source or sources; standards, limitations, management practices, or prohibitions for toxic wastes or combinations of toxic wastes discharged from any point source or sources; and pretreatment standards for wastes discharged to any disposal system subject to effluent standards or limitations or management practices.

(b) The effluent standards or limitations developed and adopted by the Commission shall provide limitations upon the effluents discharged from pretreatment facilities and from outlets and point sources to the waters of the State adequate to limit the waste loads upon the waters of the State to the extent necessary to maintain or enhance the chemical, physical, biological and radiological integrity of the waters. The management practices developed and adopted by the Commission shall prescribe practices necessary to be employed in order to prevent or reduce contribution of pollutants to the State's waters.

(c), (d) Repealed by Session Laws 1995, c. 507, s. 27.

(e) Repealed by Session Laws 1997-458, s. 13.1. (1967, c. 892, s. 1; 1971, c. 1167, s. 5; 1973, c. 821, s. 4; c. 929; c. 1262, s. 23; 1975, c. 583, s. 1; 1979, c. 633, ss. 2-4; 1987, c. 827, ss. 154, 158; 1989, c. 168, s. 48; 1991, c. 403, s. 2; 1991 (Reg. Sess., 1992), c. 890, s. 15; 1995, c. 507, s. 27.8(s); 1995 (Reg. Sess., 1996), c. 626, s. 4; 1997-458, s. 13.1.)

**Water Quality in Drinking Water Supply Reservoirs.** — Session Laws 2005-190, s. 1, effective July 15, 2005, provides: "Legislative findings. — The General Assembly finds that:

"(1) Drinking water supply reservoirs are an essential source of water needed to meet municipal, industrial, and agricultural needs.

"(2) Drinking water supply reservoirs provide recreational opportunities and wildlife habitat and, if properly managed, improve water quality.

"(3) Management and protection of the quality and quantity of water in drinking water supply reservoirs are essential to the economic vitality of North Carolina.

"(4) Excessive nutrients are a major source of impairment of water quality in drinking water supply reservoirs.

"(5) It would be beneficial for the State to study the condition of drinking water supply reservoirs and to develop nutrient control criteria to prevent drinking water supply reservoirs from becoming impaired.

"(6) It would be beneficial for the State to develop calibrated nutrient response models and nutrient management strategies to ensure that drinking water supply reservoirs that are showing evidence of impairment are protected, as envisioned by Part 1 of Article 21 of Chapter 143 of the General Statutes and S.L. 1997-458, the Clean Water Responsibility and Environmentally Sound Policy Act."

Session Laws 2005-190, s. 2(a), effective July 15, 2005, provides: "Study of drinking water supply reservoirs. — The Environmental Management Commission shall study the water quality in the drinking water supply reservoirs in the State to determine whether the reservoirs meet current water quality standards. The Commission shall analyze existing data and report its findings and recommendations to the Environmental Review Commission by 1 May 2006."

Session Laws 2005-190, s. 2(b), effective July 15, 2005, provides: "Nutrient control criteria. — Based on the results of the study of drinking water supply reservoirs and an evaluation of current water quality standards, the Environmental Management Commission shall identify any nutrient control criteria necessary to prevent excess nutrient loading in each drinking water supply reservoir in order to protect public health and other designated uses by 1 January 2009. The Commission shall adopt final nutrient control criteria for each drinking water supply reservoir by 1 May 2010. If the Commission finds that the nutrient control criteria for any drinking water supply reservoir are not being achieved, the Commission shall develop and implement a plan for enhanced water quality monitoring in that drinking water supply reservoir within one year of the determination. The Commission shall report its progress in implementing this section, including its findings and recommendations, to the Environmental Review Commission as a part of each quarterly report it makes pursuant to G.S. 143B-282(b)."

**Other Drinking Water Supply Reservoirs.** — Session Laws 2005-190, s. 4, as amended by Session Laws 2006-259, s. 31(c), effective July 15, 2005, provides: "The Environmental Management Commission shall not make any new or increased nutrient loading allocation to any person who is required to obtain a permit under G.S. 143-215 for an individual wastewater discharge directly or indirectly into any drinking water supply reservoir for which the Division of Water Quality of the Department of Environment and Natural Resources has prepared or updated a calibrated nutrient response model since 1 July 2002 until permanent rules adopted by the Commission to implement the nutrient management strategy for that reservoir become effective. The Commission shall report its progress in developing and implementing nutrient management strategies for reservoirs to which this section applies to the Environmental Review Commission by 1 April of each year beginning 1 April 2006."

Session Laws 2005-190, s. 3, as amended by Session Laws 2006-259, s. 31, and as amended by Session Laws 2009-486, s. 2, provides: "(a) Applicability of section to certain reservoirs. — This section applies only to drinking water supply reservoirs that meet all of the following criteria as of 1 July 2005:

"(1) The reservoir serves a population greater than 300,000 persons.

"(2) The Environmental Management Commission has classified all or any part of the water in the reservoir as a nutrient sensitive water (NSW).

"(3) Water quality monitoring data indicates that water quality in the reservoir violates the chlorophyll A standard

"(4) The Division of Water Quality of the Department of Environment and Natural Resources has not prepared or updated a calibrated nutrient response model for the reservoir since 1 July 2002.

"(b) Temporary limitation on increased nutrient loading. — If the Environmental Management Commission determines either that water quality in all or in any part of a drinking water supply reservoir to which this section applies does not meet current water quality standards or that it is likely that water quality will not meet water quality standards at any time prior to 1 July 2010, the Commission shall not make any new or increased nutrient loading allocation to any person who is required to obtain a permit under G.S. 143-215 for an individual wastewater discharge directly or indirectly into that reservoir. This limitation on new or increased nutrient loading allocation shall not be construed to prohibit a person who holds a permit for a wastewater discharge into a drinking water supply reservoir from purchasing a nutrient loading allocation from another person who holds a permit for a wastewater discharge into the same drinking water supply reservoir. This subsection expires with respect to a drinking water supply reservoir when permanent rules adopted by the Commission to implement the nutrient management strategy for that reservoir become effective.

"(c) Nutrient management strategy. — The Environmental Management Commission shall develop a nutrient management strategy for drinking water supply reservoirs to which this section applies by 15 January 2011. The nutrient management strategy shall be based on a calibrated nutrient response model that meets the requirement of G.S. 143-215.1(c5). The nutrient management strategy shall include specific mandatory measures to achieve the reduction goals. In developing the nutrient management strategy, the Commission shall consider the effectiveness of measures previously implemented in the watershed and the cost of the proposed measures in relation to their effectiveness. These measures could include, but are not limited to, buffers, erosion and sedimentation control requirements, post-construction stormwater management, agricultural nutrient reduction measures, the addition of nutrient removal treatment processes to point source permitted wastewater treatment plants, the removal of point source discharging wastewater treatments through regionalization and conversion to nondischarge treatment technologies, measures to address nutrient inputs from on-site wastewater treatment systems, control of atmospheric deposition, allowing the sale and purchase of nutrient offsets, allowing trading of nutrient loading allocations and credits for nutrient reductions, and any other measures that the Commission determines to be necessary to meet the nutrient reduction goals. To the extent that one or more other State programs already mandate any of these measures, the nutrient management strategy shall incorporate the mandated measures and any extension of those measures and any additional measures that may be necessary to achieve the nutrient reduction goals. In making a nutrient loading allocation to a permit holder, the Commission shall, to the extent allowed by federal and State law, give consideration to all voluntary efforts taken by the permit holder to protect water quality prior to the development of the nutrient management strategy.

"(d) Eligibility under the Clean Water Revolving Loan and Grant Act. — The definitions set out in G.S. 159G-3 apply to this subsection. The operator of a wastewater treatment works that is owned by an agency of the State may apply for a loan or grant under Chapter 159G of the General Statutes on the same basis as any other applicant if the operator is a local government unit and if the local government unit operates the wastewater treatment works pursuant to a contract with the State agency that contemplates that the local government unit will eventually acquire ownership of the wastewater treatment works.

"(e) Implementation; rulemaking. — The Environmental Management Commission shall adopt permanent rules to implement the nutrient management strategies required by this section by 15 January 2011. The rules shall require that reductions in nutrient loading from all sources begin no later than five years after the rules become effective. The rules shall require that stormwater management programs to reduce nutrient loading from new development be implemented no later than 30 months after the rules become effective.

"(f) Reports. — The Environmental Management Commission shall report its progress in implementing this section to the Environmental Review Commission as a part of each quarterly report it makes pursuant to G.S. 143B-282(b).

"(g) Compensatory mitigation for riparian buffer loss; nutrient offset purchases. — Compensatory mitigation for riparian buffer loss in the watershed of a drinking water supply to which this section applies must be performed in the watershed of the drinking water supply. The Environmental Management Commission may further limit the area in which compensatory mitigation for riparian buffer loss must be performed in the watershed of a drinking water supply to which this section applies. Any nutrient offset purchased to offset loading in the watershed of a drinking water supply to which this section applies may only be obtained from an offset project located in the watershed of the drinking water supply. The Environmental Management Commission may further limit the area from which nutrient offsets may be obtained in the watershed of a drinking water supply to which this section applies.

"(h) Additional standards for land-disturbing activities in the water supply watershed. — For purposes of this section, 'land-disturbing activity' does not include the land-disturbing activities set out in G.S. 113A-52.01. In addition to any other requirements of State, federal, and local law, land-disturbing activity in the watershed of the water supply reservoir to which this section applies shall meet all of the following design standards for sedimentation and erosion control:

"(1) Erosion and sedimentation control measures, structures, and devices shall be planned, designed, and constructed to provide protection from the runoff of the 25-year storm that produces the maximum peak rate of runoff as calculated according to procedures set out in the United States Department of Agriculture Soil Conservation Service's 'National Engineering Field Manual for Conservation Practices' or according to procedures adopted by any other agency of the State or the United States or any generally recognized organization or association.

"(2) Sediment basins shall be planned, designed, and constructed so that the basin will have a settling efficiency of at least seventy percent (70%) for the 40-micron size soil particle transported into the basin by the runoff of the two-year storm that produces the maximum peak rate of runoff as calculated according to procedures in the United States Department of Agriculture Soil Conservation Service's 'National Engineering Field Manual for Conservation Practices' or according to procedures adopted by any other agency of the State or the United States or any generally recognized organization or association.

"(3) Newly constructed open channels shall be planned, designed, and constructed with side slopes no steeper than two horizontal to one vertical if a vegetative cover is used for stabilization unless soil conditions permit steeper slopes or where the slopes are stabilized by using mechanical devices, structural devices, or other acceptable ditch liners. In any event, the angle for side slopes shall be sufficient to restrain accelerated erosion.

"(4) For an area of land-disturbing activity where grading activities have been completed, temporary or permanent ground cover sufficient to restrain erosion shall be provided as soon as practicable, but in no case later than seven days after completion of grading. For an area of land-disturbing activity where grading activities have not been completed, temporary ground cover shall be provided as follows:

"a. For an area with no slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of 14 days.

"b. For an area of moderate slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of 10 days. For purposes of this subdivision, 'moderate slope' means an inclined area, the inclination of which is less than or equal to three units of horizontal distance to one unit of vertical distance.

"c. For an area of steep slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of seven days. For purposes of this subdivision, 'steep slope' means an inclined area, the inclination of which is greater than three units of horizontal distance to one unit of vertical distance.

"(i) For purposes of this section, 'land-disturbing activity' does not include the land-disturbing activities set out in G.S. 113A-52.01. No later than December 31, 2011, the Sedimentation Control Commission shall adopt rules for the control of erosion and sedimentation resulting from land-disturbing activities in the watershed of the water supply reservoir to which this section applies. In developing the rules, the Commission shall consider the standards established pursuant to Section 3(h), as enacted by Section 2(b) of this act.

"(j) The Department of Environment and Natural Resources, in consultation with the Environmental Management Commission, shall identify improvements needed in the design, operation, and siting of septic tank systems in order to reduce excess nutrient loading from septic tank systems in the watershed of a drinking water supply to which this section applies. The Department shall report its findings and recommendations for specific changes to standards adopted by the Commission for Public Health pursuant to G.S. 130A-355 to the Commission for Public Health and to the Environmental Review Commission no later than March 1, 2010."

**Water Quality and Quantity in the Upper Neuse River Basin.** — The preamble to Session Laws 2009-486, provides: "Whereas, that portion of the Neuse River Basin that is upstream of the Falls Dam and that includes Falls Lake is often referred to as the Upper Neuse River Basin; and

"Whereas, the nine drinking water supply reservoirs in the Upper Neuse River Basin provide water for drinking, sanitation, food processing, cooling, industrial processing, and other essential uses for the citizens of Orange, Person, Durham, Granville, and Wake Counties; and

"Whereas, the General Assembly enacted S.L. 1997-458, the Clean Water Responsibility and Environmentally Sound Policy Act, to protect and restore the waters of the State in 1997; and

"Whereas, the General Assembly enacted S.L. 2005-190, the Clean Lakes Act, to protect and restore the drinking water supply reservoirs of the State in 2005; and

"Whereas, the North Carolina Division of Water Quality in the Department of Environment and Natural Resources listed Falls Lake in the Upper Neuse River Basin as impaired waters in 2008, and the U.S. Environmental Protection Agency also classifies Falls Lake as impaired waters due to nutrients and turbidity; and

"Whereas, the quality and quantity of the water in the nine drinking water supply reservoirs in the Upper Neuse River Basin are essential to public health, environmental quality, and the economic vitality of the region; and

"Whereas, the North Carolina Environmental Management Commission may not develop a nutrient management strategy and rules to implement the nutrient management strategy for the Upper Neuse River Basin by July 1, 2009, as required by law; and

"Whereas, delayed development of a nutrient management strategy and rules to implement the nutrient management strategy threatens the quality and quantity of drinking water supply reservoirs in the Upper Neuse River Basin; Now, therefore, The General Assembly of North Carolina enacts:"

Session Laws 2009-486, s. 1, provides: "(a) Definition. — For purposes of this section, the term 'Upper Neuse River Basin' is that portion of the Neuse River Basin upstream of the Falls Dam, including Falls Lake.

"(b) Credit for Early Adoption. — The Environmental Management Commission shall encourage local governments, landowners, and others to develop, adopt, and implement policies and practices to reduce the runoff and discharge of nitrogen, phosphorus, sediment, and other pollutants into the surface waters and drinking water supply reservoirs in the Upper Neuse River Basin before it adopts permanent rules to implement the nutrient management strategy and the turbidity strategy for Upper Falls Lake. The Environmental Management Commission shall, in its permanent rules, provide credit for the early implementation of the nutrient management strategy for the Upper Neuse River Basin and the turbidity strategy for Falls Lake to local governments, landowners, and others who implement policies and practices after January 1, 2007, to reduce runoff and discharge of nitrogen, phosphorus, and sediment in the Upper Neuse River Basin.

"(c) Reports. — The Environmental Management Commission shall report its progress in implementing this section to the Environmental Review Commission as part of each quarterly report it makes pursuant to G.S. 143B-282(b)."

**Editor's Note.** — Session Laws 1991, c. 403, s. 6 provides: "This act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act. Each agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency."

Session Laws 2009-486, s. 4, provides in part: "Section 3(h) of S.L. 2005-190, as enacted by Section 2(b) of this act, becomes effective January 1, 2010, applies to land-disturbing activities begun on or after January 1, 2010, and expires on the date that rules adopted pursuant to Section 3(i) of S.L. 2005-190, as enacted by Section 2(b) of this act, become effective."

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For comment, "Chlorofluorocarbon and Its Effects on the Ozone Layer: Is Legislation Sufficient to Protect the Environment?" see 19 N.C. Cent. L.J. 88 (1990).

For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

### CASE NOTES

**Cited** in Biddix v. Henredon Furn. Indus., Inc., 76 N.C. App. 30, 331 S.E.2d 717 (1985); North Carolina ex rel. McDevitt v. Acme Petroleum & Fuel Co., — F.3d —, 2002 U.S. App. LEXIS 4538 (4th Cir. Mar. 19, 2002).

## § 143-215.1. Control of sources of water pollution; permits required.

(a) Activities for Which Permits Required. — No person shall do any of the following things or carry out any of the following activities unless that person has received a permit from the Commission and has complied with all conditions set forth in the permit:

(1) Make any outlets into the waters of the State.

(2) Construct or operate any sewer system, treatment works, or disposal system within the State.

(3) Alter, extend, or change the construction or method of operation of any sewer system, treatment works, or disposal system within the State.

(4) Increase the quantity of waste discharged through any outlet or processed in any treatment works or disposal system to any extent that would result in any violation of the effluent standards or limitations established for any point source or that would adversely affect the condition of the receiving waters to the extent of violating any applicable standard.

(5) Change the nature of the waste discharged through any disposal system in any way that would exceed the effluent standards or limitations established for any point source or that would adversely affect the condition of the receiving waters in relation to any applicable standards.

(6) Cause or permit any waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument issued or entered into by the Commission under the provisions of this Article.

(7) Cause or permit any wastes for which pretreatment is required by pretreatment standards to be discharged, directly or indirectly, from a pretreatment facility to any disposal system or to alter, extend or change the construction or method of operation or increase the quantity or change the nature of the waste discharged from or processed in that facility.

(8) Enter into a contract for the construction and installation of any outlet, sewer system, treatment works, pretreatment facility or disposal system or for the alteration or extension of any such facility.

(9) Dispose of sludge resulting from the operation of a treatment works, including the removal of in-place sewage sludge from one location and its deposit at another location, consistent with the requirement of the Resource Conservation and Recovery Act and regulations promulgated pursuant thereto.

(10) Cause or permit any pollutant to enter into a defined managed area of the State's waters for the maintenance or production of harvestable freshwater, estuarine, or marine plants or animals.

(11) Cause or permit discharges regulated under G.S. 143-214.7 that result in water pollution.

(12) Construct or operate an animal waste management system, as defined in G.S. 143-215.10B, without obtaining a permit under either this Part or Part 1A of this Article.

(a1) In the event that both effluent standards or limitations and classifications and water quality standards are applicable to any point source or sources and to the waters to which they discharge, the more stringent among the standards established by the Commission shall be applicable and controlling.

(a2) No permit shall be granted for the disposal of waste in waters classified as sources of public water supply where the head of the agency that administers the public water supply program pursuant to Article 10 of Chapter 130A of the General Statutes, after review of the plans and specifications for the proposed disposal facility, determines and advises the Commission that any outlet for the disposal of waste is, or would be, sufficiently close to the intake works or proposed intake works of a public water supply as to have an adverse effect on the public health.

(a3) If the Commission denies an application for a permit, the Commission shall state in writing the reason for the denial and shall also state the Commission's estimate of the changes in the applicant's proposed activities or plans that would be required in order that the applicant may obtain a permit.

(a4) The Department shall regulate wastewater systems under rules adopted by the Commission for Public Health pursuant to Article 11 of Chapter 130A of the General Statutes except as otherwise provided in this subsection. No permit shall be required under this section for a wastewater system regulated under Article 11 of Chapter 130A of the General Statutes. The following wastewater systems shall be regulated by the Department under rules adopted by the Commission:

(1) Wastewater systems designed to discharge effluent to the land surface or surface waters.

(2) Wastewater systems designed for groundwater remediation, groundwater injection, or landfill leachate collection and disposal.

(3) Wastewater systems designed for the complete recycle or reuse of industrial process wastewater.

(b) Commission's Power as to Permits. —

(1) The Commission shall act on all permits so as to prevent, so far as reasonably possible, considering relevant standards under State and federal laws, any significant increase in pollution of the waters of the State from any new or enlarged sources. No permit shall be denied and no condition shall be attached to the permit, except when the Commission finds such denial or such conditions necessary to effectuate the purposes of this Article.

(2) The Commission shall also act on all permits so as to prevent violation of water quality standards due to the cumulative effects of permit decisions. Cumulative effects are impacts attributable to the collective effects of a number of projects and include the effects of additional projects similar to the requested permit in areas available for development in the vicinity. All permit decisions shall require that the practicable waste treatment and disposal alternative with the least adverse impact on the environment be utilized.

(3) General permits may be issued under rules adopted pursuant to Chapter 150B of the General Statutes. Such rules may provide that minor activities may occur under a general permit issued in accor-

dance with conditions set out in such rules. All persons covered under general permits shall be subject to all enforcement procedures and remedies applicable under this Article.

(4) The Commission shall have the power:
  a. To grant a permit with such conditions attached as the Commission believes necessary to achieve the purposes of this Article.
  b. To require that an applicant satisfy the Department that the applicant, or any parent, subsidiary, or other affiliate of the applicant or parent:
    1. Is financially qualified to carry out the activity for which the permit is required under subsection (a) of this section; and
    2. Has substantially complied with the effluent standards and limitations and waste management treatment practices applicable to any activity in which the applicant has previously engaged, and has been in substantial compliance with other federal and state laws, regulations, and rules for the protection of the environment.
    3. As used in this subdivision, the words "affiliate," "parent," and "subsidiary" have the same meaning as in 17 Code of Federal Regulations § 240.12b-2 (April 1, 1990, Edition).
    4. For a privately owned treatment works that serves 15 or more service connections or that regularly serves 25 or more individuals, financial qualification may be demonstrated through the use of a letter of credit, insurance, surety, trust agreement, financial test, bond, or a guarantee by corporate parents or third parties who can pass the financial test. No permit shall be issued under this section for a privately owned treatment works that serves 15 or more service connections or that regularly serves 25 or more individuals, until financial qualification is established and the issuance of the permit shall be contingent on the continuance of the financial qualification for the duration of the activity for which the permit was issued.
  c. To modify or revoke any permit upon not less than 60 days' written notice to any person affected.
  d. To designate certain classes of minor activities for which a general permit may be issued, after considering:
    1. The environmental impact of the activities;
    2. How often the activities are carried out;
    3. The need for individual permit oversight; and
    4. The need for public review and comment on individual permits.
  e. To designate certain classes of minor activities for which:
    1. Performance conditions may be established by rule; and
    2. Individual or general permits are not required.

(5) The Commission shall not issue a permit for a new municipal or domestic wastewater treatment works that would discharge to the surface waters of the State or for the expansion of an existing municipal or domestic wastewater treatment works that would discharge to the surface waters of the State unless the applicant for the permit demonstrates to the satisfaction of the Commission that:
  a. The applicant has prepared and considered an engineering, environmental, and fiscal analysis of alternatives to the proposed facility.
  b. The applicant is in compliance with the applicable requirements of the systemwide municipal and domestic wastewater collection systems permit program adopted by the Commission.

(b1) Repealed by Session Laws 1991, c. 156, s. 1.

(c) Applications for Permits and Renewals for Facilities Discharging to the Surface Waters. —

(1) All applications for permits and for renewal of existing permits for outlets and point sources and for treatment works and disposal systems discharging to the surface waters of the State shall be in writing, and the Commission may prescribe the form of such applications. All applications shall be filed with the Commission at least 180 days in advance of the date on which it is desired to commence the discharge of wastes or the date on which an existing permit expires, as the case may be. The Commission shall act on a permit application as quickly as possible. The Commission may conduct any inquiry or investigation it considers necessary before acting on an application and may require an applicant to submit plans, specifications, and other information the Commission considers necessary to evaluate the application.

(2)a. The Department shall refer each application for permit, or renewal of an existing permit, for outlets and point sources and treatment works and disposal systems discharging to the surface waters of the State to its staff for written evaluation and proposed determination with regard to issuance or denial of the permit. If the Commission concurs in the proposed determination, it shall give notice of intent to issue or deny the permit, along with any other data that the Commission may determine appropriate, to be given to the appropriate State, interstate and federal agencies, to interested persons, and to the public.

a1. The Commission shall prescribe the form and content of the notice. Public notice shall be given at least 45 days prior to any proposed final action granting or denying the permit. Public notice shall be given by publication of the notice one time in a newspaper having general circulation within the county.

b. Repealed by Session Laws 1987, c. 734.

(3) If any person desires a public hearing on any application for permit or renewal of an existing permit provided for in this subsection, he shall so request in writing to the Commission within 30 days following date of the notice of intent. The Commission shall consider all such requests for hearing, and if the Commission determines that there is a significant public interest in holding such hearing, at least 30 days' notice of such hearing shall be given to all persons to whom notice of intent was sent and to any other person requesting notice. At least 30 days prior to the date of hearing, the Commission shall also cause a copy of the notice thereof to be published at least one time in a newspaper having general circulation in such county. In any county in which there is more than one newspaper having general circulation in that county, the Commission shall cause a copy of such notice to be published in as many newspapers having general circulation in the county as the Commission in its discretion determines may be necessary to assure that such notice is generally available throughout the county. The Commission shall prescribe the form and content of the notices.

The Commission shall prescribe the procedures to be followed in hearings. If the hearing is not conducted by the Commission, detailed minutes of the hearing shall be kept and shall be submitted, along with any other written comments, exhibits or documents presented at the hearing, to the Commission for its consideration prior to final action granting or denying the permit.

(4) Not later than 60 days following notice of intent or, if a public hearing is held, within 90 days following consideration of the matters and things presented at such hearing, the Commission shall grant or deny any application for issuance of a new permit or for renewal of an existing permit. All permits or renewals issued by the Commission and all decisions denying application for permit or renewal shall be in writing.

(5) No permit issued pursuant to this subsection (c) shall be issued or renewed for a term exceeding five years.

(6) The Commission shall not act upon an application for a new nonmunicipal domestic wastewater discharge facility until it has received a written statement from each city and county government having jurisdiction over any part of the lands on which the proposed facility and its appurtenances are to be located which states whether the city or county has in effect a zoning or subdivision ordinance and, if such an ordinance is in effect, whether the proposed facility is consistent with the ordinance. The Commission shall not approve a permit application for any facility which a city or county has determined to be inconsistent with its zoning or subdivision ordinance unless it determines that the approval of such application has statewide significance and is in the best interest of the State. An applicant for a permit shall request that each city and county government having jurisdiction issue the statement required by this subdivision by mailing by certified mail, return receipt requested, a written request for such statement and a copy of the draft permit application to the clerk of the city or county. If a local government fails to mail the statement required by this subdivision, as evidenced by a postmark, within 15 days after receiving and signing for the certified mail, the Commission may proceed to consider the permit application notwithstanding this subdivision.

(c1) Any person who is required to obtain an individual wastewater permit under this section for a facility discharging to the surface waters of the State that have been classified as nutrient sensitive waters (NSW) under rules adopted by the Commission shall not discharge more than an average annual mass load of total nitrogen than would result from a discharge of the permitted flow, determined at the time the Commission makes a finding that those waters are experiencing or are subject to excessive growth of microscopic or macroscopic vegetation, having a total nitrogen concentration of five and one-half milligrams of nitrogen per liter (5.5 mg/l). The total nitrogen concentration of 5.5 mg/l for nutrient sensitive waters required by this subsection applies only to:

(1) Facilities that were placed into operation prior to 1 July 1997 or for which an authorization to construct was issued prior to 1 July 1997 and that have a design capacity to discharge 500,000 gallons per day or more.

(2) Facilities for which an authorization to construct is issued on or after 1 July 1997.

(c2) Any person who is required to obtain an individual wastewater permit under this section for a facility discharging to the surface waters of the State that have been classified as nutrient sensitive waters (NSW) under rules adopted by the Commission where phosphorus is designated by the Commission as a nutrient of concern shall not discharge more than an average annual mass load of total phosphorus than would result from a discharge of the permitted flow, determined at the time the Commission makes a finding that those waters are experiencing or are subject to excessive growth of microscopic or macroscopic vegetation, having a total phosphorus concentration of two milligrams of phosphorus per liter (2.0 mg/l). The total phosphorus concentration of 2.0 mg/l for nutrient sensitive waters required by this subsection applies only to:

(1) Facilities that were placed into operation prior to 1 July 1997 or for which an authorization to construct was issued prior to 1 July 1997 and that have a design capacity to discharge 500,000 gallons per day or more.

(2) Facilities for which an authorization to construct is issued on or after 1 July 1997.

(c3) A person to whom subsection (c1) or (c2) of this section applies may meet the limits established under those subsections either individually or on the basis of a cooperative agreement with other persons who hold individual wastewater permits if the cooperative agreement is approved by the Commission. A person to whom subsection (c1) or (c2) of this section applies whose agreement to accept wastewater from another wastewater treatment facility that discharges into the same water body and that results in the elimination of the discharge from that wastewater treatment facility shall be allowed to increase the average annual mass load of total nitrogen and total phosphorus that person discharges by the average annual mass load of total nitrogen and total phosphorus of the wastewater treatment facility that is eliminated. If the wastewater treatment facility that is eliminated has a permitted flow of less than 500,000 gallons per day, the average annual mass load of total nitrogen or phosphorus shall be calculated from the most recent available data. A person to whom this subsection applies shall comply with nitrogen and phosphorus discharge monitoring requirements established by the Commission. This average annual load of nitrogen or phosphorus shall be assigned to the wastewater discharge allocation of the wastewater treatment facility that accepts the wastewater.

(c4) A person to whom subsection (c1) of this section applies may request the Commission to approve a total nitrogen concentration greater than that set out in subsection (c1) of this section at a decreased permitted flow so long as the average annual mass load of total nitrogen is equal to or is less than that required under subsection (c1) of this section. A person to whom subsection (c2) of this section applies may request the Commission to approve a total phosphorus concentration greater than that set out in subsection (c2) of this section at a decreased permitted flow so long as the average annual mass load of total phosphorus is equal to or is less than that required under subsection (c2) of this section. If, after any 12-month period following approval of a greater concentration at a decreased permitted flow, the Commission finds that the greater concentration at a decreased permitted flow does not result in an average annual mass load of total nitrogen or total phosphorus equal to or less than those that would be achieved under subsections (c1) and (c2) of this section, the Commission shall rescind its approval of the greater concentration at a decreased permitted flow and the requirements of subsections (c1) and (c2) of this section shall apply.

(c5) For surface waters to which the limits set out in subsection (c1) or (c2) of this section apply and for which a calibrated nutrient response model that meets the requirements of this subsection has been approved by the Commission, mass load limits for total nitrogen or total phosphorus shall be based on the results of the nutrient response model. A calibrated nutrient response model shall be developed and maintained with current data, be capable of predicting the impact of nitrogen or phosphorus in the surface waters, and incorporated into nutrient management plans by the Commission. The maximum mass load for total nitrogen or total phosphorus established by the Commission shall be substantiated by the model and may require individual discharges to be limited at concentrations that are different than those set out in subsection (c1) or (c2) of this section. A calibrated nutrient response model shall be developed by the Department in conjunction with the affected parties and is subject to approval by the Commission.

(c6) For surface waters that the Commission classifies as nutrient sensitive waters (NSW) on or after 1 July 1997, the Commission shall establish a date by which facilities that were placed into operation prior to the date on which the surface waters are classified NSW or for which an authorization to construct was issued prior to the date on which the surface waters are classified NSW must comply with subsections (c1) and (c2) of this section. The Commission shall establish the compliance date at the time of the classification. The Commission shall not establish a compliance date that is more than five years after the date of the classification. The Commission may extend the compliance date as provided in G.S. 143-215.1B. A request to extend a compliance date shall be submitted within 120 days of the date on which the Commission reclassifies a surface water body as NSW.

(d) Applications and Permits for Sewer Systems, Sewer System Extensions and Pretreatment Facilities, Land Application of Waste, and for Wastewater Treatment Facilities Not Discharging to the Surface Waters of the State. —

(1) All applications for new permits and for renewals of existing permits for sewer systems, sewer system extensions and for disposal systems, and for land application of waste, or treatment works which do not discharge to the surface waters of the State, and all permits or renewals and decisions denying any application for permit or renewal shall be in writing. The Commission shall act on a permit application as quickly as possible. The Commission may conduct any inquiry or investigation it considers necessary before acting on an application and may require an applicant to submit plans, specifications, and other information the Commission considers necessary to evaluate the application. If the Commission fails to act on an application for a permit, including a renewal of a permit, within 90 days after the applicant submits all information required by the Commission, the application is considered to be approved. Permits and renewals issued in approving such facilities pursuant to this subsection shall be effective until the date specified therein or until rescinded unless modified or revoked by the Commission. Local governmental units to whom pretreatment program authority has been delegated shall establish, maintain, and provide to the public, upon written request, a list of pretreatment applications received.

(2) An applicant for a permit to dispose of petroleum contaminated soil by land application shall give written notice that he intends to apply for such a permit to each city and county government having jurisdiction over any part of the land on which disposal is proposed to occur. The Commission shall not accept such a permit application unless it is accompanied by a copy of the notice and evidence that the notice was sent to each such government by certified mail, return receipt requested. The Commission may consider, in determining whether to issue the permit, the comments submitted by local governments.

(d1) Each applicant under subsections (c) or (d) for a permit (or the renewal thereof) for the operation of a treatment works for a private multi-family or single family residential development, in which the owners of individual residential units are required to organize as a lawfully constituted and incorporated homeowners' association of a subdivision, condominium, planned unit development, or townhouse complex, shall be required to enter into an operational agreement with the Commission as a condition of any such permit granted. The agreement shall address, as necessary, construction, operation, maintenance, assurance of financial solvency, transfers of ownership and abandonment of the plant, systems, or works, and shall be modified as necessary to reflect any changed condition at the treatment plant or in the development. Where the Commission finds appropriate, it may require any other private residential subdivision, condominium, planned unit development or townhouse complex which is served by a private treatment works and does not have a lawfully constituted and incorporated homeowners' association, and for which an applicant applies for a permit or the renewal thereof under subsections (c) or (d), to incorporate as a lawfully constituted homeowners' association, and after such incorporation, to enter into an operational agreement with the Commission and the applicant as a condition of any permit granted under subsections (c) or (d). The local government unit or units having jurisdiction over the development shall receive notice of the application within an established comment period and prior to final decision.

(e) Administrative Review. — A permit applicant or permittee who is dissatisfied with a decision of the Commission may commence a contested case by filing a petition under G.S. 150B-23 within 30 days after the Commission notifies the applicant or permittee of its decision. If the permit applicant or permittee does not file a petition within the required time, the Commission's decision is final and is not subject to review.

(f) Local Permit Programs for Sewer Extension and Reclaimed Water Utilization. — Municipalities, counties, local boards or commissions, water and sewer authorities, or groups of municipalities and counties may establish and administer within their utility service areas their own general permit programs in lieu of State permit required in G.S. 143-215.1(a)(2), (3), and (8) above, for construction, operation, alteration, extension, change of proposed or existing sewer system, subject to the prior certification of the Commission. For purposes of this subsection, the service area of a municipality shall include only that area within the corporate limits of the municipality and that area outside a municipality in its extraterritorial jurisdiction where sewer service or a reclaimed water utilization system is already being provided by the municipality to the permit applicant or connection to the municipal sewer system or a reclaimed water utilization system is immediately available to the applicant; the service areas of counties and the other entities or groups shall include only those areas where sewer service or a reclaimed water utilization system is already being provided to the applicant by the permitting authority or connection to the permitting authority's system is immediately available. No later than the 180th day after the receipt of a program and statement submitted by any local government, commission, authority, or board the Commission shall certify any local program that does all of the following:

(1) Provides by ordinance or local law for requirements compatible with those imposed by this Part and the rules implementing this Part.

(2) Provides that the Department receives notice and a copy of each application for a permit and that it receives copies of approved permits and plans upon request by the Commission.

(3) Provides that plans and specifications for all construction, extensions, alterations, and changes be prepared by or under the direct supervision of an engineer licensed to practice in this State.

(4) Provides for the adequate enforcement of the program requirements by appropriate administrative and judicial process.

(5) Provides for the adequate administrative organization, engineering staff, financial and other resources necessary to effectively carry out its plan review program.

(6) Provides that the system is capable of interconnection at an appropriate time with an expanding municipal, county, or regional system.

(7) Provides for the adequate arrangement for the continued operation, service, and maintenance of the sewer or a reclaimed water utilization system.

(8) Is approved by the Commission as adequate to meet the requirements of this Part and the rules implementing this Part.

(f1) The Commission may deny, suspend, or revoke certification of a local program upon a finding that a violation of the provisions in subsection (f) of this section has occurred. A denial, suspension, or revocation of a certification of a local program shall be made only after notice and a public hearing. If the failure of a local program to carry out this subsection creates an imminent hazard, the Commission may summarily revoke the certification of the local program. Chapter 150B of the General Statutes does not apply to proceedings under this subsection.

(f2) Notwithstanding any other provision of subsections (f) and (f1) of this section, if the Commission determines that a sewer system, treatment works, or disposal system is operating in violation of the provisions of this Article and that the appropriate local authorities have not acted to enforce those provisions, the Commission may, after written notice to the appropriate local government, take enforcement action in accordance with the provisions of this Article.

(g) Any person who is required to hold a permit under this section shall submit to the Department a written description of his current and projected plans to reduce the discharge of waste and pollutants under such permit by source reduction or recycling. The written description shall accompany the payment of the annual permit fee. The written description shall also accompany any application for a new permit, or for modification of an existing permit, under this section. The written description required by this subsection shall not be considered part of a permit application and shall not serve as the basis for the denial of a permit or permit modification.

(h) Each applicant for a new permit or the modification of an existing permit issued under subsection (c) of this section shall include with the application: (i) the extent to which the new or modified facility is constructed in whole or in part with funds provided or administered by the State or a unit of local government, (ii) the impact of the facility on water quality, and (iii) whether there are cost-effective alternative technologies that will achieve greater protection of water quality. The Commission shall prepare a quarterly summary and analysis of the information provided by applicants pursuant to this subsection. The Commission shall submit the summary and analysis required by this subsection to the Environmental Review Commission (ERC) as a part of each quarterly report that the Commission is required to make to the ERC under G.S. 143B-282(b). (1951, c. 606; 1955, c. 1131, s. 1; 1959, c. 779, s. 8; 1967, c. 892, s. 1; 1971, c. 1167, s. 6; 1973, c. 476, s. 128; c. 821, s. 5; c. 1262, s. 23; 1975, c. 19, s. 51; c. 583, ss. 2-4; c. 655, ss. 1, 2; 1977, c. 771, s. 4; 1979, c. 633, s. 5; 1985, c. 446, s. 1; c. 697, s. 2; 1985 (Reg. Sess., 1986), c. 1023, ss. 1-5; 1987, c. 461, s. 1; c. 734, s. 1; c. 827, ss. 154, 159; 1989, c. 51, s. 2; c. 168, s. 29; c. 453, ss. 1, 2; c. 494, s. 1; c. 727, ss. 160, 161; 1989 (Reg. Sess., 1990), c. 1004, s. 17; c. 1024, s. 33; c. 1037, s. 1; 1991, c. 156, s. 1; c. 498, s. 1; 1991 (Reg. Sess., 1992), c. 944, s. 12; 1995 (Reg. Sess., 1996), c. 626, s. 2; 1997-458, ss. 6.1, 9.1, 11.2; 1997-496, s. 3; 1998-212, s. 14.9H(b), (d); 1999-329, s. 10.1; 2004-195, s. 1.5; 2006-250, s. 5; 2007-182, s. 2.)

**Management of Water Quality in the Jordan Watershed.** — Session Laws 2009-216, s. 9, as amended by Session Laws 2009-484, s. 8, provides, in part, that the Revisor of Statutes shall set out the text of Session Laws 2009-216, s. 2 as a note to G.S. 143-215.1. Sections 1, 2, and 6 through 8 of Session Laws 2009-216, as amended by Session Laws 2009-484, ss. 6(a) and 8, effective June 30, 2009, provide: "SECTION 1. Definitions. — The following definitions apply to this act and its implementation:

"(1) The definitions set out in G.S. 143-212 and G.S. 143-213.

"(2) The definitions set out in 15A NCAC 02B.0262 (Jordan Water Supply Nutrient

Strategy: Purpose and Scope) and 15A NCAC 02B.0263 (Jordan Water Supply Nutrient Strategy: Definitions).

"(3) 'Existing Development Rule 15A NCAC 02B.0266' means 15A NCAC 02B.0266 (Jordan Water Supply Nutrient Strategy: Stormwater Management for Existing Development), adopted by the Commission on May 8, 2008, and approved by the Rules Review Commission on November 20, 2008.

"(4) 'Wastewater Discharge Rule 15A NCAC 02B.0270' means 15A NCAC 02B.0270 (Jordan Water Supply Nutrient Strategy: Wastewater Discharge Requirements) adopted by the Commission on May 8, 2008, and approved by the Rules Review Commission on October 16, 2008.

"SECTION 2.(a) Wastewater Discharge Rule 15A NCAC 02B.0270. — Until the effective date of the revised permanent rule that the Commission is required to adopt pursuant to Section 2(c) of this act, the Commission and the Department shall implement the Wastewater Discharge Rule 15A NCAC 02B.0270, as provided in Section 2(b) of this act.

"(b) Implementation. — Notwithstanding sub-subdivision (c) of subdivision (6) of Wastewater Discharge Rule 15A NCAC 02B.0270, each existing discharger with a permitted flow greater than or equal to 0.1 million gallons per day (MGD) shall limit its total nitrogen discharge to its active individual discharge allocation as defined or modified pursuant to Wastewater Discharge Rule 15A NCAC 02B.0270 no later than calendar year 2016.

"(c) Additional Rule-Making Authority. — The Commission shall adopt a rule to replace Wastewater Discharge Rule 15A NCAC 02B.0270. Notwithstanding G.S. 150B-19(4), the rule adopted by the Commission pursuant to this section shall be substantively identical to the provisions of Section 2(b) of this act. Rules adopted pursuant to this section are not subject to G.S. 150B-21.9 through G.S. 150B-21.14. Rules adopted pursuant to this section shall become effective as provided in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2)."

"SECTION 6.(a) Definitions. — The following definitions apply to this section and its implementation:

"(1) The definitions set out in G.S. 143-212 and G.S. 143-213.

"(2) The definitions set out in 15A NCAC 02B.0262 (Jordan Water Supply Nutrient Strategy: Purpose and Scope) and 15A NCAC 02B.0263 (Jordan Water Supply Nutrient Strategy: Definitions).

"(3) 'State and Federal Rule 15A NCAC 02B.0271' means 15A NCAC 02B.0271 (Jordan Water Supply Nutrient Strategy: Stormwater Requirements for State and Federal Entities), adopted by the Commission on May 8, 2008, and approved by the Rules Review Commission on October 16, 2008.

"(4) 'Riparian Buffer Rule 15A NCAC 02B.0267' means 15A NCAC 02B.0267 (Jordan Water Supply Nutrient Strategy: Protection of Existing Riparian Buffers), adopted by the Commission on May 8, 2008, and approved by the Rules Review Commission on November 20, 2008.

"(b) State and Federal Rule 15A NCAC 02B.0271. — Until the effective date of the revised permanent rule that the Commission is required to adopt pursuant to Section 6(d) of this act, the Commission and the Department shall implement the State and Federal Rule 15A NCAC 02B.0271, as provided in Section 6(c) of this act.

"(c) Implementation. — Notwithstanding State and Federal Rule 15A NCAC 02B.0271, the Commission shall implement the State and Federal Rule 15A NCAC 02B.0271 as follows:

"(1) The load reduction goal for existing North Carolina Department of Transportation roadway and nonroadway development shall be established as provided in this subdivision. The load reduction goal shall be designed to achieve, relative to the baseline period 1997 through 2001, an eight percent (8%) reduction in nitrogen loading and a five percent (5%) reduction in phosphorus loading reaching Jordan Reservoir from existing roadway and nonroadway development in the Upper New Hope and Haw subwatersheds. The load reduction goal for the Lower New Hope arm shall be designed to maintain no increases in nitrogen and phosphorus loads from existing roadway and nonroadway development relative to the baseline period 1997 through 2001. Load reduction goals for each subwatershed shall be calculated from baseline loads for existing North Carolina Department of Transportation development present during the baseline period. Baseline loads shall be established for roadways and industrial facilities using stormwater runoff nutrient load characterization data collected through the National Pollutant Discharge Elimination System (NPDES) Research Program under NCS0000250 Permit Part II Section G. Baseline loads for other nonroadway development shall be calculated by applying the Tar-Pamlico Nutrient Export Calculation Worksheet, Piedmont Version, dated October 2004, to acreages of nonroadway development under the control of North Carolina Department of Transportation during the baseline period. The baseline load for other nonroadway development may also be calculated using an equivalent or more accurate method acceptable to the Department and recommended by the Scientific Advisory Board established pursuant to Section 4(a) of S.L. 2009-216. The load reduction goal shall be adjusted to account for nutrient loading increases from existing roadway and nonroadway development subsequent to the baseline period but prior to implementation of new development stormwater programs pursuant to 15A NCAC 02B.0271(4)(c).

"(2) Sub-subdivision (b) of subdivision (3) and sub-subdivision (d) of subdivision (4) of State and Federal Rule 15A NCAC 02B.0271 shall be implemented as follows:

"a. If the March 1, 2014, monitoring report or any subsequent monitoring report for the Upper New Hope Creek Arm of Jordan Reservoir required under Section 3(c) of S.L. 2009-216 shows that nutrient-related water quality standards are not being achieved, State and federal entities shall develop and implement a program to control nutrient loading from existing development within the subwatershed, as provided in this section and State and Federal Rule 15A NCAC 02B.0271. If the March 1, 2017, monitoring report or any subsequent monitoring report for the Haw River Arm or the Lower New Hope Creek Arm of Jordan Reservoir required under Section 3(c) of S.L. 2009-216 shows that nutrient-related water quality standards are not being achieved, State and federal entities shall develop and implement a program to control nutrient loading from existing development within the subwatershed, as provided in this section and State and Federal Rule 15A NCAC 02B.0271. The Department shall defer development and implementation of a program to control nutrient loading from existing development required in a subwatershed by this sub-subdivision if it determines that additional reductions in nutrient loading from existing development in that subwatershed will not be necessary to achieve nutrient-related water quality standards. In making this determination, the Department shall consider the anticipated effect of measures implemented or scheduled to be implemented to reduce nutrient loading from sources in the subwatershed other than existing development. If any subsequent monitoring report for an arm of Jordan Reservoir required under Section 3(c) of S.L. 2009-216 shows that nutrient-related water quality standards have not been achieved, the Department shall notify each State and federal entity, and each entity shall develop and implement a program to control nutrient loading from existing development as provided in this section and State and Federal Rule 15A NCAC 02B.0271.

"b. If the Commission requires additional reductions in nutrient loading from local governments pursuant to Section 3(f) of S.L. 2009-216, the Commission shall require State and federal entities to modify their nutrient reduction programs for the Upper New Hope Creek subwatershed to achieve a total reduction in nitrogen loading from existing roadway and nonroadway development in nitrogen loading from existing development of thirty-five percent (35%) relative to the baseline period 1997-2001.

"(3) Notwithstanding sub-subdivision (d) of subdivision (4) of State and Federal Rule 15A NCAC 02B.0271, the North Carolina Department of Transportation may achieve the nutrient load reduction goal in subdivision (1) of this section for existing roadway and nonroadway development under its control by development of a load reduction program that addresses both roadway and nonroadway development in the watershed for each arm of Jordan Reservoir. A combined program to address roadway and nonroadway development may include stormwater retrofits and other load-reducing measures in the watershed including, but not limited to, illicit discharge removal; street sweeping; source control activities such as pet waste reduction and fertilizer management at NCDOT facilities; improvement of existing stormwater structures; alternative stormwater practices such as use of rain barrels and cisterns; stormwater capture and reuse; and purchase of nutrient reduction credits. NCDOT may meet minimum implementation rate and schedule requirements by implementing a combination of three stormwater retrofits per year for existing roadway development in the Jordan Lake watershed and other load-reducing measures identified in the program to control nutrient loading from existing development developed pursuant to State and Federal Entities Rule 15A NCAC 02B.0271 and this act and approved by the Commission.

"(d) Additional Rule-Making Authority. — The Commission shall adopt a rule to replace State and Federal Rule 15A NCAC 02B.0271. Notwithstanding G.S. 150B-19(4), the rule adopted by the Commission pursuant to this section shall be substantively identical to the provisions of Section 6(c) of this act. Rules adopted pursuant to this section are not subject to G.S. 150B-21.9 through G.S. 150B-21.14. Rules adopted pursuant to this section shall become effective as provided in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2).

"(e) Sunset. — Section 6(c) of this act expires on the date that rules adopted pursuant to Section 6(d) of this act become effective.

"(f) Riparian Buffer Rule 15A NCAC 02B.0267. — Until the effective date of the revised permanent rule that the Commission is required to adopt pursuant to Section 6(h) of this act, the Commission and the Department shall implement the Riparian Buffer Rule 15A NCAC 02B.0267, as provided in Section 6(g) of this act.

"(g) Implementation. — Notwithstanding Riparian Buffer Rule 15A NCAC 02B.0267, the Commission shall implement Riparian Buffer

Rule 15A NCAC 02B.0267 as provided in this section.

"(1) For purposes of implementing Riparian Buffer Rule 15A NCAC 02B.0267, the Commission may only use one of the following types of maps for purposes of identifying a water body subject to the riparian buffer protection requirements of Riparian Buffer Rule 15A NCAC 02B.0267:

"a. The most recent version of the soil survey map prepared by the Natural Resources Conservation Service of the United State Department of Agriculture.

"b. The most recent version of the 1:24,000 scale (7.5 minute) quadrangle topographic maps prepared by the United States Geological Survey.

"c. A map approved by the Geographic Information Coordinating Council and by the Commission. Prior to approving a map under this sub-subdivision, the Commission shall provide a 30-day public notice and opportunity for comment.

"(2) Alternative maps approved by the Commission under subdivision (1) of this section shall not be used for buffer delineation on projects that are existing and ongoing within the meaning of subdivision (6) of Riparian Buffer Rule 15A NCAC 02B.0267.

"(3) Sub-subdivision a. of subdivision (4) of Riparian Buffer Rule 15A NCAC 02B.0267 shall be interpreted to prohibit only those activities conducted outside the buffer that have the effect of altering the hydrology in violation of the diffuse flow requirements set out in subdivision (8) of Riparian Buffer Rule 15A NCAC 02B.0267.

"(h) Additional Rule-Making Authority. — The Commission shall adopt a rule to replace Riparian Buffer Rule 15A NCAC 02B.0267. Notwithstanding G.S. 150B-19(4), the rule adopted by the Commission pursuant to this section shall be substantively identical to the provisions of Section 6(g) of this act. Rules adopted pursuant to this section are not subject to G.S. 150B-21.9 through G.S. 150B-21.14. Rules adopted pursuant to this section shall become effective as provided in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2).

"(i) Sunset. — Section 6(g) of this act expires on the date that rules adopted pursuant to Section 6(h) of this act become effective.

"SECTION 7. No Preemption. — A local government may adopt and implement a stormwater management program that contains provisions that are more restrictive than the standards set forth in Sections 2, 3, and 5 of this act or in any rules concerning stormwater management in the Jordan watershed adopted by the Commission. This section shall not be construed to authorize a local government to impose stormwater management requirements on lands in agriculture or forestry.

"SECTION 8. Construction of Act. —

"(1) Except as specifically provided in Sections 2(c), 3(j), 5(d), and 6(h) of this act, nothing in this act shall be construed to limit, expand, or otherwise alter the authority of the Commission or any unit of local government.

"(2) This act shall not be construed to affect any delegation of any power or duty by the Commission to the Department or subunit of the Department.

For more provisions pertaining to water quality rule-making for the Jordan Watershed pursuant to Session Laws 2009-216, ss. 1 and 3-8, as amended by Session Laws 2009-484, ss. 6(b), (c), 7, and 8, see the note at G.S. 143-214.7.

**Water Quality and Quantity in the Upper Neuse River Basin.** — The preamble to Session Laws 2009-486, provides: "Whereas, that portion of the Neuse River Basin that is upstream of the Falls Dam and that includes Falls Lake is often referred to as the Upper Neuse River Basin; and

"Whereas, the nine drinking water supply reservoirs in the Upper Neuse River Basin provide water for drinking, sanitation, food processing, cooling, industrial processing, and other essential uses for the citizens of Orange, Person, Durham, Granville, and Wake Counties; and

"Whereas, the General Assembly enacted S.L. 1997-458, the Clean Water Responsibility and Environmentally Sound Policy Act, to protect and restore the waters of the State in 1997; and

"Whereas, the General Assembly enacted S.L. 2005-190, the Clean Lakes Act, to protect and restore the drinking water supply reservoirs of the State in 2005; and

"Whereas, the North Carolina Division of Water Quality in the Department of Environment and Natural Resources listed Falls Lake in the Upper Neuse River Basin as impaired waters in 2008, and the U.S. Environmental Protection Agency also classifies Falls Lake as impaired waters due to nutrients and turbidity; and

"Whereas, the quality and quantity of the water in the nine drinking water supply reservoirs in the Upper Neuse River Basin are essential to public health, environmental quality, and the economic vitality of the region; and

"Whereas, the North Carolina Environmental Management Commission may not develop a nutrient management strategy and rules to implement the nutrient management strategy for the Upper Neuse River Basin by July 1, 2009, as required by law; and

"Whereas, delayed development of a nutrient management strategy and rules to implement the nutrient management strategy threatens the quality and quantity of drinking water supply reservoirs in the Upper Neuse River Basin; Now, therefore, The General Assembly of North Carolina enacts:"

Session Laws 2009-486, s. 1, provides: "(a) Definition. — For purposes of this section, the term 'Upper Neuse River Basin' is that portion of the Neuse River Basin upstream of the Falls Dam, including Falls Lake.

"(b) Credit for Early Adoption. — The Environmental Management Commission shall encourage local governments, landowners, and others to develop, adopt, and implement policies and practices to reduce the runoff and discharge of nitrogen, phosphorus, sediment, and other pollutants into the surface waters and drinking water supply reservoirs in the Upper Neuse River Basin before it adopts permanent rules to implement the nutrient management strategy and the turbidity strategy for Upper Falls Lake. The Environmental Management Commission shall, in its permanent rules, provide credit for the early implementation of the nutrient management strategy for the Upper Neuse River Basin and the turbidity strategy for Falls Lake to local governments, landowners, and others who implement policies and practices after January 1, 2007, to reduce runoff and discharge of nitrogen, phosphorus, and sediment in the Upper Neuse River Basin.

"(c) Reports. — The Environmental Management Commission shall report its progress in implementing this section to the Environmental Review Commission as part of each quarterly report it makes pursuant to G.S. 143B-282(b)."

**Editor's Note.** — This section was amended by Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 2, in the coded bill drafting format provided by G.S. 120-20.1. The subsection designation (a4) was assigned by the Revisor of Statutes.

Session Laws 1997-458, s. 1.2(b), as amended by Session Laws 1998-188, s. 3, by Session Laws 1999-329, s. 2.2, by Session Laws 2001-254, s. 2, and by Session Laws 2003-266, s. 2, provides: "In order to protect travel and tourism, effective 1 September 2007, no animal waste management system shall be permitted except under an individual permit issued under Part 1 of Article 21 of Chapter 143 of the General Statutes in any county in the State: (i) that has a population of less than 75,000 according to the most recent decennial federal census; (ii) in which there is more than one hundred fifty million dollars ($150,000,000) of expenditures for travel and tourism based on the most recent figures of the Department of Commerce; and (iii) that is not in the coastal area as defined by G.S. 113A-103."

Session Laws 1997-458, s. 6.4, provides G.S. 143-215.1(c5), as enacted by Section 6.1 of this act, shall not be construed to invalidate any limit established by the Environmental Management Commission prior to the date this act becomes effective. A limit established by the Environmental Management Commission prior to the date this act becomes effective may be altered pursuant to a calibrated nutrient response model approved by the Commission in accordance with G.S. 143-215.1(c5), as enacted by Section 6.1 of this act.

Session Laws 1997-458, s. 13.3, contains a severability clause.

As to a moratorium on the construction or expansion of swine farms or lagoons or animal waste management systems for swine farms, established by Session Laws 1997-458, ss. 1.1 and 1.2, as amended by Session Laws 1998-188, ss. 2 and 3, by Session Laws 1999-329, ss. 2.1 and 2.2, by Session Laws 2001-254, ss. 1 and 2, and by Session Laws 2003-266, ss. 1 and 2, see the Editor's notes following G.S. 143-215.10A.

Session Laws 1998-212, s. 14.9H(e), provides: "The Environmental Management Commission shall present the first summary and analysis required by G.S. 143-215.1(h), as enacted by subsection (d) of this section, as a part of the quarterly report to the Environmental Review Commission due on or before 15 April 1999 under G.S. 143B-282(b), as amended by subsection (f) of this section."

Session Laws 1999-329, s. 13.7, provides that this act shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act. Every State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency.

Session Laws 2001-361, s. 1, provides: "Notwithstanding G.S. 150B-21.3(b), 15A NCAC 2B.0315 (Neuse River Basin), as amended by the Environmental Management Commission on 12 October 2000 and approved by the Rules Review Commission on 16 November 2000, becomes effective on 1 July 2004 unless the 2004 Regular Session of the 2003 General Assembly specifically disapproves 15A NCAC 2B.0315 (Neuse River Basin), as amended by the Environmental Management Commission on 12 October 2000 and approved by the Rules Review Commission on 16 November 2000, by enactment of a bill as provided in G.S. 150B-21.3(b)."

Session Laws 2003-433, ss. 1 and 2, provide: "Pursuant to G.S. 150B-21.3(b), 15A NCAC 2B.0225 (Outstanding Resource Waters) and 15A NCAC 2B.0316 (Tar-Pamlico River Basin), as adopted by the Environmental Management Commission on 11 July 2002 and approved by the Rules Review Commission on 15 August 2002, are approved effective 1 August 2003 with respect to all waters and lands that are located west of Nash County State Road 1003 (Red Oak Road).

"With respect to all waters and lands that are located east of Nash County State Road 1003

(Red Oak Road), 15A NCAC 2B.0225 (Outstanding Resource Waters) and 15A NCAC 2B.0316 (Tar-Pamlico River Basin), as adopted by the Environmental Management Commission on 11 July 2002 and approved by the Rules Review Commission on 15 August 2002, shall not become effective as provided in G.S. 150B-21.3(b) and shall become effective only as the 2004 Regular Session of the 2003 General Assembly may provide by law."

Session Laws 2004-176, s. 6, provides:

"(1) In the event there is a final determination by a court of competent jurisdiction that part or all of the federal regulations governing dry litter poultry facilities are invalid, this act shall not be construed to implement the invalid parts of the regulations or to apply the invalid parts of the regulations to facilities otherwise made subject to those federal regulations.

"(2) This act shall not be construed to affect the provisions of Section 1.1 of S.L. 1997-458, as amended by Section 2 of S.L. 1998-188, Section 2.1 of S.L. 1999-329, Section 1 of S.L. 2001-254, and S.L. 2003-266.

"(3) This act shall not be construed to affect any federal permit requirement that was in effect on or before the date this act becomes effective."

Session Laws 2008-211 enacted improvements to the rules on the management of stormwater in the coastal counties in order to protect water quality, which superceded the former rules. The act is noted in full under G.S. 143-214.7.

Session Laws 2008-211, s. 1(a)-(b), provides: "(a) Disapprove Rule. — Pursuant to G.S. 150B-21.3(b1), 15A NCAC 02H.1005 (Stormwater Requirements: Coastal Counties), as adopted by the Environmental Management Commission on 10 January 2008 and approved by the Rules Review Commission on 20 March 2008, is disapproved.

"(b) Supersede Rule. — 15A NCAC 02H.1005 (Stormwater Requirements: Coastal Counties), effective 1 September 1995, is superseded by this act. References in the North Carolina Administrative Code to 15A NCAC 02H.1005 shall be deemed to refer to the equivalent provisions of this act."

**Legal Periodicals.** — For note on estuarine pollution, see 49 N.C.L. Rev. 921 (1971).

For 1997 legislative survey, see 20 Campbell L. Rev. 450.

## CASE NOTES

**Illustrative Cases.** — Trial court did not err in setting aside two penalties for violating notice requirements of the hog facility owner's permit, because those two events, regarding problems with the waste management system, did not occur during the time period of the illegal discharges, and did not cause an emergency action plan to be initiated; the trial court erred in failing to uphold all eight violations for the consecutive days of the illegal discharges and holding the facility owner committed only one violation. Murphy Family Farms v. N.C. Dep't of Env't & Natural Res., 160 N.C. App. 338, 585 S.E.2d 446, 2003 N.C. App. LEXIS 1793 (2003), cert. granted, 358 N.C. 155, 592 S.E.2d 690 (2004).

**Authority to Issue Permits.** — G.S. 143-215.1 authorizes the North Carolina Environmental Management Commission to issue permits in order to control sources of water pollution. N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 154 N.C. App. 18, 571 S.E.2d 602, 2002 N.C. App. LEXIS 1411 (2002), review denied sub nom. N.C. Forestry Ass'n v. N.C. Dep't of Env't & Nat'l Res., 357 N.C. 251, 582 S.E.2d 276 (2003).

G.S. 143-215.1(b) gives the North Carolina Environmental Management Commission authority to issue general National Pollutant Discharge Elimination System permits. N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 154 N.C. App. 18, 571 S.E.2d 602, 2002 N.C. App. LEXIS 1411 (2002), review denied sub nom. N.C. Forestry Ass'n v. N.C. Dep't of Env't & Nat'l Res., 357 N.C. 251, 582 S.E.2d 276 (2003).

G.S. 143-215.1 does not require the North Carolina Environmental Management Commission to make general National Pollutant Discharge Elimination System permits available, and availability of general permits depends on, inter alia, the need for individual permit oversight and the need for public review and comment on individual permits, under G.S. 143-215.1(b)(4). N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 154 N.C. App. 18, 571 S.E.2d 602, 2002 N.C. App. LEXIS 1411 (2002), review denied sub nom. N.C. Forestry Ass'n v. N.C. Dep't of Env't & Nat'l Res., 357 N.C. 251, 582 S.E.2d 276 (2003).

**Permit Types.** — Under G.S. 143-215.1, National Pollutant Discharge Elimination System permits may be "general," prescribing conditions to be applied to a group or category of discharges, or "individual," tailored to the particular discharge and location. N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 154 N.C. App. 18, 571 S.E.2d 602, 2002 N.C. App. LEXIS 1411 (2002), review denied sub nom. N.C. Forestry Ass'n v. N.C. Dep't of Env't & Nat'l Res., 357 N.C. 251, 582 S.E.2d 276 (2003).

Review of G.S. 143-215.1(b) and the history of general National Pollutant Discharge Elimination System permits reveals their primary purpose is to alleviate the North Carolina Environmental Management Commission's administrative burden, so the statute does not define a right to a general permit, abrogation of which provides the grounds for an administrative hearing pursuant to the North Carolina Administrative Procedure Act, G.S. 150B-1 et seq. N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 154 N.C. App. 18, 571 S.E.2d 602, 2002 N.C. App. LEXIS 1411 (2002), review denied sub nom. N.C. Forestry Ass'n v. N.C. Dep't of Env't & Nat'l Res., 357 N.C. 251, 582 S.E.2d 276 (2003).

Appellate court remanded the trial court's judgment that the Director of the North Carolina Division of Water Quality acted lawfully when he excluded certain wood chip mills from coverage under a storm water general permit because the record did not show that the trial court applied the proper standard of review. N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 162 N.C. App. 467, 591 S.E.2d 549, 2004 N.C. App. LEXIS 178 (2004).

**Right to Appeal from Consent Special Order.** — "Procedural injury," whereby petitioner State of Tennessee's right to be heard on certain aspects of a National Pollutant Discharge Elimination System (NPDES) permit, was substantially impaired, was sufficient under G.S. 150B-43 to qualify petitioner as an "aggrieved person" for purposes of appeal of issuance of Commission's consent special order with corporation. In addition, where the consent special order contained provisions substantially identical to provisions which petitioner opposed in the proposed NPDES permit, which affected the property rights of the petitioner in the Pigeon River, these allegations also established petitioner's "aggrieved person" status. State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

**Same — Contested Case.** — A permitting decision, that is, the process by which a National Pollutant Discharge Elimination System permit is issued by the Department of Environmental Health and Natural Resources (now the Department of Environment and Natural Resources), is a "contested case" so that no additional administrative hearing is required before seeking judicial review. Citizens for Clean Indus., Inc. v. Lofton, 109 N.C. App. 229, 427 S.E.2d 120 (1993), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 768, rehearing denied, 338 N.C. 314, 451 S.E.2d 634 (1994).

G.S. 143-215.1(e) allows contested case review to a National Pollutant Discharge Elimination System permit applicant or permittee who is dissatisfied with a decision of the North Carolina Environmental Management Commission. N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 154 N.C. App. 18, 571 S.E.2d 602, 2002 N.C. App. LEXIS 1411 (2002), review denied sub nom. N.C. Forestry Ass'n v. N.C. Dep't of Env't & Nat'l Res., 357 N.C. 251, 582 S.E.2d 276 (2003).

**Review of Agency Decision.** — Although a trial court properly reviewed, under G.S. 150B-51(b)(5), a final agency decision of a contested case petition filed pursuant to G.S. 150B-23, the trial court incorrectly applied the standard of review by making its own findings of fact on unappealed issues; the trial court also erred in permanently restraining the imposition of a civil penalty assessed pursuant to G.S. 143-215.1(a)(6). Town of Wallace v. N.C. Dep't of Env't & Natural Res., Div. of Water Quality, 160 N.C. App. 49, 584 S.E.2d 809, 2003 N.C. App. LEXIS 1673 (2003).

**Testimony of Director of Division of Environmental Management concerning harm to the regulatory process and community** was competent evidence to support the findings of the N.C. Environmental Management Commission imposing civil penalty for violations of subdivision (a)(2) of this section. Chesapeake Microfilm, Inc. v. North Carolina Dep't of Env't, Health & Natural Resources, 111 N.C. App. 737, 434 S.E.2d 218 (1993), appeal dismissed, cert. denied, 335 N.C. 768, 442 S.E.2d 511, aff'd per curiam, 337 N.C. 797, 448 S.E.2d 514 (1994).

**Applied** in N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 357 N.C. 640, 588 S.E.2d 880, 2003 N.C. LEXIS 1413 (2003).

**Cited** in Biddix v. Henredon Furn. Indus., Inc., 76 N.C. App. 30, 331 S.E.2d 717 (1985); Concerned Citizens v. North Carolina Envtl. Mgt. Comm'n, 89 N.C. App. 708, 367 S.E.2d 13 (1988); Brinkman v. Barrett Kays & Assocs., P.A., 155 N.C. App. 738, 575 S.E.2d 40, 2003 N.C. App. LEXIS 17 (2003); Granville Farms, Inc. v. County of Granville, 170 N.C. App. 109, 612 S.E.2d 156, 2005 N.C. App. LEXIS 906 (2005).

## OPINIONS OF ATTORNEY GENERAL

**Exception to Swine Farm Moratorium.** — A swine waste operation general permit and the certificates of coverage issued under this section on the morning of August 27, 1997, were effective, and construction or expansion thereunder could proceed as a statutory exception to the swine farm moratorium signed by the Governor in the afternoon of August 27, 1997. See opinion of Attorney General to Mr. Preston Howard, Director Division of Water Quality Department of Environment and Natural Resources, 1997 N.C.A.G. 59 (9/22/97).

**For a general discussion of the validity of three permit conditions,** see opinion of Attorney General to Senator John H. Kerr, III, North Carolina General Assembly, 1998 N.C.A.G. 29 (6/7/98).

## § 143-215.1A. Closed-loop groundwater remediation systems allowed.

(a) The phrase "closed-loop groundwater remediation system" means a system and attendant processes for cleaning up contaminated groundwater by pumping groundwater, treating the groundwater to reduce the concentration of or remove contaminants, and reintroducing the treated water beneath the surface so that the treated groundwater will be recaptured by the system.

(b) The Secretary may issue a permit for the siting, construction, and operation of a closed-loop groundwater remediation system. Permits shall be issued in accordance with G.S. 143-215.1 and applicable rules of the Commission. A permit issued under this section constitutes prior permission under G.S. 87-88.

(c) A permit for a closed-loop groundwater remediation system shall specify the location at which groundwater is to be reintroduced and shall specify design, construction, operation, and closure requirements for the closed-loop groundwater remediation system necessary to ensure that the treated groundwater will be captured by the contaminant and removal system that extracts the groundwater for treatment. The Secretary may impose any additional permit conditions or limitations necessary to:

(1) Achieve efficient, effective groundwater remediation.
(2) Minimize the possibility of spills or other releases from the closed-loop groundwater remediation system.
(3) Specify or limit the distance between the point at which contaminated groundwater is extracted and the point at which treated groundwater is reintroduced.
(4) Specify the minimum or maximum gradients between the point at which contaminated groundwater is extracted and the point at which treated groundwater is reintroduced.
(5) Specify or limit the chemical, physical, or biological treatment processes that may be used.
(6) Protect the environment or public health.

(d) The Commission may adopt rules to implement this section. (1991 (Reg. Sess., 1992), c. 786, s. 3.)

## § 143-215.1B. Extension of date for compliance with nitrogen and phosphorus discharge limits.

(a) The Commission may extend a compliance date established under G.S. 143-215.1(c6) only in accordance with the requirements of this section and only upon the request of a person who holds a permit under G.S. 143-215.1 that authorizes a discharge into surface waters to which the limits set out in subsections (c1) or (c2) of G.S. 143-215.1 apply. The Commission shall act on a request for an extension of a compliance date within 120 days after the Commission receives the request. The Commission shall not extend a compliance date if the Commission concludes, on the basis of the scientific data available to the Commission at the time of the request, that the extension will result in a violation of the antidegradation policy set out in 40 Code of Federal Regulations § 131.12 (1 July 1997 Edition). The Commission shall not extend a compliance date unless the Commission finds that the permit holder needs additional time to develop a calibrated nutrient response model that meets the requirements of this section. If the Commission requires an individual discharge to be limited to a maximum mass load or concentration that is different from those set out in subsections (c1) or (c2) of G.S. 143-215.1, the maximum mass load or concentration shall be substantiated by the model.

(b) The Commission shall determine the extended compliance date by adding to the date on which the Commission grants the extension: (i) two years for the collection of data needed to prepare a calibrated nutrient response model; (ii) a maximum of one year to prepare the calibrated nutrient response model; (iii) the amount of time, if any, that is required for the Commission to develop a nutrient management strategy and to adopt rules or to modify discharge permits to establish maximum mass loads or concentration limits based on the calibrated nutrient response model; and (iv) a maximum of three years to plan, design, finance, and construct a facility that will comply with those maximum mass loads and concentration limits. If the Commission finds that additional time is needed to complete the construction of a facility, the Commission may further extend an extended compliance date by a maximum of two additional years.

(c) Notwithstanding the provisions of G.S. 150B-21.1(a), the Commission may adopt temporary rules to establish maximum mass loads or concentration limits pursuant to this section or as may otherwise be necessary to implement this section.

(d) A permit holder who is granted an extended compliance date under this section shall:

(1) Develop a calibrated nutrient response model in conjunction with other affected parties and in accordance with a timetable for the development of the model that has been approved by the Commission. The model shall be based on current data, capable of predicting the impact of nitrogen and phosphorus in the surface waters, capable of being incorporated into any nutrient management plan developed by the Commission, and approved by the Commission.

(2) Evaluate and optimize the operation of all facilities operated by the permit holder that are permitted under G.S. 143-215.1(c) and that discharge into the nutrient sensitive waters (NSW) for which the compliance date is extended pursuant to this section in order to reduce nutrient loading.

(3) Evaluate methods to reduce the total mass load of waste that is discharged from all facilities operated by the permit holder that are permitted under G.S. 143-215.1(c) and that discharge into the nutrient sensitive waters (NSW) for which the compliance date is extended pursuant to this section and determine whether these methods are cost-effective.

(4) Evaluate methods to reduce the discharge of treated effluent from all facilities operated by the permit holder that are permitted under G.S. 143-215.1(c) and that discharge into the nutrient sensitive waters (NSW) for which the compliance date is extended pursuant to this section; including land application of treated effluent, the use of restored or created wetlands that are not located in a 100-year floodplain to polish treated effluent, and other methods to reuse treated effluent; and determine whether these methods are cost-effective.

(5) Report to the Commission on progress in the development of the calibrated nutrient response model, on efforts to optimize the operation of facilities, on the evaluation of methods of reducing the total mass load of waste, and on the evaluation of methods to reduce the discharge of treated effluent. The Commission shall establish a schedule for reports that requires the permit holder to report on at least a semiannual basis.

(e) The Commission may revoke an extension granted under this section and impose the limits set out in subsections (c1) and (c2) of G.S. 143-215.1 if the Commission determines that a permit holder who has obtained an extension under this section has, at any time during the period of the extension:

(1) Failed to comply with the requirements of subsection (d) of this section; or

(2) Violated any conditions or limitations of any permit issued under G.S. 143-215.1 or special order issued under G.S. 143-215.2 if the violation is the result of conduct by the permit holder that results in a significant violation of water quality standards. (1998-212, s. 14.9H(c); 2004-195, s. 1.6.)

**Editor's Note.** — Session Laws 1997-458, s. 6.3, as amended by Session Laws 1998-212, s. 14.9H(a) provides: "By November 1997, the Environmental Management Commission shall develop a schedule of dates between 1 January 1998 and 1 January 2003, by which facilities in existence on 1 July 1997 must comply with G.S. 143-215.1(c1) and G.S. 143-215.1(c2), as enacted by Section 6.1 of this act. The schedule of compliance dates shall follow as closely as possible the dates on which permits for existing facilities must be renewed. New facilities and expansions of existing facilities for which an application for a permit is received by the Department of Environment and Natural Resources on behalf of the Environmental Management Commission prior to the date this act becomes effective shall be treated as existing facilities. For surface waters to which the limit set out in G.S. 143-215.1(c1) applies where nitrogen is not designated by the Commission as a nutrient of concern, the Commission may extend the compliance date established pursuant to this section as provided in G.S. 143-215.1B, which applies to this section notwithstanding the absence of a reference to this section in G.S. 143-215.1B(a). A request to extend a compliance date under this section shall be submitted to the Commission no later than 1 January 1999."

## § 143-215.1C. Report to wastewater system customers on system performance; publication of notice of discharge of untreated wastewater and waste.

(a) Report to Wastewater System Customers. — The owner or operator of any wastewater collection or treatment works, the operation of which is primarily to collect or treat municipal or domestic wastewater and for which a permit is issued under this Part, shall provide to the users or customers of the collection system or treatment works and to the Department an annual report that summarizes the performance of the collection system or treatment works and the extent to which the collection system or treatment works has violated the permit or federal or State laws, regulations, or rules related to the protection of water quality. The report shall be prepared on either a calendar or fiscal year basis and shall be provided no later than 60 days after the end of the calendar or fiscal year.

(b) Publication of Notice of Discharge of Untreated Wastewater. — The owner or operator of any wastewater collection or treatment works, the operation of which is primarily to collect or treat municipal or domestic wastewater and for which a permit is issued under this Part shall:

(1) In the event of a discharge of 1,000 gallons or more of untreated wastewater to the surface waters of the State, issue a press release to all print and electronic news media that provide general coverage in the county where the discharge occurred setting out the details of the discharge. The owner or operator shall issue the press release within 48 hours after the owner or operator has determined that the discharge has reached the surface waters of the State. The owner or operator shall retain a copy of the press release and a list of the news media to which it was distributed for at least one year after the

discharge and shall provide a copy of the press release and the list of the news media to which it was distributed to any person upon request.

(2) In the event of a discharge of 15,000 gallons or more of untreated wastewater to the surface waters of the State, publish a notice of the discharge in a newspaper having general circulation in the county in which the discharge occurs and in each county downstream from the point of discharge that is significantly affected by the discharge. The Secretary shall determine, at the Secretary's sole discretion, which counties are significantly affected by the discharge and shall approve the form and content of the notice and the newspapers in which the notice is to be published. The notice shall be captioned "NOTICE OF DISCHARGE OF UNTREATED SEWAGE". The owner or operator shall publish the notice within 10 days after the Secretary has determined the counties that are significantly affected by the discharge and approved the form and content of the notice and the newspapers in which the notice is to be published. The owner or operator shall file a copy of the notice and proof of publication with the Department within 30 days after the notice is published. Publication of a notice of discharge under this subdivision is in addition to the requirement to issue a press release under subdivision (1) of this subsection.

(c) Publication of Notice of Discharge of Untreated Waste. — The owner or operator of any wastewater collection or treatment works, other than a wastewater collection or treatment works the operation of which is primarily to collect or treat municipal or domestic wastewater, for which a permit is issued under this Part shall:

(1) In the event of a discharge of 1,000 gallons or more of untreated waste to the surface waters of the State, issue a press release to all print and electronic news media that provide general coverage in the county where the discharge occurred setting out the details of the discharge. The owner or operator shall issue the press release within 48 hours after the owner or operator has determined that the discharge has reached the surface waters of the State. The owner or operator shall retain a copy of the press release and a list of the news media to which it was distributed for at least one year after the discharge and shall provide a copy of the press release and the list of the news media to which it was distributed to any person upon request.

(2) In the event of a discharge of 15,000 gallons or more of untreated waste to the surface waters of the State, publish a notice of the discharge in a newspaper having general circulation in the county in which the discharge occurs and in each county downstream from the point of discharge that is significantly affected by the discharge. The Secretary shall determine, at the Secretary's sole discretion, which counties are significantly affected by the discharge and shall approve the form and content of the notice and the newspapers in which the notice is to be published. The notice shall be captioned "NOTICE OF DISCHARGE OF UNTREATED WASTE". The owner or operator shall publish the notice within 10 days after the Secretary has determined the counties that are significantly affected by the discharge and approved the form and content of the notice and the newspapers in which the notice is to be published. The owner or operator shall file a copy of the notice and proof of publication with the Department within 30 days after the notice is published. Publication of a notice of discharge under this subdivision is in addition to the requirement to issue a press release under subdivision (1) of this subsection. (1999-329, s. 8.1; 1999-456, s. 68.)

**Editor's Note.** — Session Laws 1999-329, s. 13.7 provides that this act shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act. Every State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency.

## § 143-215.2. Special orders.

(a) Issuance. — The Commission may, after the effective date of classifications, standards and limitations adopted pursuant to G.S. 143-214.1 or G.S. 143-215, or a water supply watershed management requirement adopted pursuant to G.S. 143-214.5, issue, and from time to time modify or revoke, a special order, or other appropriate instrument, to any person whom it finds responsible for causing or contributing to any pollution of the waters of the State within the area for which standards have been established. The order or instrument may direct the person to take, or refrain from taking an action, or to achieve a result, within a period of time specified by the special order, as the Commission deems necessary and feasible in order to alleviate or eliminate the pollution. The Commission is authorized to enter into consent special orders, assurances of voluntary compliance or other similar documents by agreement with the person responsible for pollution of the water, subject to the provisions of subsection (a1) of this section regarding proposed orders, and the consent order, when entered into by the Commission after public review, shall have the same force and effect as a special order of the Commission issued pursuant to hearing.

(a1) Public Notice and Review of Consent Orders.

(1) The Commission shall give notice of a proposed consent order to the proper State, interstate, and federal agencies, to interested persons, and to the public. The Commission may also provide any other data it considers appropriate to those notified. The Commission shall prescribe the form and content of the notice. The notice shall be given at least 45 days prior to any final action regarding the consent order. Public notice shall be given by publication of the notice one time in a newspaper having general circulation within the county in which the pollution originates.

(2) Any person who desires a public meeting on any proposed consent order may request one in writing to the Commission within 30 days following date of the notice of the proposed consent order. The Commission shall consider all such requests for meetings. If the Commission determines that there is significant public interest in holding a meeting, the Commission shall schedule a meeting and shall give notice of such meeting at least 30 days in advance to all persons to whom notice of the proposed consent order was given and to any other person requesting notice. At least 30 days prior to the date of meeting, the Commission shall also have a copy of the notice of the meeting published at least one time in a newspaper having general circulation within the county in which the pollution originates. The Commission shall prescribe the form and content of notices under this subsection.

(3) The Commission shall prescribe the procedures to be followed in such meetings. If the meeting is not conducted by the Commission, detailed minutes of the meeting shall be kept and shall be submitted, along with any other written comment, exhibits or other documents presented at the meeting, to the Commission for its consideration prior to final action granting or denying the consent order.

(4) The Commission shall take final action on a proposed consent not later than 60 days following notice of the proposed consent order or, if a public meeting is held, within 90 days following such meeting.

(b) Procedure to Contest Certain Orders. — A special order that is issued without the consent of the person affected may be contested by that person by filing a petition for a contested case under G.S. 150B-23 within 30 days after the order is issued. If the person affected does not file a petition within the required time, the order is final and is not subject to review.

(c) Repealed by Session Laws 1987, c. 827, s. 160.

(d) Effect of Compliance. — Any person who installs a treatment works for the purpose of alleviating or eliminating water pollution in compliance with the terms of, or as a result of the conditions specified in, a permit issued pursuant to G.S. 143-215.1, or a special order, consent special order, assurance of voluntary compliance or similar document issued pursuant to this section, or a final decision of the Commission or a court rendered pursuant to either of said sections, shall not be required to take or refrain from any further action nor be required to achieve any further results under the terms of this or any other State law relating to the control of water pollution, for a period to be fixed by the Commission or court as it shall deem fair and reasonable in the light of all the circumstances after the date when such special order, consent special order, assurance of voluntary compliance, other document, or decision, or the conditions of such permit become finally effective, if:

(1) The treatment works result in the elimination or alleviation of water pollution to the extent required by such permit, special order, consent special order, assurance of voluntary compliance or other document, or decision and complies with any other terms thereof; and

(2) Such person complies with the terms and conditions of such permit, special order, consent special order, assurance of voluntary compliance, other document, or decision within the time limit, if any, specified therein or as the same may be extended, and thereafter remains in compliance. (1951, c. 606; 1955, c. 1131, s. 2; 1967, c. 892, s. 1; 1973, c. 698, s. 3; c. 1262, s. 23; 1975, c. 19, s. 52; 1979, c. 889; 1987, c. 827, ss. 154, 160; 1989, c. 426, s. 3; c. 766, s. 1; 1995 (Reg. Sess., 1996), c. 626, s. 3.)

**Editor's Note.** — Session Laws 1989, c. 426, which amended this section, in s. 7 provided: "This act shall not affect the validity of any local ordinance relating to watershed protection adopted prior to the effective date of this act [June 23, 1989]."

Section 7.1 of Session Laws 1989, c. 426 provided: "Nothing herein contained shall be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act."

**Legal Periodicals.** — For note on estuarine pollution, see 49 N.C.L. Rev. 921 (1971).

## CASE NOTES

**Effect of Consent Special Order.** — A consent special order has the same force and effect as a special order issued pursuant to a hearing; thus a consent special order is a final decision by the Commission. State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

**Right to Appeal from Consent Special Order.** — "Procedural injury," whereby petitioner State of Tennessee's right to be heard on certain aspects of a National Pollutant Discharge Elimination System (NPDES) permit was substantially impaired, was sufficient under G.S. 150B-43 to qualify petitioner as an "aggrieved person" for purposes of appeal of issuance of Commission's consent special order with corporation. In addition, where the consent special order contained provisions substantially identical to provisions which petitioner opposed in the proposed NPDES permit, which affected the property rights of the petitioner in the Pigeon River, these allegations also established petitioner's "aggrieved person" status. State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

Case challenging a consent special order entered into by Commission and a corporation, which order was alleged to intrude upon the NPDES permit process (which process requires a hearing), was "contested" for the purposes of

G.S. 150B-43. State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

**County had standing and was entitled to challenge the constitutionality** of the Water Supply Watershed Protection Act. Town of Spruce Pine v. Avery County, 123 N.C. App. 704, 475 S.E.2d 233 (1996), rev'd on other grounds, 346 N.C. 787, 488 S.E.2d 144 (1997).

**Cited** in Scarborough v. Adams, 264 N.C. 631, 142 S.E.2d 608 (1965).

## § 143-215.3. General powers of Commission and Department; auxiliary powers.

(a) Additional Powers. — In addition to the specific powers prescribed elsewhere in this Article, and for the purpose of carrying out its duties, the Commission shall have the power:

(1) To make rules implementing Articles 21, 21A, 21B, or 38 of this Chapter.

(1a) To adopt fee schedules and collect fees for the following:

a. Processing of applications for permits or registrations issued under Article 21, other than Parts 1 and 1A, Articles 21A, 21B, and 38 of this Chapter;

b. Administering permits or registrations issued under Article 21, other than Parts 1 and 1A, Articles 21A, 21B, and 38 of this Chapter including monitoring compliance with the terms of those permits; and

c. Reviewing, processing, and publicizing applications for construction grant awards under the Federal Water Pollution Control Act.

No fee may be charged under this provision, however, to a farmer who submits an application that pertains to his farming operations.

(1b) The fee to be charged pursuant to G.S. 143-215.3(a)(1a) for processing an application for a permit under G.S. 143-215.108 and G.S. 143-215.109 of Article 21B of this Chapter may not exceed five hundred dollars ($500.00). The fee to be charged pursuant to G.S. 143-215.3(a)(1a) for processing a registration under Part 2A of this Article or Article 38 of this Chapter may not exceed fifty dollars ($50.00) for any single registration. An additional fee of twenty percent (20%) of the registration processing fee may be assessed for a late registration under Article 38 of this Chapter. The fee for administering and compliance monitoring under Article 21, other than Parts 1 and 1A, and G.S. 143-215.108 and G.S. 143-215.109 of Article 21B shall be charged on an annual basis for each year of the permit term and may not exceed one thousand five hundred dollars ($1,500) per year. Fees for processing all permits under Article 21A and all other sections of Article 21B shall not exceed one hundred dollars ($100.00) for any single permit. The total payment for fees that are set by the Commission under this subsection for all permits for any single facility shall not exceed seven thousand five hundred dollars ($7,500) per year, which amount shall include all application fees and fees for administration and compliance monitoring. A single facility is defined to be any contiguous area under one ownership and in which permitted activities occur. For all permits issued under these Articles where a fee schedule is not specified in the statutes, the Commission, or other commission specified by statute shall adopt a fee schedule in a rule following the procedures established by the Administrative Procedure Act. Fee schedules shall be established to reflect the size of the emission or discharge, the potential impact on the environment, the staff costs involved, relative costs of the issuance of new permits and the reissuance of existing permits, and shall include adequate safeguards to prevent unusual fee assessments which would result in serious economic burden on an individual applicant. A system shall be considered to allow consolidated annual payments for persons with multiple permits. In its rulemaking to establish fee schedules, the Commission is also directed to consider a method of rewarding facilities which achieve full compliance with administrative and self-monitoring reporting requirements, and to consider, in those cases where the cost of renewal or amendment of a permit is less than for the original permit, a lower fee for the renewal or amendment.

(1c) Moneys collected pursuant to G.S. 143-215.3(a)(1a) shall be used to:

a. Eliminate, insofar as possible, backlogs of permit applications awaiting agency action;

b. Improve the quality of permits issued;

c. Improve the rate of compliance of permitted activities with environmental standards; and

d. Decrease the length of the processing period for permit applications.

(1d) The Commission may adopt and implement a graduated fee schedule sufficient to cover all direct and indirect costs required for the State to develop and administer a permit program which meets the requirements of Title V. The provisions of subdivision (1b) of this subsection do not apply to the adoption of a fee schedule under this subdivision. In adopting and implementing a fee schedule, the Commission shall require that the owner or operator of all air contaminant sources subject to the requirement to obtain a permit under Title V to pay an annual fee, or the equivalent over some other period, sufficient to cover costs as provided in section 502(b)(3)(A) of Title V. The fee schedule shall be adopted according to the procedures set out in Chapter 150B of the General Statutes.

a. The total amount of fees collected under the fee schedule adopted pursuant to this subdivision shall conform to the requirements of section 502(b)(3)(B) of Title V. No fee shall be collected for more than 4,000 tons per year of any individual regulated pollutant, as defined in section 502(b)(3)(B)(ii) of Title V, emitted by any source. Fees collected pursuant to this subdivision shall be credited to the Title V Account.

b. The Commission may reduce any permit fee required under this section to take into account the financial resources of small business stationary sources as defined under Title V and regulations promulgated by the United States Environmental Protection Agency.

c. When funds in the Title V Account exceed the total amount necessary to cover the cost of the Title V program for the next fiscal year, the Secretary shall reduce the amount billed for the next fiscal year so that the excess funds are used to supplement the cost of administering the Title V permit program in that fiscal year.

(1e) The Commission shall collect the application, annual, and project fees for processing and administering permits, certificates of coverage under general permits, and certifications issued under Parts 1 and 1A of this Article and for compliance monitoring under Parts 1 and 1A of this Article as provided in G.S. 143-215.3D and G.S. 143-215.10G.

(2) To direct that such investigation be conducted as it may reasonably deem necessary to carry out its duties as prescribed by this Article or Article 21A or Article 21B of this Chapter, and for this purpose to enter at reasonable times upon any property, public or private, for the purpose of investigating the condition of any waters and the discharge

therein of any sewage, industrial waste, or other waste or for the purpose of investigating the condition of the air, air pollution, air contaminant sources, emissions, or the installation and operation of any air-cleaning devices, and to require written statements or the filing of reports under oath, with respect to pertinent questions relating to the operation of any air-cleaning device, sewer system, disposal system, or treatment works. In the case of effluent or emission data, any records, reports, or information obtained under this Article or Article 21A or Article 21B of this Chapter shall be related to any applicable effluent or emission limitations or toxic, pretreatment, or new source performance standards. No person shall refuse entry or access to any authorized representative of the Commission or Department who requests entry for purposes of inspection, and who presents appropriate credentials, nor shall any person obstruct, hamper or interfere with any such representative while in the process of carrying out his official duties.

(3) To conduct public hearings and to delegate the power to conduct public hearings in accordance with the procedures prescribed by this Article or by Article 21B of this Chapter.

(4) To delegate such of the powers of the Commission as the Commission deems necessary to one or more of its members, to the Secretary or any other qualified employee of the Department. The Commission shall not delegate to persons other than its own members and the designated employees of the Department the power to conduct hearings with respect to the classification of waters, the assignment of classifications, air quality standards, air contaminant source classifications, emission control standards, or the issuance of any special order except in the case of an emergency under subdivision (12) of this subsection for the abatement of existing water or air pollution. Any employee of the Department to whom a delegation of power is made to conduct a hearing shall report the hearing with its evidence and record to the Commission.

(5) To institute such actions in the superior court of any county in which a violation of this Article, Article 21B of this Chapter, or the rules of the Commission has occurred, or, in the discretion of the Commission, in the superior court of the county in which any defendant resides, or has his or its principal place of business, as the Commission may deem necessary for the enforcement of any of the provisions of this Article, Article 21B of this Chapter, or of any official action of the Commission, including proceedings to enforce subpoenas or for the punishment of contempt of the Commission.

(6) To agree upon or enter into any settlements or compromises of any actions and to prosecute any appeals or other proceedings.

(7) To direct the investigation of any killing of fish and wildlife which, in the opinion of the Commission, is of sufficient magnitude to justify investigation and is known or believed to have resulted from the pollution of the waters or air as defined in this Article, and whenever any person, whether or not he shall have been issued a certificate of approval, permit or other document of approval authorized by this or any other State law, has negligently, or carelessly or unlawfully, or willfully and unlawfully, caused pollution of the waters or air as defined in this Article, in such quantity, concentration or manner that fish or wildlife are killed as the result thereof, the Commission, may recover, in the name of the State, damages from such person. The measure of damages shall be the amount determined by the Department and the North Carolina Wildlife Resources Commission, which-

ever has jurisdiction over the fish and wildlife destroyed to be the replacement cost thereof plus the cost of all reasonable and necessary investigations made or caused to be made by the State in connection therewith. Upon receipt of the estimate of damages caused, the Department shall notify the persons responsible for the destruction of the fish or wildlife in question and may effect such settlement as the Commission may deem proper and reasonable, and if no settlement is reached within a reasonable time, the Commission shall bring a civil action to recover such damages in the superior court in the county in which the discharge took place. Upon such action being brought the superior court shall have jurisdiction to hear and determine all issues or questions of law or fact, arising on the pleadings, including issues of liability and the amount of damages. On such hearing, the estimate of the replacement costs of the fish or wildlife destroyed shall be prima facie evidence of the actual replacement costs of such fish or wildlife. In arriving at such estimate, any reasonably accurate method may be used and it shall not be necessary for any agent of the Wildlife Resources Commission or the Department to collect, handle or weigh numerous specimens of dead fish or wildlife.

The State of North Carolina shall be deemed the owner of the fish or wildlife killed and all actions for recovery shall be brought by the Commission on behalf of the State as the owner of the fish or wildlife. The fact that the person or persons alleged to be responsible for the pollution which killed the fish or wildlife holds or has held a certificate of approval, permit or other document of approval authorized by this Article or any other law of the State shall not bar any such action. The proceeds of any recovery, less the cost of investigation, shall be used to replace, insofar as and as promptly as possible, the fish and wildlife killed, or in cases where replacement is not practicable, the proceeds shall be used in whatever manner the responsible agency deems proper for improving the fish and wildlife habitat in question. Any such funds received are hereby appropriated for these designated purposes. Nothing in this paragraph shall be construed in any way to limit or prevent any other action which is now authorized by this Article.

(8) After issuance of an appropriate order, to withhold the granting of any permit or permits pursuant to G.S. 143-215.1 or G.S. 143-215.108 for the construction or operation of any new or additional disposal system or systems or air-cleaning device or devices in any area of the State. Such order may be issued only upon determination by the Commission, after public hearing, that the permitting of any new or additional source or sources of water or air pollution will result in a generalized condition of water or air pollution within the area contrary to the public interest, detrimental to the public health, safety, and welfare, and contrary to the policy and intent declared in this Article or Article 21B of this Chapter. The Commission may make reasonable distinctions among the various sources of water and air pollution and may direct that its order shall apply only to those sources which it determines will result in a generalized condition of water or air pollution.

The determination of the Commission shall be supported by detailed findings of fact and conclusions set forth in the order and based upon competent evidence of record. The order shall describe the geographical area of the State affected thereby with particularity and shall prohibit the issuance of permits pending a determination by the Commission that the generalized condition of water or air pollution has ceased.

Notice of hearing shall be given in accordance with the provisions of G.S. 150B-21.2.

A person aggrieved by an order of the Commission under this subdivision may seek judicial review of the order under Article 4 of Chapter 150B of the General Statutes without first commencing a contested case. An order may not be stayed while it is being reviewed.

(9) If an investigation conducted pursuant to this Article or Article 21B of this Chapter reveals a violation of any rules, standards, or limitations adopted by the Commission pursuant to this Article or Article 21B of this Chapter, or a violation of any terms or conditions of any permit issued pursuant to G.S. 143-215.1 or 143-215.108, or special order or other document issued pursuant to G.S. 143-215.2 or G.S. 143-215.110, the Commission may assess the reasonable costs of any investigation, inspection or monitoring survey which revealed the violation against the person responsible therefor. If the violation resulted in an unauthorized discharge to the waters or atmosphere of the State, the Commission may also assess the person responsible for the violation for any actual and necessary costs incurred by the State in removing, correcting or abating any adverse effects upon the water or air resulting from the unauthorized discharge. If the person responsible for the violation refuses or fails within a reasonable time to pay any sums assessed, the Commission may institute a civil action in the superior court of the county in which the violation occurred or, in the Commission's discretion, in the superior court of the county in which such person resides or has his or its principal place of business, to recover such sums.

(10) To require a laboratory facility that performs any tests, analyses, measurements, or monitoring required under this Article or Article 21B of this Chapter to be certified annually by the Department, to establish standards that a laboratory facility and its employees must meet and maintain in order for the laboratory facility to be certified, and to charge a laboratory facility a fee for certification. Fees collected under this subdivision shall be credited to the Water and Air Account and used to administer this subdivision. These fees shall be applied to the cost of certifying commercial, industrial, and municipal laboratory facilities.

(11) Repealed by Session Laws 1983, c. 296, s. 6.

(12) To declare an emergency when it finds that a generalized condition of water or air pollution which is causing imminent danger to the health or safety of the public. Regardless of any other provisions of law, if the Department finds that such a condition of water or air pollution exists and that it creates an emergency requiring immediate action to protect the public health and safety or to protect fish and wildlife, the Secretary of the Department with the concurrence of the Governor, shall order persons causing or contributing to the water or air pollution in question to reduce or discontinue immediately the emission of air contaminants or the discharge of wastes. Immediately after the issuance of such order, the chairman of the Commission shall fix a place and time for a hearing before the Commission to be held within 24 hours after issuance of such order, and within 24 hours after the commencement of such hearing, and without adjournment thereof, the Commission shall either affirm, modify or set aside the order.

In the absence of a generalized condition of air or water pollution of the type referred to above, if the Secretary finds that the emissions from one or more air contaminant sources or the discharge of wastes from one or more sources of water pollution is causing imminent danger to human health and safety or to fish and wildlife, he may with the concurrence of the Governor order the person or persons responsible for the operation or operations in question to immediately reduce or discontinue the emissions of air contaminants or the discharge of wastes or to take such other measures as are, in his judgment, necessary, without regard to any other provisions of this Article or Article 21B of this Chapter. In such event, the requirements for hearing and affirmance, modification or setting aside of such orders set forth in the preceding paragraph of this subdivision shall apply.

(13) Repealed by Session Laws 1983, c. 296, s. 6.

(14) To certify and approve, by appropriate delegations and conditions in permits required by G.S. 143-215.1, requests by publicly owned treatment works to implement, administer and enforce a pretreatment program for the control of pollutants which pass through or interfere with treatment processes in such treatment works; and to require such programs to be developed where necessary to comply with the Federal Water Pollution Control Act and the Resource Conservation and Recovery Act, including the addition of conditions and compliance schedules in permits required by G.S. 143-215.1. Pretreatment programs submitted by publicly owned treatment works shall include, at a minimum, the adoption of pretreatment standards, a permit or equally effective system for the control of pollutants contributed to the treatment works, and the ability to effectively enforce compliance with the program.

(15) To adopt rules for the prevention of pollution from underground tanks containing petroleum, petroleum products, or hazardous substances. Rules adopted under this section may incorporate standards and restrictions which exceed and are more comprehensive than comparable federal regulations.

(16) To adopt rules limiting the manufacture, storage, sale, distribution or use of cleaning agents containing phosphorus pursuant to G.S. 143-214.4(e), and to adopt rules limiting the manufacture, storage, sale, distribution or use of cleaning agents containing nitrilotriacetic acid.

(17) To adopt rules to implement Part 2A of Article 21A of Chapter 143.

(b) Research Functions. — The Department shall have the power to conduct scientific experiments, research, and investigations to discover economical and practical corrective methods for air pollution and waste disposal problems. To this end, the Department may cooperate with any public or private agency or agencies in the conduct of such experiments, research, and investigations, and may, when funds permit, establish research studies in any North Carolina educational institution, with the consent of such institution. In addition, the Department shall have the power to cooperate and enter into contracts with technical divisions of State agencies, institutions and with municipalities, industries, and other persons in the execution of such surveys, studies, and research as it may deem necessary in fulfilling its functions under this Article or Article 21B of this Chapter. All State departments shall advise with and cooperate with the Department on matters of mutual interest.

(c) Relation with the Federal Government. — The Commission as official water and air pollution control agency for the State is delegated to act in local administration of all matters covered by any existing federal statutes and future legislation by Congress relating to water and air quality control. In order for the State of North Carolina to effectively participate in programs administered by federal agencies for the regulation and abatement of water and air pollution, the Department is authorized to accept and administer funds provided by federal agencies for water and air pollution programs and to enter into contracts with federal agencies regarding the use of such funds.

(d) Relations with Other States. — The Commission or the Department may, with the approval of the Governor, consult with qualified representatives of adjoining states relative to the establishment of regulations for the protection of waters and air of mutual interest, but the approval of the General Assembly shall be required to make any regulations binding.

(e) Variances. — Any person subject to the provisions of G.S. 143-215.1 or 143-215.108 may apply to the Commission for a variance from rules, standards, or limitations established pursuant to G.S. 143-214.1, 143-215, or 143-215.107. The Commission may grant such variance, for fixed or indefinite periods after public hearing on due notice, or where it is found that circumstances so require, for a period not to exceed 90 days without prior hearing and notice. Prior to granting a variance hereunder, the Commission shall find that:

(1) The discharge of waste or the emission of air contaminants occurring or proposed to occur do not endanger human health or safety; and

(2) Compliance with the rules, standards, or limitations from which variance is sought cannot be achieved by application of best available technology found to be economically reasonable at the time of application for such variances, and would produce serious hardship without equal or greater benefits to the public, provided that such variances shall be consistent with the provisions of the Federal Water Pollution Control Act as amended or the Clean Air Act as amended; and provided further, that any person who would otherwise be entitled to a variance or modification under the Federal Water Pollution Control Act as amended or the Clean Air Act as amended shall also be entitled to the same variance from or modification in rules, standards, or limitations established pursuant to G.S. 143-214.1, 143-215, and 143-215.107, respectively.

(f) Notification of Completed Remedial Action. — The definitions set out in G.S. 130A-310.31(b) apply to this subsection. Any person may submit a written request to the Department for a determination that groundwater has been remediated to meet the standards and classifications established under this Part. A request for a determination that groundwater has been remediated to meet the standards and classifications established under this Part shall be accompanied by the fee required by G.S. 130A-310.39(a)(2). If the Department determines that groundwater has been remediated to established standards and classifications, the Department shall issue a written notification that no further remediation of the groundwater will be required. The notification shall state that no further remediation of the groundwater will be required unless the Department later determines, based on new information or information not previously provided to the Department, that the groundwater has not been remediated to established standards and classifications or that the Department was provided with false or incomplete information. Under any of those circumstances, the Department may withdraw the notification and require responsible parties to remediate the groundwater to established standards and classifications. (1951, c. 606; 1957, c. 1267, s. 3; 1959, c. 779, s. 8; 1963, c. 1086; 1967, c. 892, s. 1; 1969, c. 538; 1971, c. 1167, ss. 7, 8; 1973, c. 698, ss. 1-7, 9, 17; c. 712, s. 1; c. 1262, ss. 23, 86; c. 1331, s. 3; 1975, c. 583, ss. 5, 6; c. 655, s. 3; 1977, c. 771, s. 4; 1979, c. 633, ss. 6-8; 1979, 2nd Sess., c. 1158, ss. 1, 3, 4; 1983, c. 296, ss. 5-8; 1985, c. 551, s. 2; 1987, c. 111, s. 2; c. 767, s. 1; c. 827, ss. 1, 154, 161, 266; 1987 (Reg. Sess., 1988), c. 1035, s. 2; 1989, c. 500, s. 122; c. 652, s. 1; 1991, c. 552, ss. 2, 11; c. 712, s. 2; 1991 (Reg. Sess., 1992), c. 890, s. 16; c. 1039, ss. 14, 20.1; 1993, c. 344, s. 2; c. 400, ss. 1(c), 2, 3, 15; c. 496, s. 4; 1993 (Reg. Sess., 1994), c. 694, s. 1; 1995, c. 484, s. 5; 1997-357, s. 6; 1997-496, s. 4; 1998-212, s. 29A.11(b).)

**Cross References.** — As to powers and duties of the Environmental Management Commission under the North Carolina Well Construction Act, see G.S. 87-83 to 87-96. As to powers and duties of the commission with regard to water resources, see G.S. 143-354.

**Management of Water Quality in the Jordan Watershed.** — For provisions pertaining to water quality rule-making for the Jordan Watershed pursuant to Session Laws 2009-216, ss. 1 and 3-8, as amended by Session Laws 2009-484, ss. 6(b), (c), 7, and 8, see the note at G.S. 143-214.7.

**Editor's Note.** — Session Laws 1997-357, s. 8, provides: "This act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act. The Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] shall implement the provisions of this act from funds otherwise available or appropriated to the Department."

Session Laws 1998-138, s. 1, provided: "Pursuant to G.S. 150B-21.3(b), the amendments to 15A NCAC 2B.0316, (Tar-Pamlico River Basin), as adopted by the Environmental Management Commission and approved by the Rules Review Commission on 15 January 1998, are disapproved. The Environmental Management Commission may adopt, pursuant to G.S. 150B-21.1 and consistent with G.S. 143-214.1, 143-215.1, and 143-215.3(a)(1), a temporary rule that incorporates the amendments to 15A NCAC 2B.0316 that are disapproved by this act, except that the primary classification of the portion of the Tar River designated as Index Number 28- (74) may not be reclassified from WS-IV to WS-V by a temporary rule pursuant to this act."

Session Laws 1999-329, s. 7.1, provides that, notwithstanding G.S. 150B-21.1(a)(2) and s. 8.6 of Session Laws 1997-458, the Environmental Management Commission may adopt temporary rules to protect water quality standards and uses as required to implement basinwide water quality management plans for the Cape Fear, Catawba, and Tar-Pamlico River Basins pursuant to G.S. 143-214.1, 143-214.7, 143-215.3, and 143B-282. The Commission is to provide notice and the opportunity for a hearing prior to the adoption of a temporary rule under this provision. Section 7.2 provides that s. 7.1 is to continue in effect until July 1, 2001. Section 7.3 provides that 7.1 through 7.3 are not to be construed to invalidate any development and implementation of basinwide water quality management plans by the Envirnomental Management Commission and the Department of Environment and Natural Resources occurring prior to the effective date thereof (July 21, 1999).

Session Laws 2001-355, ss. 1 to 6 provide for the implementation of the Tar-Pamlico River Basin-Nutrient Sensitive Waters Management Strategy: Agricultural Nutrient Control Strategy, as adopted by the Environmental Management Commission on 12 October 2000 and approved by the Rules Review Commission on 20 November 2000, to become effective on 1 September 2001. A Local Advisory Committee is to be appointed in each county or watershed, as specified in the Basin Oversight Committee, within the Tar-Pamlico River Basin; these committees terminate upon a finding by the Environmental Management Commission that the long-term maintenance of nutrient loads is assured. Under the act, the Soil and Water Commission is to approve best management practices for pasture-based production or management of livestock, including a point system applicable thereto. Harvesting of trees is also addressed. Furthermore, the Basin Oversight Committee is to develop a nutrient loading accounting methodology, to be approved by the Environmental Management Commission no later than 1 March 2003. The Environmental Management Commission may adopt and revise a temporary rule incorporating the provisions of the act until a permanent rule can be adopted. Session Laws 2001-355, s. 7 provides that ss. 2 and 3 of the act expire when the temporary rule becomes effective, and s. 4 expires upon a finding that the long-term maintenance of nutrient loads in the Tar-Pamlico River Basin is assured.

Session Laws 2001-361, s. 1, provides "Notwithstanding G.S. 150B-21.3(b), 15ANCAC 2B.0315 (Neuse River Basin), as amended by the Environmental Management Commission on 12 October 2000 and approved by the Rules Review Commission on 16 November 2000, becomes effective on 1 July 2004 unless the 2004 Regular Session of the 2003 General Assembly specifically disapproves 15A NCAC2B.0315 (Neuse River Basin), as amended by the Environmental Management Commission on 12 October 2000 and approved by the Rules Review Commission on 16 November 2000, by enactment of a bill as provided in G.S. 150B-21.3(b)."

Session Laws 2001-418, s. 4(a), as amended by Session Laws 2003-340, s. 5, provides: "Notwithstanding G.S. 150B-21.1(d), temporary rules 15A NCAC 2B.0243 and 15A NCAC 2B.0244, which were adopted pursuant to Section 7.1 of S.L. 1999-329 and which became effective on or before 1 July 2001, shall continue in effect until 1 September 2004 in order to provide sufficient time for the Environmental Management Commission to further consult with businesses and industries, local governments, landowners, and other interested or potentially affected persons in the upper and lower Catawba River Basin as to the appropriate scope of permanent rules to protect water quality and riparian buffers in that river basin. In developing permanent rules, the Commission shall consider whether riparian buffers on the mainstem of the Catawba River and on lake shorelines are adequate to protect water quality in the river and whether riparian buffer protection requirements should or should not be extended to some or all of the tributary streams in the river basin, taking into account the sources of water quality degradation in the river, the topography of the land in the river basin, and other relevant factors."

Session Laws 2001-418, s. 4(b), provides: "Vested rights recognized or established under the common law or by G.S. 153A-344(b), 153A-344.1, 160A-385(b), or 160A-385.1 shall include the right, as provided in this subsection, to undertake and complete development in the Catawba River Basin without application of temporary rule 15A NCAC 2B.0243. The Commission and the Department shall not apply temporary rule 15A NCAC 2B.0243 to development with vested rights recognized or established under G.S. 153A-344(b), 153A-344.1, 160A-385(b), or 160A-385.1 prior to 1 July 2001. The Commission and the Department shall not apply temporary rule 15A NCAC 2B.0243 to development with vested rights recognized or established under the common law prior to the date this section becomes effective if the Commission has issued a certification pursuant to G.S. 143B-282(a)(1)u. prior to 1 July 2001. The Commission shall not adopt or enforce rules that confer or restrict a vested right to undertake or complete development. It is the intent of the General Assembly that this subsection apply only to the particular circumstances that are the subject of this section. This subsection does not establish a precedent as to the application of vesting under a zoning or land-use planning program administered by a local government or to any other environmental program."

Session Laws 2001-418, s. 4(c), provides: "Notwithstanding G.S. 150B-21.3(a),this section shall not be construed to authorize the adoption of additional temporary rules related to protection of water quality and riparian buffers."

Session Laws 2006-255, s. 5.4, provides: "The provisions of 15A NCAC 2D.0530(b)(1)(A)(iv) as adopted by the Environmental Management Commission on 10 February 2005 and as approved by the Rules Review Commission on 21 April 2005, do not apply to any application for an air quality permit that is submitted and determined to be administratively complete by the Department of Environment and Natural Resources on or before 1 August 2006. An air quality permit issued pursuant to an application described in this section shall both:

"(1) Include a requirement that the permittee will install advanced control technology designed to remove ninety-nine percent (99%) of any pollutants at each electric generating unit to which 15A NCAC 2D.0530(b)(1)(A)(iv) would otherwise apply and that the permittee will operate the advanced control technology at any time that electricity is being produced by the electric generating unit other than during startup of the unit.

"(2) State that the actual emissions of sulfur dioxide (SO2) shall be no greater than 0.15 pound per million British Thermal Units (BTUs) as measured on a rolling 30-day average."

Session Laws 2008-137, ss. 1-4, provide: "Section 1. The Environmental Review Commission ('Commission') shall study the impacts on the State of the potential issuance of a new fifty-year license by the Federal Energy Regulatory Commission ('FERC') to Alcoa Power Generating, Inc., ('APGI') in the FERC relicensing proceeding known as FERC Project No. P-2197. The Commission is authorized to consider and develop proposals regarding all of the following issues:

"(1) The socioeconomic impacts of APGI's decision to discontinue its job-producing manufacturing activities at its Badin facility that relied on the use of low-cost power from the Yadkin Hydroelectric Project.

"(2) Assurance of an adequate, clean future water supply for the region.

"(3) The allocation of water for non-power uses from the Yadkin Hydroelectric Project.

"Section 2. The Commission shall submit a report to the 2009 General Assembly no later than February 1, 2009. This report shall include findings and any recommendations, including legislative proposals that would assist in implementing the recommendations.

"Section 3. Nothing in this act shall preclude the Governor or any State agency or department from taking any action necessary to protect the interest of the State in the FERC relicensing procedure known as FERC Project No. P-2197.

"Section 4. The Department of Environment and Natural Resources ('DENR') shall, to the extent allowed by State and federal statutes and rules, and without delaying its decision, consider the report submitted by the Commission under Section 2 of this act in making any decision on an application for water quality certification requested by APGI in connection with FERC relicensing of Project No. P-2197. The report submitted by the Commission under Section 2 of this act shall be included in the information necessary to trigger the 60-day time limit for the Director's decision pursuant to 15A NCAC 02H.0507(a) and shall be promptly supplied to the Director of the Division of Water Quality in DENR upon receipt by the General Assembly. Failure by the Commission to issue a report by the date specified in

Section 2 will not prohibit DENR from making a final determination on such certification, nor is it the intent of the General Assembly to delay the processing by DENR of any such certification. Nothing in this act shall affect the authority of DENR to provide notices, request additional studies or information, conduct hearings, or issue or deny a 401 Water Quality Certification for FERC relicensing Project No. P-2197."

Session Laws 2008-211 enacted improvements to the rules on the management of stormwater in the coastal counties in order to protect water quality, which superceded the former rules. The act is noted in full under G.S. 143-214.7.

Session Laws 2008-211, s. 1(a)-(b), provides: "(a) Disapprove Rule. — Pursuant to G.S. 150B-21.3(b1), 15A NCAC 02H.1005 (Stormwater Requirements: Coastal Counties), as adopted by the Environmental Management Commission on 10 January 2008 and approved by the Rules Review Commission on 20 March 2008, is disapproved.

"(b) Supersede Rule. — 15A NCAC 02H.1005 (Stormwater Requirements: Coastal Counties), effective 1 September 1995, is superseded by this act. References in the North Carolina Administrative Code to 15A NCAC 02H.1005 shall be deemed to refer to the equivalent provisions of this act."

**Legal Periodicals.** — For note on control of pesticides, see 49 N.C.L. Rev. 529 (1971).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note on the Brownfields Property Reuse Act of 1997, see 78 N.C.L. Rev. 1015 (1998).

## CASE NOTES

**As to the power of regional boards to adopt air quality and emission control standards,** see State v. W.N.C. Pallet & Forest Prods. Co., 283 N.C. 705, 198 S.E.2d 433 (1973).

**Judicial Notice of Regional Board and Its Rules and Regulations.** — Court cannot take judicial notice that a regional air pollution board known as the Western North Carolina Regional Air Pollution Agency has been created by two or more municipalities or counties by joint resolution or contract. A fortiori, the Court cannot take judicial notice of the contents of any rules and regulations which such a board may have adopted. State v. W.N.C. Pallet & Forest Prods. Co., 283 N.C. 705, 198 S.E.2d 433 (1973).

**Warrant Charging Violation of Regional Board's Regulation Held Insufficient.** — A warrant which charged a violation of a regulation of the Western North Carolina Regional Air Pollution Agency, but did not allege verbatim or in substance the provisions of the alleged regulation, nor allege when and under what circumstances the alleged regulation was adopted, nor that a copy thereof had been filed with the State Board of Water and Air Resources (now the Environmental Management Commission) and with the clerk of court of the county was insufficient to show that a violation of the regulation constituted a criminal offense. State v. W.N.C. Pallet & Forest Prods. Co., 283 N.C. 705, 198 S.E.2d 433 (1973).

**Investigative and Enforcement Costs.** — Where the hog facility owner committed several violations regarding the discharge of hog waste, the trial court erred in reducing the investigative and enforcement costs assessed by the Environmental Management Commission, commensurate with the reduction in the amount of penalties assessed, as there was no authority for such an approach in G.S. 143-215.3(a)(9). Murphy Family Farms v. N.C. Dep't of Env't & Natural Res., 160 N.C. App. 338, 585 S.E.2d 446, 2003 N.C. App. LEXIS 1793 (2003), cert. granted, 358 N.C. 155, 592 S.E.2d 690 (2004).

**National Pollutant Discharge Elimination System Committee** of the North Carolina Environmental Management Commission had the power to review an administrative law judge's decision finding that the Director of the North Carolina Division of Water Quality exceeded his authority when he excluded certain wood chip mills from coverage under a storm water general permit. N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 162 N.C. App. 467, 591 S.E.2d 549, 2004 N.C. App. LEXIS 178 (2004).

**Applied** in Dixie Lumber Co. of Cherryville, Inc. v. N.C. Dep't of Env't, Health & Natural Res., 150 N.C. App. 144, 563 S.E.2d 212, 2002 N.C. App. LEXIS 407 (2002).

**Cited** in State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982); Rudd v. Electrolux Corp., 982 F. Supp. 355 (M.D.N.C. 1997); N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

## OPINIONS OF ATTORNEY GENERAL

**Adoption of Rules.** — The Water Quality Committee of the Environmental Management Commission is authorized to adopt rules requiring permits for impacts to isolated wetlands and surface waters. See opinion of Attorney General to Dr. Charles H. Peterson, Vice Chairman, Environmental Management Commission, and Ms. Coleen Sullins, Water Quality

Section, Division of Water Quality, 2001 N.C. AG LEXIS 33 (9/5/01).

**As to authority of local air pollution control program,** see opinion of Attorney General to Mr. W.E. Knight, N.C. Department of Water and Air Resources, 40 N.C.A.G. 526 (1970).

### § 143-215.3A. Water and Air Quality Account; use of application and permit fees; Title V Account; I & M Air Pollution Control Account; reports.

(a) The Water and Air Quality Account is established as a nonreverting account within the Department. Revenue in the Account shall be applied to the costs of administering the programs for which the fees were collected. Revenue credited to the Account pursuant to G.S. 105-449.43, G.S. 105-449.125, and G.S. 105-449.136 shall be used to administer the air quality program. Except for the following fees, all application fees and permit administration fees collected by the State for permits issued under Articles 21, 21A, 21B, and 38 of this Chapter shall be credited to the Account:

(1) Fees collected under Part 2 of Article 21A and credited to the Oil or Other Hazardous Substances Pollution Protection Fund.
(2) Fees credited to the Title V Account.
(3) Repealed by Session Laws 2005-454, s. 7, effective January 1, 2006.
(4) Fees collected under G.S. 143-215.28A.
(5) Fees collected under G.S. 143-215.94C shall be credited to the Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund.

(a1) The total monies collected per year from fees for permits under G.S. 143-215.3(a)(1a), after deducting those monies collected under G.S. 143-215.3(a)(1d), shall not exceed thirty percent (30%) of the total budgets from all sources of environmental permitting and compliance programs within the Department. This subsection shall not be construed to relieve any person of the obligation to pay a fee established under this Article or Articles 21A, 21B, or 38 of this Chapter.

(b) The Title V Account is established as a nonreverting account within the Department. Revenue in the Account shall be used for developing and implementing a permit program that meets the requirements of Title V. The Title V Account shall consist of fees collected pursuant to G.S. 143-215.3(a)(1d) and G.S. 143-215.106A. Fees collected under G.S. 143-215.3(a)(1d) shall be used only to cover the direct and indirect costs required to develop and administer the Title V permit program, and fees collected under G.S. 143-215.106A shall be used only for the eligible expenses of the Title V program. Expenses of the Small Business Environmental Advisory Panel, the ombudsman for the Small Business Stationary Source Technical and Environmental Compliance Assistance Program, support staff, equipment, legal services provided by the Attorney General, and contracts with consultants and program expenses listed in section 502(b)(3)(A) of Title V shall be included among Title V program expenses.

(b1) The I & M Air Pollution Control Account is established as a nonreverting account within the Department. Fees transferred to the Division of Air Quality of the Department pursuant to G.S. 20-183.7(c) shall be credited to the I & M Air Pollution Control Account and shall be applied to the costs of developing and implementing an air pollution control program for mobile sources.

(c) The Department shall report to the Environmental Review Commission and the Fiscal Research Division on the cost of the State's environmental permitting programs contained within the Department on or before 1 November of each year. In addition, the Department shall report to the Environmental Review Commission and the Fiscal Research Division on the cost of the Title V Program on or before 1 November of each year. The reports shall include, but are not limited to, fees set and established under this Article, fees collected under this Article, revenues received from other sources for environmental permitting and compliance programs, changes made in the fee schedule since the last report, anticipated revenues from all other sources, interest earned and any other information requested by the General Assembly. (1987, c. 767, s. 2; 1989, c. 500, s. 121; c. 727, s. 218(104); 1989 (Reg. Sess., 1990), c. 976, s. 2; 1991, c. 552, s. 3; 1991 (Reg. Sess., 1992), c. 1039, s. 12; 1993, c. 400, s. 14; 1995, c. 390, s. 28; 1995 (Reg. Sess., 1996), c. 743, s. 13; 1998-212, s. 29A.11(c); 2001-452, s. 2.4; 2001-474, s. 27; 2005-386, s. 8.1; 2005-454, s. 7; 2008-198, s. 11.2.)

**Editor's Note.** — Session Laws 2007-323, s. 12.2A, provides: "Notwithstanding G.S. 143-215.3A, of the funds available in the Water and Air Quality Account for the costs of administering the air quality program, the Department of Environment and Natural Resources shall transfer the sum of one million dollars ($1,000,000) for the 2007-2008 fiscal year to the Office of State Budget and Management's Litigation Reserve. These funds shall be used solely by the Department of Justice for expenses related to litigation and expert witnesses associated with either of the actions pending in North Carolina ex rel. Cooper v. Tennessee Valley Authority, No. 1:06CV20 (W.D.N.C. filed Jan. 30, 2006) or South Carolina v. North Carolina, No. 22O138 ORG (U.S. Sup. Ct. filed June 7, 2007). Any of these funds that remain unused for this purpose on June 30, 2008, shall revert to the Water and Air Quality Account."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2008-107, s. 12.7, provides: "From funds in the I & M Air Pollution Control Account, there is appropriated the sum of seven hundred fifty thousand dollars ($750,000) for the 2008-2009 fiscal year to the Office of State Budget and Management, Litigation Reserve. Notwithstanding G.S. 143-215.3A, these funds shall be used by the Department of Justice solely for expenses related to either ex rel. Cooper v. Tennessee Valley Authority, No. 1:06CV20 (W.D.N.C. filed Jan. 30, 2006) or South Carolina v. North Carolina, No. 220138 ORG (U.S. Sup. Ct. filed June 7, 2007). Any of these funds that remain unused on June 30, 2009, shall revert to the I & M Air Pollution Control Account."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2008-198, s. 11.2, effective August 8, 2008, in subsection (a), substituted "G.S. 105-449.136" for "105-449.134" and made a related change.

## § 143-215.3B: Repealed by Session Laws, 2005-454, s. 8, effective January 1, 2006.

**Editor's Note.** — Session Laws 2005-454, s. 8, provides in part "Funds in the Wastewater Treatment Works Emergency Maintenance, Operation and Repair Fund are transferred to the Wastewater Reserve of the Water Infrastructure Fund established in G.S. 159G-22."

## § 143-215.3C. Confidential information protected.

(a) Information obtained under this Article or Article 21A or 21B of this Chapter shall be available to the public except that, upon a showing satisfactory to the Commission by any person that information to which the Commission has access, if made public, would divulge methods or processes entitled to protection as trade secrets pursuant to G.S. 132-1.2, the Commission shall consider the information confidential.

(b) Effluent data, as defined in 40 Code of Federal Regulations § 2.302 (1 July 1993 Edition) and emission data, as defined in 40 Code of Federal Regulations § 2.301 (1 July 1993 Edition) is not entitled to confidential treatment under this section.

(c) Confidential information may be disclosed to any officer, employee, or authorized representative of any federal or state agency if disclosure is necessary to carry out a proper function of the Department or other agency or when relevant in any proceeding under this Article or Article 21A or Article 21B of this Chapter.

(d) The Commission shall provide for adequate notice to any person who submits information of any decision that the information is not entitled to confidential treatment and of any decision to release information that the person who submits the information contends is entitled to confidential treatment. Any person who requests information and any person who submits information who is dissatisfied with a decision of the Commission to withhold or release information may request a declaratory ruling from the Commission under G.S. 150B-4 within 10 days after the Commission notifies the person of its decision. The information may not be released by the Commission until the Commission issues a declaratory ruling or, if judicial review of the final agency decision is sought by any party, the information may not be released by the Commission until a final judicial determination has been made. (1993 (Reg. Sess., 1994), c. 694, s. 2.)

## § 143-215.3D. Fee schedule for water quality permits.

(a) Annual fees for discharge and nondischarge permits under G.S. 143-215.1. —

(1) Major Individual NPDES Permits. — The annual fee for an individual permit for a point source discharge of 1,000,000 or more gallons per day, a publicly owned treatment works (POTW) that administers a POTW pretreatment program, as defined in 40 Code of Federal Regulations § 403.3 (1 July 1996 Edition), or an industrial waste treatment works that has a high toxic pollutant potential is three thousand four hundred forty dollars ($3,440).

(2) Minor Individual NPDES Permits. — The annual fee for an individual permit for a point source discharge other than a point source discharge to which subdivision (1) of this subsection applies is eight hundred sixty dollars ($860.00).

(3) Single-Family Residence. — The annual fee for a certificate of coverage under a general permit for a point source discharge or an individual nondischarge permit from a single-family residence is sixty dollars ($60.00).

(4) Stormwater and Wastewater Discharge General Permits. — The annual fee for a certificate of coverage under a general permit for a point source discharge of stormwater or wastewater is one hundred dollars ($100.00).

(5) Recycle Systems. — The annual fee for an individual permit for a recycle system nondischarge permit is three hundred sixty dollars ($360.00).

(6) Major Nondischarge Permits. — The annual fee for an individual permit for a nondischarge of 10,000 or more gallons per day or requiring 300 or more acres of land is one thousand three hundred ten dollars ($1,310).

(7) Minor Nondischarge Permits. — The annual fee for an individual permit for a nondischarge of less than 10,000 gallons per day or requiring less than 300 acres of land is eight hundred ten dollars ($810.00).

(8) Animal Waste Management Systems. — The annual fee for animal waste management systems is as set out in G.S. 143-215.10G.

(b) Application fee for new discharge and nondischarge permits. — An application for a new permit of the type set out in subsection (a) of this section shall be accompanied by an initial application fee equal to the annual fee for that permit. If a permit is issued, the application fee shall be applied as the annual fee for the first year that the permit is in effect. If the application is denied, the application fee shall not be refunded.

(c) Application and annual fees for consent special orders. —

(1) Major Consent Special Orders. — If the Commission enters into a consent special order, assurance of voluntary compliance, or similar document pursuant to G.S. 143-215.2 for an activity subject to an annual fee under subdivision (1) or (6) of subsection (a) of this section, the initial project fee is four hundred dollars ($400.00) and the annual fee is five hundred dollars ($500.00). These fees are in addition to the annual fee due under subsection (a) of this section.

(2) Minor Consent Special Orders. — If the Commission enters into a consent special order, assurance of voluntary compliance, or similar document pursuant to G.S. 143-215.2 for an activity subject to an annual fee under subdivision (2) or (7) of subsection (a) of this section, the initial project fee is four hundred dollars ($400.00) and the annual fee is two hundred fifty dollars ($250.00). These fees are in addition to the annual fee due under subsection (a) of this section.

(d) Fee for major permit modifications. — An application for a major modification of a permit of the type set out in subsection (a) of this section shall be accompanied by an application fee equal to thirty percent (30%) of the annual fee applicable to that permit. A major modification of a permit is any modification that would allow an increase in the volume or pollutant load of the discharge or nondischarge or that would result in a significant relocation of the point of discharge, as determined by the Commission. This fee is in addition to the fees due under subsections (a) and (c) of this section. If the application is denied, the application fee shall not be refunded.

(e) Other fees under this Article. —

(1) Sewer System Extension Permits. — The application fee for a permit for the construction of a new sewer system or for the extension of an existing sewer system is four hundred eighty dollars ($480.00).

(2) State Stormwater Permits. — The application fee for a permit regulating stormwater runoff under G.S. 143-214.7 and G.S. 143-215.1 is five hundred five dollars ($505.00).

(3) Major Water Quality Certifications. — The fee for a water quality certification involving one acre or more of wetland fill or 150 feet or more of stream impact is five hundred seventy dollars ($570.00).

(4) Minor Water Quality Certifications. — The fee for a water quality certification involving less than one acre of wetland fill or less than 150 feet of stream impact is two hundred forty dollars ($240.00).

(5) Permit for Land Application of Petroleum Contaminated Soils. — The fee for a permit to apply petroleum contaminated soil to land is four hundred eighty dollars ($480.00).

(6) Fee Nonrefundable. — If an application for a permit or a certification described in this subsection is denied, the application or certification fee shall not be refunded.

(7) Limit Water Quality Certification Fee Required for CAMA Permit. — An applicant for a permit under Article 7 of Chapter 113A of the

General Statutes for which a water quality certification is required shall pay a fee established by the Secretary. The Secretary shall not establish a fee that exceeds the greater of the fee for a permit under Article 7 of Chapter 113A of the General Statutes or the fee for a water quality certification under subdivision (3) or (4) of this subsection.

(f) Local Government Fee Authority Not Impaired. — This section shall not be construed to limit any authority that a unit of local government may have pursuant to any other provision of law to assess or collect a fee for the review of an application for a permit, the review of a mitigation plan, or the inspection of a site or a facility under any local program that is approved by the Commission under this Article. (1998-212, s. 29A.11(a); 1999-413, s. 6; 2006-250, s. 4; 2007-323, s. 30.3(a).)

**Cross References.** — As to express permit and certification reviews, see G.S. 143B-279.13.

**Express Review Pilot Program.** — Session Laws 2003-284, ss. 11.4A(a)-(e), provide: "(a) The Department of Environment and Natural Resources may develop the Express Review Pilot Program, a pilot program to provide express permit and certification reviews. Participation in the Express Review Pilot Program is voluntary, and the program is to become supported by the fees determined pursuant to subsection (b) of this section. The Department of Environment and Natural Resources shall determine the project applications to review under the Express Review Pilot Program from those who request to participate in the Pilot Program. The Express Review Pilot Program may be applied to any one or all of the permits, approvals, or certifications in the following programs: the erosion and sedimentation control program, the coastal management program, and the water quality programs, including water quality certifications and stormwater management. The Express Review Pilot Program shall focus on the following permits or certifications:

"(1) Stormwater permits under Part 1 of Article 21 of Chapter 143 of the General Statutes.

"(2) Stream origination certifications under Article 21 of Chapter 143 of the General Statutes.

"(3) Water quality certification under Article 21 of Chapter 143 of the General Statutes.

"(4) Erosion and sedimentation control permits under Article 4 of Chapter 113A of the General Statutes.

"(5) Permits under the Coastal Area Management Act (CAMA), Part 4 of Article 7 of Chapter 113A of the General Statutes.

"(b) The Department of Environment and Natural Resources may establish up to eight positions to administer the Express Review Pilot Program and may determine the fees for express application review under the Pilot Program. Notwithstanding G.S. 143-215.3D, the maximum permit application fee to be charged under subsection (a) of this section for the express review of a project application requiring all of the permits under subdivisions (1) through (5) of subsection (a) of this section shall not exceed five thousand five hundred dollars ($5,500). Notwithstanding G.S. 143-215.3D, the maximum permit application fee to be charged for the express review of a project application requiring all of the permits under subdivisions (1) through (4) of subsection (a) of this section shall not exceed four thousand five hundred dollars ($4,500). Notwithstanding G.S. 143-215.3D, the maximum permit application fee charged for the express review of a project application for any other combination of permits under subdivisions (1) through (5) of subsection (a) of this section shall not exceed four thousand dollars ($4,000). Express review of a project application involving additional permits or certifications issued by the Department of Environment and Natural Resources other than those under subdivisions (1) through (5) of subsection (a) of this section may be allowed by the Department, and, notwithstanding G.S. 143-215.3D or any other statute or rule that sets a permit fee, the maximum permit application fee charged for the express review of a project application shall not exceed four thousand dollars ($4,000), plus one hundred fifty percent (150%) of the fee that would otherwise apply by statute or rule for that particular permit or certification. Additional fees, not to exceed fifty percent (50%) of the original permit application fee under this section, may be charged for subsequent reviews due to the insufficiency of the permit applications. The Department of Environment and Natural Resources may establish the procedure by which the amount of the fees under this subsection is determined, and the fees and procedures are not rules under G.S. 150B-2(8a) for the Express Review Pilot Program under this section.

"(c) The funds appropriated to the Department of Environment and Natural Resources in this act for the 2003-2004 fiscal year shall be used for the costs of implementing the Express Review Pilot Program under this section during the 2003-2004 fiscal year.

"(d) The Express Review Fund is created as a special nonreverting fund. The Express Review Fund shall be used for the costs of implementing the Express Review Pilot Program under this section. All fees collected under this section shall be credited to the Express Review Fund. If the Express Review Pilot Program is abolished, the funds in the Express Review Fund shall be credited to the General Fund.

"(e) No later than May 1, 2004, the Department of Environment and Natural Resources shall report to the General Assembly its findings on the success of the Express Review Pilot Program and whether it recommends that the Pilot Program be continued or expanded."

**Expand Express Review Pilot Program.** — Session Laws 2004-124, s. 12.9(a)-(f), provides: "(a) The Department of Environment and Natural Resources shall continue the Express Review Pilot Program established by Section 11.4A of S.L. 2003-284 that was implemented in the Wilmington and Raleigh regional offices and shall expand the Express Review Pilot Program to two additional regional offices within the Department, to be selected by the Department based on the Department's determination of where the Pilot Program is most needed.

"(b) The Department of Environment and Natural Resources shall continue and support the eight positions that were authorized under Section 11.4A of S.L. 2003-284 to administer the expanded Express Review Pilot Program under this section. This expanded Program and these positions and support shall be funded from the Express Review Fund, created by Section 11.4A of S.L. 2003-284.

"(c) The Department of Environment and Natural Resources may establish and support four additional positions to administer the expanded Express Review Pilot Program under this section. These positions and support may be funded for the 2004-2005 fiscal year from funds appropriated in this act to the Department of Environment and Natural Resources for this purpose. It is the intent of the General Assembly that these positions and support be funded in future fiscal years from the Express Review Fund.

"(d) The Department of Environment and Natural Resources may establish and support four additional positions to administer the expanded Express Review Pilot Program under this section. These positions and support shall be funded from the Express Review Fund, created by Section 11.4A of S.L. 2003-284.

"(e) No later than March 1, 2005, the Department of Environment and Natural Resources shall report to the Fiscal Research Division and the Environmental Review Commission its findings on the success of the continued Express Pilot Review Program and whether it recommends that the Program be continued or expanded and any other findings or recommendations, including any legislative proposals, that it deems pertinent.

"(f) Subsection (c) of this section becomes effective January 1, 2005. The remaining subsections of this section become effective July 1, 2004."

**Expand Express Review Program Statewide.** — Session Laws 2005-276, s. 12.2(b), effective July 1, 2005, provides: "The Department of Environment and Natural Resources shall expand to a statewide program that operates in each regional office of the Department the Express Review Pilot Program established by Section 11.4A of S.L. 2003-284 and expanded by Section 12.9 of S.L. 2004-124, and the provisions of G.S. 143B-279.13, as enacted by subsection (a) of this section, shall apply to this statewide program."

**Editor's Note.** — Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.5 is a severability clause.

## § 143-215.4. Mailing list for rules; procedures for public input; form of order or decision; seal; official notice.

(a) Mailing List. — When the Commission proposes or adopts a rule establishing water quality classifications and standards under G.S. 143-214.1 or establishing effluent standards or waste treatment management practices under G.S. 143-215, it shall send notice of the action to each person who has requested to be notified of these matters. The Department shall maintain a mailing list for this purpose on which it shall record the name and address of each person who has made a written request to be on the list and the date on which the request was made. In making a request to be put on the list, a person may request to be added to the list for a specified period or indefinitely.

(b) Procedures for Public Input. —

(1) The Commission may, on its own motion or when required by federal law, request public comments on or hold public hearings on matters within the scope of its authority under this Article or Articles 21A or 21B of this Chapter. To request public comments on a matter, the Commission shall notify appropriate agencies of the opportunity to submit written comments to the Commission on the matter and shall publish a notice in a newspaper having general circulation in the affected area, stating the matter under consideration by the Commission and informing the public of its opportunity to submit written comments to the Commission on the matter. A public comment period shall extend for at least 30 days after the notice is published.

(2) To hold a public hearing on a matter, the Commission shall notify, by personal service or certified mail, persons directly affected by the matter under consideration and shall publish a notice in a newspaper having general circulation in the affected area, stating the matter under consideration by the Commission and the time, date, and place of a public hearing to be held on the matter. A public hearing shall be held no sooner than 20 days after the notice is published. The proceedings at a public hearing held under this subsection shall be recorded. Upon payment of a fee established by the Commission, any person may obtain a copy of the record of the public hearing. After a public hearing, the Commission shall accept written comments for the time period prescribed by the Commission.

(3) This subsection does not apply to rule-making proceedings, contested case hearings, or the issuance of permits required under Title V. The Commission shall establish procedures for public hearings, public notice, and public comment respecting permits required by Title V as provided by G.S. 143-215.111(4).

(4) The Commission may hold a public meeting on any matter within its scope of authority. The Commission may hold a public meeting in addition to any public hearing that is required under any provision of law, but a public meeting may not be substituted for any required public hearing. Except as may be otherwise provided by law, the Commission may determine the procedures for any public meeting it holds.

(c) Decisions and Orders. — An order or decision of the Commission shall state the Commission's findings of fact and conclusions of law and shall state the statute or rule on which the order or decision is based.

(d) Seal/Official Notice. — The Department shall have the authority to adopt a seal which shall be judicially noticed by the courts of the State. Any document, proceeding, order, decree, special order, rule, rule of procedure or any other official act or records of the Commission or its minutes may be certified by the secretary of the department under his hand and the seal of the Department and when so certified shall be received in evidence in all actions or proceedings in the courts of the State without further proof of the identity of the same if such records are competent, relevant and material in any such action or proceeding. The Commission shall have the right to take official notice of all studies, reports, statistical data or any other official reports or records of the federal government or of any sister state and all such records, reports and data may be placed in evidence by the Commission or by any other person or interested party where material, relevant and competent. (1951, c. 606; 1967, c. 892, s. 1; 1973, c. 698, s. 10; c. 1262, s. 23; 1977, c. 374, s. 1; c. 771, s. 4; 1983, c. 296, s. 9; 1987, c. 827, ss. 154, 162, 169; 1993, c. 400, s. 4; 1995, c. 504, s. 10; 1997-496, s. 5.)

### CASE NOTES

**Cited** in State v. W.N.C. Pallet & Forest Prods. Co., 283 N.C. 705, 198 S.E.2d 433 (1973); High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 39 N.C. App. 699, 252 S.E.2d 109 (1979).

## § 143-215.5. Judicial review.

(a) Article 4 of Chapter 150B of the General Statutes governs judicial review of a final agency decision or order of the Secretary or of the Commission under this Article and Articles 21A and 21B of this Chapter. If a case that concerns an action of the Secretary or of the Commission under this Article or Article 21A or 21B of this Chapter is appealed from the superior court to the Appellate Division of the General Court of Justice, no bond shall be required of the Secretary or of the Commission.

(b) A person aggrieved, as defined in G.S. 150B-2, other than the applicant or permittee, who seeks judicial review of a final agency decision on an application for a permit required under Title V shall file a petition for judicial review under G.S. 150B-45 within 30 days after public notice of the final agency decision is given as provided in rules adopted by the Commission pursuant to G.S. 143-215.4(b)(3). A permit applicant, permittee, or other person aggrieved who seeks judicial review of a failure of the Commission to act within the time specified in rules adopted pursuant to G.S. 143-215.108(d)(2) on an application for a permit required by Title V or G.S. 143-215.108 shall file a petition for judicial review under G.S. 150B-45 within 30 days after the expiration of the time specified for action on the application. (1951, c. 606; 1967, c. 892, s. 1; 1973, c. 108, s. 88; c. 698, s. 11; c. 1262, s. 23; 1983, c. 296, s. 4; 1987, c. 827, ss. 154, 163; 1991 (Reg. Sess., 1992), c. 1028, s. 3; 1993, c. 400, s. 5.)

**Legal Periodicals.** — For note on estuarine pollution, see 49 N.C.L. Rev. 921 (1971).

### CASE NOTES

**Finality of Consent Special Order.** — A consent special order has the same force and effect as a special order issued pursuant to a hearing; thus a consent special order is a final decision by the Commission. State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

**Right to Appeal from Consent Special Order.** — "Procedural injury," whereby petitioner State of Tennessee's right to be heard on certain aspects of a National Pollutant Discharge Elimination System (NPDES) permit was substantially impaired, was sufficient under G.S. 150B-43 to qualify petitioner as an "aggrieved person" for purposes of appeal of issuance of Commission's consent special order with corporation. In addition, where the consent special order contained provisions substantially identical to provisions which petitioner opposed in the proposed NPDES permit, which affected the property rights of the petitioner in the Pigeon River, these allegations also established petitioner's "aggrieved person" status. State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

**Cited** in High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 39 N.C. App. 699, 252 S.E.2d 109 (1979); Concerned Citizens v. North Carolina Envtl. Mgt. Comm'n, 89 N.C. App. 708, 367 S.E.2d 13 (1988).

## § 143-215.6: Recodified as §§ 143-215.6A to 143-215.6C.

## § 143-215.6A. Enforcement procedures: civil penalties.

(a) A civil penalty of not more than twenty-five thousand dollars ($25,000) may be assessed by the Secretary against any person who:

(1) Violates any classification, standard, limitation, or management practice established pursuant to G.S. 143-214.1, 143-214.2, or 143-215.

(2) Is required but fails to apply for or to secure a permit required by G.S. 143-215.1, or who violates or fails to act in accordance with the terms, conditions, or requirements of such permit or any other permit or certification issued pursuant to authority conferred by this Part, including pretreatment permits issued by local governments and laboratory certifications.

(3) Violates or fails to act in accordance with the terms, conditions, or requirements of any special order or other appropriate document issued pursuant to G.S. 143-215.2.

(4) Fails to file, submit, or make available, as the case may be, any documents, data, or reports required by this Article or G.S. 143-355(k) relating to water use information.

(5) Refuses access to the Commission or its duly designated representative to any premises for the purpose of conducting a lawful inspection provided for in this Article.

(6) Violates a rule of the Commission implementing this Part, Part 2A of this Article, or G.S. 143-355(k).

(7) Violates or fails to act in accordance with the statewide minimum water supply watershed management requirements adopted pursuant to G.S. 143-214.5, whether enforced by the Commission or a local government.

(8) Violates the offenses set out in G.S. 143-215.6B.

(9) Is required, but fails, to apply for or to secure a certificate required by G.S. 143-215.22L, or who violates or fails to act in accordance with the terms, conditions, or requirements of the certificate.

(10) Violates subsections (c1) through (c5) of G.S. 143-215.1 or a rule adopted pursuant to subsections (c1) through (c5) of G.S. 143-215.1.

(11) Violates or fails to act in accordance with G.S. 143-214.7(d1).

(a1) For purposes of this section, the term "Part" includes Part 1A of this Article.

(b) If any action or failure to act for which a penalty may be assessed under this section is continuous, the Secretary may assess a penalty not to exceed twenty-five thousand dollars ($25,000) per day for so long as the violation continues, unless otherwise stipulated.

(b1) The Secretary may assess a civil penalty of more than ten thousand dollars ($10,000) or, in the case of a continuing violation, more than ten thousand dollars ($10,000) per day, against a violator only if a civil penalty has been imposed against the violator within the five years preceding the violation. The Secretary may assess a civil penalty of more than ten thousand dollars ($10,000) or, in the case of a continuing violation, more than ten thousand dollars ($10,000) per day for so long as the violation continues, for a violation of subdivision (4) of subsection (a) of this section only if the Secretary determines that the violation is intentional.

(c) In determining the amount of the penalty the Secretary shall consider the factors set out in G.S. 143B-282.1(b). The procedures set out in G.S. 143B-282.1 shall apply to civil penalty assessments that are presented to the Commission for final agency decision.

(d) The Secretary shall notify any person assessed a civil penalty of the assessment and the specific reasons therefor by registered or certified mail, or by any means authorized by G.S. 1A-1, Rule 4. Contested case petitions shall be filed within 30 days of receipt of the notice of assessment.

(e) Consistent with G.S. 143B-282.1, a civil penalty of not more than ten thousand dollars ($10,000) per month may be assessed by the Commission against any local government that fails to adopt a local water supply watershed protection program as required by G.S. 143-214.5, or willfully fails to administer or enforce the provisions of its program in substantial compliance with the minimum statewide water supply watershed management requirements. No such penalty shall be imposed against a local government until the Commission has assumed the responsibility for administering and enforcing the local water supply watershed protection program. Civil penalties shall be imposed pursuant to a uniform schedule adopted by the Commission. The schedule of civil penalties shall be based on acreage and other relevant cost factors and shall be designed to recoup the costs of administration and enforcement.

(f) Requests for remission of civil penalties shall be filed with the Secretary. Remission requests shall not be considered unless made within 30 days of receipt of the notice of assessment. Remission requests must be accompanied by a waiver of the right to a contested case hearing pursuant to Chapter 150B and a stipulation of the facts on which the assessment was based. Consistent with the limitations in G.S. 143B-282.1(c) and (d), remission requests may be resolved by the Secretary and the violator. If the Secretary and the violator are unable to resolve the request, the Secretary shall deliver remission requests and his recommended action to the Committee on Civil Penalty Remissions of the Environmental Management Commission appointed pursuant to G.S. 143B-282.1(c).

(g) If any civil penalty has not been paid within 30 days after notice of assessment has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment, unless the violator contests the assessment as provided in subsection (d) of this section, or requests remission of the assessment in whole or in part as provided in subsection (f) of this section. If any civil penalty has not been paid within 30 days after the final agency decision or court order has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment. Such civil actions must be filed within three years of the date the final agency decision or court order was served on the violator.

(h) Repealed by Session Laws 1995 (Regular Session, 1996), c. 743, s. 14.

(h1) The clear proceeds of civil penalties assessed by the Secretary or the Commission pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(i) As used in this subsection, "municipality" refers to any unit of local government which operates a wastewater treatment plant. As used in this subsection, "unit of local government" has the same meaning as in G.S.

130A-290. The provisions of this subsection shall apply whenever a municipality that operates a wastewater treatment plant with an influent bypass diversion structure and with a permitted discharge of 10 million gallons per day or more into any of the surface waters of the State that have been classified as nutrient sensitive waters (NSW) under rules adopted by the Commission is subject to a court order which specifies (i) a schedule of activities with respect to the treatment of wastewater by the municipality; (ii) deadlines for the completion of scheduled activities; and (iii) stipulated penalties for failure to meet such deadlines. A municipality as specified herein that violates any provision of such order for which a penalty is stipulated shall pay the full amount of such penalty as provided in the order unless such penalty is modified, remitted, or reduced by the court.

(j) Local governments certified and approved by the Commission to administer and enforce pretreatment programs pursuant to G.S. 143-215.3(a)(14), stormwater programs pursuant to G.S. 143-214.7, or riparian buffer protection programs pursuant to G.S. 143-214.23 may assess civil penalties for violations of their respective programs in accordance with the powers conferred upon the Commission and the Secretary in this section, except that actions for collection of unpaid civil penalties shall be referred to the attorney representing the assessing local government. The total of the civil penalty assessed by a local government and the civil penalty assessed by the Secretary for any violation may not exceed the maximum civil penalty for such violation under this section.

(k) A person who has been assessed a civil penalty by a local government as provided by subsection (j) of this section may request a review of the assessment by filing a request for review with the local government within 30 days of the date the notice of assessment is received. If a local ordinance provides for a local administrative hearing, the hearing shall afford minimum due process including an unbiased hearing official. The local government shall make a final decision on the request for review within 90 days of the date the request for review is filed. The final decision on a request for review shall be subject to review by the superior court pursuant to Article 27 of Chapter 1 of the General Statutes. If the local ordinance does not provide for a local administrative hearing, a person who has been assessed a civil penalty by a local government as provided by subsection (j) of this section may contest the assessment by filing a civil action in superior court within 60 days of the date the notice of assessment is received. (1951, c. 606; 1967, c. 892, s. 1; 1973, c. 698, s. 12; c. 712, s. 2; c. 1262, s. 23; c. 1331, s. 3; 1975, c. 583, s. 7; c. 842, ss. 6, 7; 1977, c. 771, s. 4; 1979, c. 633, ss. 9-11; 1981, c. 514, s. 1; c. 585, s. 13; 1987, c. 271; c. 827, ss. 154, 164; 1989, c. 426, s. 4; 1989 (Reg. Sess., 1990), c. 951, s. 1; c. 1036, s. 3; c. 1045, s. 1; c. 1075, s. 6; 1991, c. 579, s. 2; c. 725, s. 3; 1993, c. 348, s. 2; 1995 (Reg. Sess., 1996), c. 743, s. 14; 1997-458, s. 6.2; 1998-215, s. 63; 1999-329, ss. 5.1, 5.3, 5.5, 5.7; 2004-124, s. 6.29(b); 2006-250, s. 6; 2007-484, s. 43.7C; 2007-518, s. 5; 2007-536, s. 3.)

**Management of Water Quality in the Jordan Watershed.** — For provisions pertaining to water quality rule-making for the Jordan Watershed pursuant to Session Laws 2009-216, ss. 1 and 3-8, as amended by Session Laws 2009-484, ss. 6(b), (c), 7, and 8, see the note at G.S. 143-214.7.

**Editor's Note.** — For provisions regarding the implementation of the "Tar-Pamlico River Basin-Nutrient Sensitive Waters Management Strategy: Agricultural Nutrient Control Strategy," see Editor's note under G.S. 143-214.1.

The subsection designations for subsections (f), (g) and (h) of this section were assigned by the Revisor of Statutes, the designations in Session Laws 1989 (Reg. Sess., 1990), c. 1036, s. 3 having been (a)(6), (a)(7) and (a)(8), respectively.

Session Laws 1989, c. 426, which amended this section, in s. 7 provided: "This act shall not affect the validity of any local ordinance relating to watershed protection adopted prior to the effective date of this act [June 23, 1989]."

Section 7.1 of Session Laws 1989, c. 426 provided: "Nothing herein contained shall be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act."

Session Laws 1999-329, s. 5.8 provides that section 5.7 of this act is effective 1 October 2002 and applies to violations that occur on or after 1 October 2002 and shall not be construed to affect the validity of any civil penalty that is assessed prior to 1 October 2002.

Session Laws 1999-329, s. 13.7 provides that this act shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act. Every State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency.

Session Laws 1999-329, s. 13.8 contains a severability clause.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Subdivision (a)(11), added by Session Laws 2004-124 s. 6.29(b), effective January 1, 2005, is applicable only to a retail merchant that first opens a retail premises for business on or after that date or that submits an application for a building permit for the construction or renovation of a retail premises after that date.

Session Laws 2004-124, s. 33.5, contains a severability clause.

This section, as amended by Session Laws 2007-518, s. 5, as amended by Session Laws 2007-484, s. 43.7C, effective August 31, 2007, which substituted "G.S. 143-215.22L" for "G.S. 143-215.22I" is applicable to any petition for a certificate for a transfer of surface water from one river basin to another river basin for which preparation of an environmental assessment or an environmental impact statement has begun on or after August 31, 2007.

Session Laws 2007-518, s. 6 is a severability clause.

**Legal Periodicals.** — For note on estuarine pollution, see 49 N.C.L. Rev. 921 (1971).

For article, "North Carolina Employment Law After Coman: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

## CASE NOTES

**Commission Has Exclusive Jurisdiction over Laws Protecting Water and Air.** — By enacting former G.S. 143-215.6, the General Assembly placed subject matter jurisdiction over the assessment and adjudication of civil penalties relating to violations of laws protecting North Carolina's water and air exclusively in the Environmental Management Commission (EMC). State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc., 101 N.C. App. 433, 400 S.E.2d 107 (1991), discretionary review denied, 328 N.C. 576, 403 S.E.2d 521 (1991), decided under former § 143-215.6.

**Action for Damages for Willful or Negligent Discharge.** — Willful or negligent discharges in violation of a National Pollutant Discharge Elimination System permit afford a basis for an action in damages to a riparian owner. Biddix v. Henredon Furn. Indus., Inc., 76 N.C. App. 30, 331 S.E.2d 717 (1985).

Because the hog waste discharged by the facility owner continued to be intermixed with the waters of the State, the North Carolina Department of Environment and Natural Resources was entitled to assess a penalty under G.S. 143- 215.6A for each day that the violation continued, and the trial court erred in reducing the number of dissolved oxygen violations from eight to one. Murphy Family Farms v. N.C. Dep't of Env't & Natural Res., 160 N.C. App. 338, 585 S.E.2d 446, 2003 N.C. App. LEXIS 1793 (2003), cert. granted, 358 N.C. 155, 592 S.E.2d 690 (2004).

**Cited** in Biddix v. Henredon Furn. Indus., Inc., 76 N.C. App. 30, 331 S.E.2d 717 (1985); House of Raeford Farms, Inc. v. City of Raeford, 112 N.C. App. 522, 435 S.E.2d 829 (1993); Brinkman v. Barrett Kays & Assocs., P.A., 155 N.C. App. 738, 575 S.E.2d 40, 2003 N.C. App. LEXIS 17 (2003); N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003); Lancaster v. N.C. Dep't of Env't & Natural Res., 187 N.C. App. 105, 652 S.E.2d 359, 2007 N.C. App. LEXIS 2304 (2007).

## § 143-215.6B. Enforcement procedures: criminal penalties.

(a) For purposes of this section, the term "person" shall mean, in addition to the definition contained in G.S. 143-212, any responsible corporate or public officer or employee; provided, however, that where a vote of the people is required to effectuate the intent and purpose of this Article by a county, city, town, or other political subdivision of the State, and the vote on the referendum is against the means or machinery for carrying said intent and purpose into effect, then, and only then, this section shall not apply to elected officials or to any responsible appointed officials or employees of such county, city, town, or political subdivision.

(a1) For purposes of this section, the term "Part" includes Part 1A of this Article.

(b) No proceeding shall be brought or continued under this section for or on account of a violation by any person who has previously been convicted of a federal violation based upon the same set of facts.

(c) In proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information. Consistent with the principles of common law, the subjective mental state of defendants may be inferred from their conduct.

(d) For the purposes of the felony provisions of this section, a person's state of mind shall not be found "knowingly and willfully" or "knowingly" if the conduct that is the subject of the prosecution is the result of any of the following occurrences or circumstances:

(1) A natural disaster or other act of God which could not have been prevented or avoided by the exercise of due care or foresight.

(2) An act of third parties other than agents, employees, contractors, or subcontractors of the defendant.

(3) An act done in reliance on the written advice or emergency on-site direction of an employee of the Department. In emergencies, oral advice may be relied upon if written confirmation is delivered to the employee as soon as practicable after receiving and relying on the advice.

(4) An act causing no significant harm to the environment or risk to the public health, safety, or welfare and done in compliance with other conflicting environmental requirements or other constraints imposed in writing by environmental agencies or officials after written notice is delivered to all relevant agencies that the conflict exists and will cause a violation of the identified standard.

(5) Violations of permit limitations causing no significant harm to the environment or risk to the public health, safety, or welfare for which no enforcement action or civil penalty could have been imposed under any written civil enforcement guidelines in use by the Department at the time, including but not limited to, guidelines for the pretreatment permit civil penalties. This subdivision shall not be construed to require the Department to develop or use written civil enforcement guidelines.

(6) Occasional, inadvertent, short-term violations of permit limitations causing no significant harm to the environment or risk to the public health, safety, or welfare. If the violation occurs within 30 days of a prior violation or lasts for more than 24 hours, it is not an occasional, short-term violation.

(e) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other criminal offenses under State criminal offenses may apply to prosecutions brought under this section or other criminal statutes that refer to this section and shall be determined by the courts of this State according to the principles of common law as they may be applied in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(f) Any person who negligently violates any: (i) classification, standard, or limitation established in rules adopted by the Commission pursuant to G.S. 143-214.1, 143-214.2, or 143-215; (ii) term, condition, or requirement of a permit issued pursuant to this Part, including permits issued pursuant to G.S. 143-215.1, pretreatment permits issued by local governments, and laboratory certifications; (iii) term, condition, or requirement of a special order or other appropriate document issued pursuant to G.S. 143-215.2; or (iv) rule of the Commission implementing this Part; and any person who negligently fails to apply for or to secure a permit required by G.S. 143-215.1 shall be guilty of a Class 2 misdemeanor which may include a fine not to exceed fifteen thousand dollars ($15,000) per day of violation, provided that such fine shall not exceed a cumulative total of two hundred thousand dollars ($200,000) for each period of 30 days during which a violation continues.

(g) Any person who knowingly and willfully violates any (i) classification, standard, or limitation established in rules adopted by the Commission pursuant to G.S. 143-214.1, 143-214.2, or 143-215; (ii) term, condition, or requirement of a permit issued pursuant to this Part, including permits issued pursuant to G.S. 143-215.1, pretreatment permits issued by local governments, and laboratory certifications; or (iii) term, condition, or requirement of a special order or other appropriate document issued pursuant to G.S. 143-215.2; and any person who knowingly and willfully fails to apply for or to secure a permit required by G.S. 143-215.1 shall be guilty of a Class I felony, which may include a fine not to exceed one hundred thousand dollars ($100,000) per day of violation, provided that this fine shall not exceed a cumulative total of five hundred thousand dollars ($500,000) for each period of 30 days during which a violation continues. For the purposes of this subsection, the phrase “knowingly and willfully” shall mean intentionally and consciously as the courts of this State, according to the principles of common law interpret the phrase in the light of reason and experience.

(h)(1) Any person who knowingly violates any: (i) classification, standard, or limitation established in rules adopted by the Commission pursuant to G.S. 143-214.1, 143-214.2, 143-215; (ii) term, condition, or requirement of a permit issued pursuant to this Part, including permits issued pursuant to G.S. 143-215.1, pretreatment permits issued by local governments, and laboratory certifications; or (iii) term, condition, or requirement of a special order or other appropriate document issued pursuant to G.S. 143-215.2; and any person who knowingly fails to apply for or to secure a permit required by G.S. 143-215.1 and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury shall be guilty of a Class C felony, which may include a fine not to exceed two hundred fifty thousand dollars ($250,000) per day of violation, provided that this fine shall not exceed a cumulative total of one million dollars ($1,000,000) for each period of 30 days during which a violation continues.

(2) For the purposes of this subsection, a person’s state of mind is knowing with respect to:
- a. His conduct, if he is aware of the nature of his conduct;
- b. An existing circumstance, if he is aware or believes that the circumstance exists; or
- c. A result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(3) Under this subsection, in determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury:
- a. The person is responsible only for actual awareness or actual belief that he possessed; and
- b. Knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant.

(4) It is an affirmative defense to a prosecution under this subsection that the conduct charged was conduct consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of an occupation, a business, or a profession; or of medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent. The defendant may establish an affirmative defense under this subdivision by a preponderance of the evidence.

(i) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Article or a rule implementing this Article; or who knowingly makes a false statement of a material fact in a rulemaking proceeding or contested case under this Article; or who falsifies, tampers with, or knowingly renders inaccurate any recording or monitoring device or method required to be operated or maintained under this Article or rules of the Commission implementing this Article shall be guilty of a Class 2 misdemeanor which may include a fine not to exceed ten thousand dollars ($10,000).

(j) Repealed by Session Laws 1993, c. 539, s. 1315.

(k) The Secretary shall refer to the State Bureau of Investigation for review any discharge of waste by any person or facility in any manner that violates this Article or rules adopted pursuant to this Article that involves the possible commission of a felony. Upon receipt of a referral under this section, the State Bureau of Investigation may conduct an investigation and, if appropriate, refer the matter to the district attorney in whose jurisdiction any criminal offense has occurred. This subsection shall not be construed to limit the authority of the Secretary to refer any matter to the State Bureau of Investigation for review. (1951, c. 606; 1967, c. 892, s. 1; 1973, c. 698, s. 12; c. 712, s. 2; c. 1262, s. 23; c. 1331, s. 3; 1975, c. 583, s. 7; c. 842, ss. 6, 7; 1977, c. 771, s. 4; 1979, c. 633, ss. 9-11; 1981, c. 514, s. 1; c. 585, s. 13; 1987, c. 271; c. 827, ss. 154, 164; 1989, c. 426, s. 4; 1989 (Reg. Sess., 1990), c. 1004, s. 48; c. 1045, s. 2; 1991, c. 725, s. 4; 1993, c. 539, ss. 1018, 1019, 1313-1315; 1994, Ex. Sess., c. 24, s. 14(c); 1997-458, s. 11.1; 2007-536, s. 4.)

**Management of Water Quality in the Jordan Watershed.** — For provisions pertaining to water quality rule-making for the Jordan Watershed pursuant to Session Laws 2009-216, ss. 1 and 3-8, as amended by Session Laws 2009-484, ss. 6(b), (c), 7, and 8, see the note at G.S. 143-214.7.

**Editor's Note.** — For provisions regarding the implementation of the "Tar-Pamlico River Basin-Nutrient Sensitive Waters Management Strategy: Agricultural Nutrient Control Strategy," see Editor's note under G.S. 143-214.1.

**Legal Periodicals.** — For 1997 legislative survey, see 20 Campbell L. Rev. 450.

### CASE NOTES

**Cited** in Brinkman v. Barrett Kays & Assocs., P.A., 155 N.C. App. 738, 575 S.E.2d 40, 2003 N.C. App. LEXIS 17 (2003); Lancaster v. N.C. Dep't of Env't & Natural Res., 187 N.C. App. 105, 652 S.E.2d 359, 2007 N.C. App. LEXIS 2304 (2007).

## § 143-215.6C. Enforcement procedures; injunctive relief.

Whenever the Department has reasonable cause to believe that any person has violated or is threatening to violate any of the provisions of this Part, any of the terms of any permit issued pursuant to this Part, or a rule implementing this Part, the Department may, either before or after the institution of any other action or proceeding authorized by this Part, request the Attorney General to institute a civil action in the name of the State upon the relation of the Department for injunctive relief to restrain the violation or threatened violation and for such other and further relief in the premises as the court shall deem proper. The Attorney General may institute such action in the superior court of the county in which the violation occurred or may occur or, in his discretion, in the superior court of the county in which the person responsible for the violation or threatened violation resides or has his or its principal place of business. Upon a determination by the court that the alleged violation of the provisions of this Part or the regulations of the Commission has occurred or is threatened, the court shall grant the relief necessary to prevent or abate the violation or threatened violation. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from any penalty prescribed for violation of this Part. For purposes of this section references to "this Part" include Part 1A of this Article and G.S. 143-355(k) relating to water use information. (1951, c. 606; 1967, c. 892, s. 1; 1973, c. 698, s. 12; c. 712, s. 2; c. 1262, s. 23; c. 1331, s. 3; 1975, c. 583, s. 7; c. 842, ss. 6, 7; 1977, c. 771, s. 4; 1979, c. 633, ss. 9-11; 1981, c. 514, s. 1; c. 585, s. 13; 1987, c. 217; c. 827, ss. 154, 164; 1989, c. 426, s. 4; 1989 (Reg. Sess., 1990), c. 1045, s. 3; 2007-536, s. 5.)

**Management of Water Quality in the Jordan Watershed.** — For provisions pertaining to water quality rule-making for the Jordan Watershed pursuant to Session Laws 2009-216, ss. 1 and 3-8, as amended by Session Laws 2009-484, ss. 6(b), (c), 7, and 8, see the note at G.S. 143-214.7.

**Editor's Note.** — For provisions regarding the implementation of the "Tar-Pamlico River Basin-Nutrient Sensitive Waters Management Strategy: Agricultural Nutrient Control Strategy," see Editor's note under G.S. 143-214.1.

### CASE NOTES

**Cited** in Lancaster v. N.C. Dep't of Env't & Natural Res., 187 N.C. App. 105, 652 S.E.2d 359, 2007 N.C. App. LEXIS 2304 (2007).

## § 143-215.6D. Additional requirements applicable to certain municipal wastewater treatment facilities.

(a) As used in this section, "municipal" and "municipality" refer to any unit of local government which operates a wastewater treatment plant. As used in this section, "unit of local government" has the same meaning as in G.S. 130A-290.

(b) A municipality that operates a wastewater treatment plant with an influent bypass diversion structure and with a permitted discharge of five million gallons per day or more into any of the surface waters of the State shall maintain a notification list of units of local government which have requested to be on such list. Any unit of local government with territorial jurisdiction over or adjacent to any part of the surface waters of the State located within 100 miles downstream from the point of discharge from a municipal wastewater treatment plant to which this section applies as measured along the path of the stream, and any unit of local government which withdraws water from such surface waters to supply water to the public, may request the municipality operating the wastewater treatment plant to include the names of appropriate officials of the unit of local government on the notification list required by this subsection. The municipality operating such municipal wastewater treatment plant shall give notice of each instance when untreated or partially treated wastewater is diverted so as to bypass the wastewater treatment plant to each person on the notification list at least 24 hours before any such instance which is planned or anticipated and within 24 hours after any such instance which is unplanned or unanticipated. (1989 (Reg. Sess., 1990), c. 951, s. 2; c. 1075, s. 6.)

## § 143-215.6E. Violation Points System applicable to swine farms.

(a) The Commission shall develop a Violation Points System applicable to permits for animal waste management systems for swine farms. This system shall operate in addition to the provisions of G.S. 143-215.6A. This system shall not alter the authority of the Commission to revoke a permit for an animal waste management system for a swine farm. The Violation Points System shall provide that:

(1) Violations that involve the greatest harm to the natural resources of the State, the groundwater or surface water quantity or quality, public health, or the environment shall receive the most points and shall be considered significant violations.
(2) Violations that are committed willfully or intentionally shall be considered significant violations.
(3) The number of points received shall be directly related to the degree of negligence or willfulness.
(4) The commission of three significant violations, or the commission of lesser violations that result in a predetermined cumulative number of points, within a limited period of time of not less than five years shall result in the mandatory revocation of a permit.
(5) The commission of one willful violation that results in serious harm may result in the revocation of a permit.

(b) In developing the Violation Points System under this section, the Commission shall determine the:

(1) Number of points that lesser violations must cumulatively total to result in the revocation of a permit.
(2) Limited period of time during which the commission of three significant violations, or the commission of a greater number of lesser violations, will result in the revocation of the operator's permit. This limited period of time shall not be less than five years.
(3) Duration of the permit revocation.
(4) Conditions under which the person whose permit is revoked may reapply for another permit for an animal waste management system for a swine farm.

(c) In developing the Violation Points System under this section, the Commission shall provide for an appeals process. (1997-458, s. 10.1.)

**Editor's Note.** — Session Laws 1997-458, s. 13.3, contains a severability clause.

## § 143-215.7. Effect on laws applicable to public water supplies and the sanitary disposal of sewage.

This Article shall not be construed as amending, repealing, or in any manner abridging or interfering with the provisions of Article 10 of Chapter 130A of the General Statutes relating to the control of public water supplies; nor shall the provisions of this Article be construed as being applicable to or in anywise affecting the authority of the Department to control the sanitary disposal of sewage as provided in Article 11 of Chapter 130A of the General Statutes, or as affecting the powers, duties and authority of local health departments or as affecting the charter powers, or other lawful authority of municipal corporations, to pass ordinances in regard to sewage disposal. (1951, c. 606; 1957, c.

1357, s. 11; 1967, c. 892, s. 1; 1973, c. 476, s. 128; 1987, c. 827, s. 165; 1989, c. 727, s. 162; 1997-502, s. 9.)

**§ 143-215.8:** Repealed by Session Laws 1973, c. 698, s. 13.

**Cross References.** — For present provisions covering the subject matter of the repealed section, see G.S. 143-215.6C.

## § 143-215.8A. Planning.

(a) Policy, Purpose and Intent. — The Commission and Department shall undertake a continuing planning process to develop and adopt plans and programs to assure that the policy, purpose and intent declared in this Article are carried out with regard to establishing and enforcing standards of water purity designed to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to enhance the quality of the environment, to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development, and to insure the beneficial use of the water resources of the State.

(b) Goals. — The goals of the continuing planning process shall be the enhancement of the quality of life and protection of the environment through development by the Commission of water quality plans and programs utilizing the resources of the State on a priority basis to attain, maintain, and enhance water quality standards and water purity throughout the State.

(c) Statewide and Regional Planning. — The planning process may be conducted on a statewide or regional basis, as the Commission shall determine appropriate. If the Commission elects to proceed on a regional basis, it shall delineate the boundaries of each region by preparation of appropriate maps; by description referring to geographical features, established landmarks or political boundaries; or such other manner that the extent and limits of each region shall be easily ascertainable. The Commission shall consult officials and agencies of localities and regions in the development of plans affecting those areas.

(d) Local Planning Organizations. — The Commission shall submit to the Governor or his designee any plans, projections, data, comments or recommendations that he may request. If the Governor determines that the goals of this section will be more expeditiously and efficiently achieved, he may designate a representative organization, capable of carrying out a planning process for any region of the State or area therein, to develop plans, consistent with the State's water quality management plans, for the control or abatement of water pollution within such region or area. The Commission shall consult with, advise, and assist any organization so designated in the preparation of its plans and shall submit to the Governor the Commission's comments and recommendations regarding such plans. All such organizations shall submit plans developed by them to the Governor for review, and no plan shall be effective until concurred in and approved by him.

(e) Interstate Planning Regions. — The Governor may consult and cooperate with the governor of any adjoining state in establishing an interstate planning region or area and in designating a representative organization, capable of carrying out a planning process for the region or area, to develop plans, consistent with the State's water quality management plans, for the control or abatement of water pollution within such region or area, if he determines that such region or area has common water quality control problems for which an interstate plan would be most effective.

(f) Repealed by Session Laws 1987, c. 827, s. 166, effective August 13, 1987. (1973, c. 698, s. 13; c. 1262, s. 23; 1977, c. 771, s. 4; 1987, c. 827, ss. 154, 166.)

## § 143-215.8B. Basinwide water quality management plans.

(a) The Commission shall develop and implement a basinwide water quality management plan for each of the 17 major river basins in the State. In developing and implementing each plan, the Commission shall consider the cumulative impacts of all of the following:

(1) All activities across a river basin and all point sources and nonpoint sources of pollutants, including municipal wastewater facilities, industrial wastewater systems, septic tank systems, stormwater management systems, golf courses, farms that use fertilizers and pesticides for crops, public and commercial lawns and gardens, atmospheric deposition, and animal operations.

(2) All transfers into and from a river basin that are required to be registered under G.S 143-215.22H.

(b) Each basinwide water quality management plan shall:

(1) Provide that all point sources and nonpoint sources of pollutants jointly share the responsibility of reducing the pollutants in the State's waters in a fair, reasonable, and proportionate manner, using computer modeling and the best science and technology reasonably available and considering future anticipated population growth and economic development.

(2) If any of the waters located within the river basin are designated as nutrient sensitive waters, then the basinwide water quality management plan shall establish a goal to reduce the average annual mass load of nutrients that are delivered to surface waters within the river basin from point and nonpoint sources. The Commission shall establish a nutrient reduction goal for the nutrient or nutrients of concern that will result in improvements to water quality such that the designated uses of the water, as provided in the classification of the water under G.S. 143-214.1(d), are not impaired. The plan shall require that incremental progress toward achieving the goal be demonstrated each year. The Commission shall develop a five-year plan to achieve the goal. In developing the plan, the Commission shall determine and allow appropriate credit toward achieving the goal for reductions of water pollution by point and nonpoint sources through voluntary measures.

(c) The Commission shall review and revise its 17 basinwide water quality management plans at least every five years to reflect changes in water quality, improvements in modeling methods, improvements in wastewater treatment technology, and advances in scientific knowledge and, as need to support designated uses of water, modifications to management strategies.

(d) The Commission and the Department shall each report on or before 1 October of each year on an annual basis to the Environmental Review Commission on the progress in developing and implementing basinwide water quality management plans and on increasing public involvement and public education in connection with basinwide water quality management planning. The report to the Environmental Review Commission by the Department shall include a written statement as to all concentrations of heavy metals and other pollutants in the surface waters of the State that are identified in the course of preparing or revising the basinwide water quality management plans.

(e) A basinwide water quality management plan is not a rule and Article 2A of Chapter 150B of the General Statutes does not apply to the development of basinwide water quality management plans. Any water quality standard or classification and any requirement or limitation of general applicability that implements a basinwide water quality management plan is a rule and must be adopted as provided in Article 2A of Chapter 150B of the General Statutes. (1997-458, s. 8.2; 1998-168, s. 2.)

**Cross References.** — As to the Roanoke River Basin Bi-State Commission and the Roanoke River Basin Authority Committee, see G.S. 77-90 et seq.

**Management of Water Quality in the Jordan Watershed.** — For provisions pertaining to water quality rule-making for the Jordan Watershed pursuant to Session Laws 2009-216, ss. 1 and 3-8, as amended by Session Laws 2009-484, ss. 6(b), (c), 7, and 8, see the note at G.S. 143-214.7.

**Water Quality and Quantity in the Upper Neuse River Basin.** — For provisions pertaining to protection and restoration of water quality and quantity in the Upper Neuse River Basin, Falls Lake, and other drinking supply reservoirs pursuant to Session Laws 2009-486, see the notes at G.S. 143-214.1 and G.S. 143-215.

**Editor's Note.** — Session Laws 1997-458, s. 8.1, provides: "The General Assembly makes the following findings:

"(1) There are 17 major river basins in the State.

"(2) Many activities occur in the vicinity of each of these river basins, and the activities and conditions in one river basin may vary greatly from those in another river basin.

"(3) The public is focusing on the swine industry's role in degrading water quality, but, in fact, numerous other industries and even private citizens are responsible for contributing pollutants to the waters of the State. Among the point source and nonpoint sources of pollutants in our State's waters are: municipal wastewater facilities, industrial wastewater systems, septic tank systems, stormwater management systems, golf courses, farms that use fertilizers and pesticides for crops, public and commercial lawns and gardens, and atmospheric deposition, as well as animal operations.

"(4) The best and most effective approach to protecting and improving water quality is a comprehensive, systemwide management approach.

"(5) Basinwide water quality management is an approach already being taken by the Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] to improve the efficiency, effectiveness, and consistency of its water quality protection program. It is not a new regulatory program; it is a watershed-based approach that provides for basinwide permitting and integration of point and nonpoint source controls through existing regulatory and cooperative programs. The Neuse River Basinwide Management Plan has already been released. Seventeen basinwide plans are planned to be prepared by the Department over the next five years.

"(6) The better solution to improving water quality lies not in abandoning efforts under way in an effort to find a new solution, but to accelerate effective efforts currently in progress by establishing a deadline for completing, and expediting the implementation of, the 17 comprehensive conservation and management plans for each major river basin in the State.

"(7) The public should be informed of the complexity of the problems regarding water quality so that the public can appreciate the effectiveness of a systemwide approach and the degree of effort that has already been expended to address these problems. Public involvement should be encouraged, and public education should be enhanced."

Session Laws 2009-486, s. 3, provides: "Concurrent with the permanent rule making required by Section 3 of S.L. 2005-190, as amended by Section 31 of S.L. 2006-259 and Section 2(a) of this act, and pursuant to G.S. 143-215.8B, the Environmental Management Commission shall adopt temporary rules. The Commission shall adopt the temporary rules required by this section by January 15, 2011."

**Legal Periodicals.** — For 1997 legislative survey, see 20 Campbell L. Rev. 450.

## § 143-215.8C: Repealed by Session Laws 2005-386, s. 2.1, effective December 1, 2005.

## § 143-215.8D. North Carolina Water Quality Workgroup; Rivernet.

(a) The Department of Environment and Natural Resources and North Carolina State University shall jointly establish the North Carolina Water

Quality Workgroup. The Workgroup shall work collaboratively with the appropriate divisions of the Department of Environment and Natural Resources and North Carolina State University, the Environmental Management Commission, and the Environmental Review Commission to identify the scientific and State agency databases that can be used to formulate public policy regarding the State's water quality, evaluate those databases to determine the information gaps in those databases, and establish the priorities for obtaining the information lacking in those databases. The Workgroup shall have the following duties:

(1) To address specifically the ongoing need of evaluation, synthesis, and presentation of current scientific knowledge that can be used to formulate public policy on water quality issues.
(2) To identify knowledge gaps in the current understanding of water quality problems and fill these gaps with appropriate research projects.
(3) To maintain a web-based water quality data distribution site.
(4) To organize and evaluate existing scientific and State agency water quality databases.
(5) To prioritize recognized knowledge gaps in water quality issues for immediate funding.

(b) The North Carolina Water Quality Workgroup shall be composed of no more than 15 members. Those members shall be jointly appointed by the Chancellor of North Carolina State University and the Secretary of Environment and Natural Resources. Any person appointed as a member of the Workgroup shall be knowledgeable in one of the following areas:

(1) Water Quality Assessment, Water Quality Monitoring, and Water Quality Permitting.
(2) Nutrient Management.
(3) Water Pollution Control.
(4) Waste Management.
(5) Groundwater Resources.
(6) Stream Hydrology.
(7) Aquatic Biology.
(8) Environmental Education and Web-Based Data Dissemination.

(c) North Carolina State University shall provide meeting facilities for the North Carolina Water Quality Workgroup as requested by the Chair.

(d) The members of the North Carolina Water Quality Workgroup shall elect a Chair. The Chair shall call meetings of the Workgroup and set the meeting agenda.

(e) The Chair of the North Carolina Water Quality Workgroup shall report each year by January 30 to the Environmental Review Commission, to the Cochairs of the House of Representatives and Senate Appropriations Subcommittees on Natural and Economic Resources, and to the Chancellor of North Carolina State University or the Chancellor's designee on the previous year's activities, findings, and recommendations of the North Carolina Water Quality Workgroup.

(f) The North Carolina Water Quality Workgroup shall develop a water quality monitoring system to be known as Rivernet that effectively uses the combined resources of North Carolina State University and State agencies. The Rivernet system shall be designed to implement advances in monitoring technology and information management systems with web-based data dissemination in the waters that are impaired based on the criteria of the State's basinwide water quality management plans. Water quality and nutrient parameters shall be continuously monitored at each station, and the data shall be sent back to a centralized computer server.

The Rivernet system shall be coordinated with related data collection and monitoring activities of the Department of Environment and Natural Resources, the Water Resources Research Institute, the North Carolina Water Quality Workgroup, and other research efforts pursued by academic institutions or State government entities. If the North Carolina Water Quality Workgroup chooses to employ a technology for which there are testing procedure guidelines promulgated by the United States Environmental Protection Agency, the American Public Health Association, the American Water Works Association, or the Water Environment Federation then the testing procedures shall comply with the appropriate guidelines. If the North Carolina Water Quality Workgroup chooses to employ a technology for which there are no testing procedure guidelines promulgated by any of the groups cited in this subsection, then the North Carolina Water Quality Workgroup may establish testing procedure guidelines.

The Rivernet system shall also have the capabilities to trigger alarms and notify the appropriate member of the Workgroup when monitoring stations exceed defined limits indicating a spill or a significant water quality or nutrient measurement event, which then can be comprehensively analyzed. (2001-424, s. 19.5; 2004-195, ss. 3.3, 3.4.)

## § 143-215.9. Restrictions on authority of the Commission.

Nothing in this Article shall be construed to:

(1) Grant to the Commission any jurisdiction or authority with respect to air contamination existing solely within commercial and industrial plants, works or shops;

(2) Affect the relations between employers and employees with respect or arising out of conditions of air contamination or air pollution;

(3) Supersede or limit the applicability of any law, rules and regulations or ordinances relating to industrial health or safety. (1967, c. 892, s. 1; 1973, c. 1262, s. 23; 1987, c. 827, s. 154.)

### CASE NOTES

**Cited** in State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).

## § 143-215.9A. Reports.

(a) The Department shall report to the Environmental Review Commission and the Fiscal Research Division on or before 1 October of each year on the status of facilities discharging into surface waters during the previous fiscal year. The report shall include:

(1) The names and locations of all persons permitted under G.S. 143-215.1(c).

(2) The number of compliance inspections of persons permitted under G.S. 143-215.1(c) that the Department has conducted since the last report.

(3) The number of violations found during each inspection, including the date on which the violation occurred and the nature of the violation; the status of enforcement actions taken and pending; and the penalties imposed, collected, and in the process of being negotiated for each violation.

(4) Any other information that the Department determines to be appropriate or that is requested by the Environmental Review Commission or the Fiscal Research Division.

(b) The information to be included in the report pursuant to subsection (a) of this section shall be itemized by each regional office of the Department, with totals for the State indicated.

(c) Repealed by Session Laws 2002-148, s. 5. (1998-221, s. 4.1; 2002-148, s. 5.)

## § 143-215.9B. Systemwide municipal and domestic wastewater collection system permit program report.

The Environmental Management Commission shall develop and implement a permit program for municipal and domestic wastewater collection systems on a systemwide basis. The collection system permit program shall provide for performance standards, minimum design and construction requirements, a capital improvement plan, operation and maintenance requirements, and minimum reporting requirements. In order to ensure an orderly and cost-effective phase-in of the collection system permit program, the Commission shall implement the permit program over a five-year period beginning 1 July 2000. The Commission shall issue permits for approximately twenty percent (20%) of municipal and domestic wastewater collection systems that are in operation on 1 July 2000 during each of the five calendar years beginning 1 July 2000 and shall give priority to those collection systems serving the largest populations, those under a moratorium imposed by the Commission under G.S. 143-215.67, and those for which the Department of Environment and Natural Resources has issued a notice of violation for the discharge of untreated wastewater. The Commission shall report on its progress in developing and implementing the collection system permit program required by this section as a part of each quarterly report the Environmental Management Commission makes to the Environmental Review Commission pursuant to G.S. 143B-282(b). (2001-452, s. 2.6.)

**Editor's Note.** — Session Laws 2001-452, s. 2.9, provides: "The Department of Environment and Natural Resources shall report to the Environmental Review Commission and the Fiscal Research Division of the General Assembly on or before 15 October of each year on the Wastewater Discharge Elimination Program."

## § 143-215.9C. Use of certain types of culverts allowed.

(a) The Division of Water Quality in the Department of Environment and Natural Resources shall allow the use of structures known as three-sided, open-bottom, or bottomless culverts. A culvert authorized under this section shall be designed, constructed, and installed so that it satisfies all of the following requirements:

(1) Adheres to professional engineering standards and sound engineering practices.

(2) To the extent practicable, minimizes the erosive velocity of water.

(3) Has an inside that is greater than or equal to 1.2 times the bankfull width of the spanned waterbody. For purposes of this subdivision, "bankfull width" means the width of the stream where over-bank flow begins during a flood event.

(b) The Division shall allow the use of culverts authorized under this section throughout the State and may not limit their use to locations where they must be tied into bedrock. Culverts authorized under this section may only be used on private property and may not be transferred to, or operated or maintained by, the Department of Transportation. (2009-478, s. 1.)

**Editor's Note.** — Session Laws 2009-478, s. 2, made this section effective August 26, 2009.

**§ 143-215.10:** Repealed by Session Laws 1973, c. 1262, s. 23.

## Part 1A. Animal Waste Management Systems.

### § 143-215.10A. Legislative findings and intent.

The General Assembly finds that animal operations provide significant economic and other benefits to this State. The growth of animal operations in recent years has increased the importance of good animal waste management practices to protect water quality. It is critical that the State balance growth with prudent environmental safeguards. It is the intention of the State to promote a cooperative and coordinated approach to animal waste management among the agencies of the State with a primary emphasis on technical assistance to farmers. To this end, the General Assembly intends to establish a permitting program for animal waste management systems that will protect water quality and promote innovative systems and practices while minimizing the regulatory burden. Technical assistance, through operations reviews, will be provided by the Division of Soil and Water Conservation. Permitting, inspection, and enforcement will be vested in the Division of Water Quality. (1995 (Reg. Sess., 1996), c. 626, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 27.34(a); 2002-176, s. 1.2.)

**Interagency Group To Provide Information.** — Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 18, as amended by Session Laws 1996, Second Extra Session, c. 18, s. 27.34(e), provides for the creation of an interagency group to address questions and provide uniform interpretations to technical specialists regarding the requirements of animal waste management rules, to publish its decisions on those questions, to provide uniform strategies for operators of intensive livestock operations to meet the December 31, 1997 deadline to obtain an approved animal waste management plan, and to develop by August 1, 1996, a standard for the use of riparian buffers, decide which standard best protects water quality, and submit that standard; provides who shall provide representatives; and provides that the group shall remain in existence until such time after December 31, 1997, that the Secretary of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] determines the group is no longer needed to resolve issues related to certifying animal waste management plans.

Session Laws 1997-443, s. 15.3(a) and (c), provide that the interagency group created in Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 18 and the Department of Enviroment, Health, and Natural Resources [Department of Environment and Natural Resources] shall, by October 1, 1997, revise the general permits for animal waste management systems that were previously developed by the Department and revise the proposed time schedule for issuing those general permits, and shall submit a joint report to the Environmental Review Commission by October 1, 1997, and that after the revised general permits are adopted, the Department shall issue the revised general permit to all animal waste management operations currently holding general permits.

Session Laws 1999-329, s. 3.2, directs that the two counties that were selected for the pilot program pursuant to Section 15.4(a) of S.L. 1997-443, Columbus County and Jones County, shall remain in the pilot program. In addition, Brunswick County shall be added to the program.

**Moratorium On Swine Farm Construction Or Expansion.** — Session Laws 1997-458, s. 1.1, as amended by Session Laws 1998-188, s. 2, by Session Laws 1999-329, s. 2.1, by Session Laws 2001-254, s. 1, and by Session Laws 2003-266, s. 1, provides: "(a) Moratorium Established. — As used in this section:

"(1) 'Swine farm' and 'lagoon' have the same meaning as in G.S. 106-802.

"(2) 'Animal waste management system' has the same meaning as in G.S. 143-215.10B.

"(3) 'Anaerobic lagoon' means a lagoon that treats waste by converting it into carbon dioxide, methane, ammonia, and other gaseous compounds; organic acids; and cell tissue through an anaerobic process.

"(4) 'Anaerobic process' means a biological treatment process that occurs in the absence of dissolved oxygen.

"(a1) There is hereby established a moratorium on the construction or expansion of swine farms and on lagoons and animal waste management systems for swine farms. The purposes of this moratorium are to allow time for the completion of ongoing evaluations of animal waste management technologies and related research and studies; to allow the General Assembly to receive and act on the findings and recommendations of those evaluations, research, and studies; and to allow for the implementation of any legislation that may be enacted. Except as provided in subsection (b) of this section, the Environmental Management Commission shall not issue a permit for an animal waste management system for a new swine farm or the expansion of an existing swine farm for a period beginning on 1 March 1997 and ending on 1 September 2007. The construction or expansion of a swine farm or animal waste management system for a swine farm is prohibited during the period of the moratorium regardless of the date on which a site evaluation for the swine farm is completed and regardless of whether the animal waste management system is permitted under G.S. 143-215.1 or Part 1A of Article 21 of Chapter 143 of the General Statutes or deemed permitted under 15A North Carolina Administrative Code 2H.0217.

"(b) Exceptions. — The moratorium established by subsection (a1) of this section does not prohibit:

"(1) Construction to repair a component of an existing swine farm or lagoon.

"(2) Construction to replace a component of an existing swine farm or lagoon if the replacement does not result in an increase in swine population, except as provided in subdivision (3) (7), or (8) of this subsection.

"(3) Construction or expansion for the purpose of increasing the swine population to the projected population or to the population that the animal waste management system serving that swine farm is designed to accommodate, as set forth in a certified animal waste management plan filed with the Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] prior to 1 March 1997.

"(4) Construction or expansion for the purpose of complying with applicable animal waste management rules and not for the purpose of increasing the swine population.

"(5) Construction or expansion, if the person undertaking the construction or expansion of the swine farm, lagoon, or animal waste management system has been issued a permit for that construction or expansion under G.S. 143-215.1 or Part 1A of Article 21 of Chapter 143 of the General Statutes prior to the date this act becomes effective.

"(6) Construction or expansion, if the person undertaking the construction or expansion of the swine farm, lagoon, or animal waste management system has, prior to 1 March 1997, either:

"a. Laid a foundation for a component of the swine farm, lagoon, or animal waste management system.

"b. Entered into a bona fide written contract for the construction or expansion of the swine farm, lagoon, or animal waste management system.

"c. Been approved for a loan or line of credit to finance the construction or expansion of the swine farm, lagoon, or animal waste management system and has obligated or expended funds derived from the loan or line of credit.

"(7) Construction or expansion of an animal waste management system that does not employ an anaerobic lagoon as the primary method of treatment, does not employ land application of waste except by injection into soil or by surface application if the injection or surface application meets the equirements of sub-subdivisions a. through e. of this subdivision, and is designed to be the subject of a research project. The Environmental Management Commission shall issue a permit for the construction or expansion of an animal waste management system under this subdivision only if the Commission determines, after consultation with the Animal and Poultry Waste Management Center of North Carolina State University, that additional research is necessary to evaluate whether the animal waste treatment system will:

"a. Eliminate the discharge of animal waste to surface waters and groundwater through direct discharge, seepage, or runoff.

"b. Substantially eliminate atmospheric emissions of ammonia.

"c. Substantially eliminate the emission of odor that is detectable beyond the boundaries of the parcel or tract of land on which the swine farm is located.

"d. Substantially eliminate the release of disease-transmitting vectors and airborne pathogens.

"e. Substantially eliminate nutrient and heavy metal contamination of soil and groundwater.

"(8) Construction or expansion of an animal waste management system that does not employ an anaerobic lagoon as the primary method of treatment and does not employ land application of waste except by injection into soil or by surface application if the injection or surface application meets the requirements of sub-subdivisions a. through e. of this subdivision. The Environmental Management Commission may issue permits under this subdivision only in a manner consistent with G.S. 143-215.1(b)(2). The Commission shall issue a permit for the construction or expansion of an animal waste management system under this subdivision only if the Commission determines, after consultation with the Animal and Poultry Waste Management Center of North Carolina State University, that the animal waste management system has been in use on a swine farm with climatic conditions and soil characteristics that are similar to those that will be encourtered at the proposed site of the swine farm for at least a year, that the animal waste management system has been evaluated for at least a year, and that sufficient data exists to establish that the animal waste management system will:

"a. Eliminate the discharge of animal waste to surface waters and groundwater through direct discharge, seepage, or runoff.

"b. Substantially eliminate atmospheric emissions of ammonia.

"c. Substantially eliminate the emission of odor that is detectable beyond the boundaries of the parcel or tract of land on which the swine farm is located.

"d. Substantially eliminate the release of disease-transmitting vectors and airborne pathogens.

"e. Substantially eliminate nutrient and heavy metal contamination of soil and groundwater.

"(c) Establishing Eligibility for an Exemption. — It shall be the responsibility of an applicant for a permit for an animal waste management system for a new swine farm or for the expansion of an existing swine farm under subdivisions (1) through (8) of subsection (b) of this section to provide information and documentation to the Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] that establishes, to the satisfaction of the Department, that the applicant is eligible for the permit. In demonstrating eligibility for a permit under this section, the burden of proof shall be on the applicant.

"(d) Rule Making Not Required; Administrative and Judicial Review. — Notwithstanding the provisions of Article 2A of Chapter 150B of the General Statutes, this section shall not be construed to obligate the Commission or the Department to adopt a temporary or permanent rule to implement this section. The Commission and the Department shall implement the provisions of this section by evaluating each application for a permit for an animal waste management system on a case-by-case basis. A decision of the Commission or the Department under this section is subject to administrative and judicial review as provided in Articles 3 and 4 of Chapter 150B of the General Statutes."

Session Laws 1997-458, s. 1.2, amended by Session Laws 1998-188, s. 3, by Session Laws 1999-329, s. 2.2, by Session Laws 2001-254, s. 2, and by Session Laws 2003-266, s. 2, provides: "As used in this section, 'swine farm' and 'lagoon' have the same meaning as in G.S. 106-802. As used in this section, 'animal waste management system' has the same meaning as in G.S. 143-215.10B. There is hereby established a moratorium for any new or expanding swine farm or lagoon for which a permit is required under Parts 1 or 1A of Article 21 of Chapter 143 of the General Statutes in any county in the State: (i) that has a population of less than 75,000 according to the most recent decennial federal census; (ii) in which there is more than one hundred fifty million dollars ($150,000,000) of expenditures for travel and tourism based on the most recent figures of the Department of Commerce; and (iii) that is not in the coastal area as defined by G.S. 113A-103. Effective 1 January 1997, until 1 September 2007, the Environmental Management Commission shall not issue a permit for an animal waste management system, as defined in G.S. 143-215.10B, or for a new or expanded swine farm or lagoon, as defined in G.S. 106-802. The exemptions set out in subsection (b) of Section 1.1 of this act do not apply to the moratorium established under this section.

"(b) In order to protect travel and tourism, effective 1 September 2007, no animal waste management system shall be permitted except under an individual permit issued under Part 1 of Article 21 of Chapter 143 of the General Statutes in any county in the State: (i) that has a population of less than 75,000 according to the most recent decennial federal census; (ii) in which there is more than one hundred fifty million dollars ($150,000,000) of expenditures for travel and tourism based on the most recent figures of the Department of Commerce; and (iii) that is not in the coastal area as defined by G.S. 113A-103."

The preamble to Session Laws 2003-266, provides: "Whereas, the 1997 General Assembly established moratoria on the construction or expansion of certain swine farms and on lagoons and animal waste management systems for certain swine farms; and

"Whereas, one of the original purposes of these moratoria was to allow completion of certain studies related to swine farms and animal waste management systems; and

"Whereas, the 1998 General Assembly extended these moratoria and established exceptions for animal waste management systems that meet certain performance standards; and

"Whereas, the 1999 General Assembly and the 2001 General Assembly further extended the moratoria so that moratoria have remained in effect continuously since 1 March 1997; and

"Whereas, on 25 July 2000, the Attorney General of North Carolina entered into an agreement with Smithfield Foods, Incorporated, and certain other companies; and

"Whereas, on 13 March 2002, the Attorney General of North Carolina entered into an agreement with Frontline Farmers, Incorporated; and

"Whereas, the companies that are parties to these agreements constitute a significant portion of the swine production capacity of the State; and

"Whereas, these agreements commit the companies that are parities to these agreements to work cooperatively to develop and implement animal waste management technologies that meet the performance standards established by the General Assembly; and

"Whereas, the companies that are parties to these agreements have agreed to provide substantial resources to assist the State in the development and implementation of animal waste management technologies that meet the performance standards established by the General Assembly and that are economically feasible; and

"Whereas, the Animal and Poultry Waste Management Center at North Carolina State University is currently evaluating a number of animal waste management technologies in order to identify one or more technologies that meet the performance standards established by the General Assembly and that are economically feasible, as provided in the Smithfield and related agreements; and

"Whereas, on 28 January 2003, the Environmental Review Commission received a report from the Animal and Poultry Waste Management Center on progress in the evaluation of animal waste management technologies; and

"Whereas, based on this report, it appears that additional time will be needed to complete the evaluation of all technologies currently being evaluated; and

"Whereas, it also appears that the General Assembly will need some time to consider the results of this evaluation process once it has been completed and to enact whatever legislation it determines to be appropriate; and

"Whereas, it further appears that some time may be required for the implementation of any legislation that may be enacted by the General Assembly; Now, therefore,

"The General Assembly of North Carolina enacts:"

Session Laws 2003-340, s. 7, provides: "The moratorium established by Section 1.2 of S.L. 1997-458; as amended by Section 3 of S.L. 1998-188, Section 2.2 of S.L. 1999-329, Section 2 of S.L. 2001-254, and Section 2 of S.L. 2003-266; on new swine farms and lagoons and on the expansion of existing swine farms and lagoons shall not apply to any swine farm or lagoon that would otherwise be prohibited by the moratorium if, on or before 27 August 1997, the Soil and Water Conservation Commission allocated funds under the Agriculture Cost Share Program for Nonpoint Source Pollution Control established pursuant to G.S. 143-215.74 for the construction or expansion of the otherwise prohibited swine farm or lagoon. The Environmental Management Commission may issue a permit for an animal waste management system, as defined by G.S. 143-215.10B, or for a new swine farm or lagoon or the expansion of an existing swine farm or lagoon, as defined in G.S. 106-802, that is authorized by this section."

**Definitions Applicable to This Part Only.** — Session Laws 1999-329, s. 4.1, provides: "The definitions set out in G.S. 143-215.10B apply to this Part. The definitions set out in this section apply only to this Part and shall not be construed to apply to any regulatory program. As used in this Part:

"(1) 'Inactive lagoon' means a lagoon into which animal waste has not been lawfully discharged for a period of one year or more.

"(2) 'Lagoon' means a lagoon, as defined in G.S. 106-802, that is a component of an animal waste management system that serves an animal operation."

**General Provisions.** — Session Laws 1999-329, s. 13.7 provides that this act shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act. Every State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency.

Session Laws 2004-176, s. 6, provides: "(1) In the event there is a final determination by a court of competent jurisdiction that part or all of the federal regulations governing dry litter poultry facilities are invalid, this act shall not be construed to implement the invalid parts of the regulations or to apply the invalid parts of the regulations to facilities otherwise made subject to those federal regulations.

"(2) This act shall not be construed to affect the provisions of Section 1.1 of S.L. 1997-458, as amended by Section 2 of S.L. 1998-188, Section 2.1 of S.L. 1999-329, Section 1 of S.L. 2001-254, and S.L. 2003-266.

"(3) This act shall not be construed to affect any federal permit requirement that was in effect on or before the date this act becomes effective."

**Annual Inspection Pilot Program.** — Session Laws 1997-443, s. 15.4, as amended by Session Laws 1999-329, ss. 3.1, 3.2, Session Laws 2001-254, s. 5, Session Laws 2002-176, ss. 1.1, 1.2, Session Laws 2003-340, ss. 6.1, 6.2, Session Laws 2005-276, s. 12.7(a) and (b), Session Laws 2007-536, s. 2, and Session Laws 2009-84, s. 1, provides that the Department of Environment and Natural Resources shall develop and implement a pilot program to begin no later than 1 November 1997, and to terminate 1 September 2011, regarding the annual inspections of animal operations that are subject to a permit under Article 21 of Chapter 143 of the General Statutes, choosing two counties to participate in the program (Columbus and Jones), and adding Brunswick and Pender Counties to the program. The Division of Soil and Water Conservation of the Department of Environment and Natural Resources is to conduct inspections of animal operations in those four counties at least once a year for violations of water quality standards and compliance. In addition, the Department of Environment and Natural Resources, in consultation with both the Division of Water Quality and the Division of Soil and Water Conservation, is to submit semiannual interim reports no later than 15 April and 15 October of each year beginning 15 October 1999 to the Environmental Review Commission, to the Fiscal Research Division, and the Appropriations Subcommittees on Natural and Economic Resources in both the Senate and House of Representatives, which reports shall indicate whether the pilot program has increased the effectiveness of the annual inspections program or the response to complaints and reported problems, specifically whether the pilot program had resulted in identifying violations earlier, taking corrective actions earlier, increasing compliance with the animal waste management plans and permit conditions, improving the time to respond to discharges, complaints, and reported problems, improving communications between farmers and Department employees, and any other consequences deemed pertinent by the Department. These reports shall also compare the costs of conducting operations reviews and inspections under the pilot program with the costs of conducting operations reviews and inspections pursuant to G.S. 143-215.10D and G.S. 143-215.10F and the resources that would be required to expand the pilot program to all counties.

Session Laws 1999-329, s. 3.3, as amended by Session Laws 2001-254, s. 6, Session Laws 2002-176, s. 1.2, Session Laws 2003-340, s. 6.2 and Session Laws 2005-276, s. 12.7(b), provides: "The Department of Environment and Natural Resources, in consultation with both the Division of Water Quality and the Division of Soil and Water Conservation, shall submit semiannual interim reports no later than 15 April and 15 October of each year beginning 15 October 1999 to the Environmental Review Commission, the Fiscal Research Division, and the Appropriations Subcommittees on Natural and Economic Resources in both the Senate and the House of Representatives. These reports shall indicate whether the pilot program has increased the effectiveness of the annual inspections program or the response to complaints and reported problems, specifically whether the pilot program had resulted in identifying violations earlier, taking corrective actions earlier, increasing compliance with the animal waste management plans and permit conditions, improving the time to respond to discharges, complaints, and reported problems, improving communications between farmers and Department employees, and any other consequences deemed pertinent by the Department. These reports shall also compare the costs of conducting operations reviews and inspections under the pilot program with the costs of conducting operations reviews and inspections pursuant to G.S. 143-215.10D and G.S. 143-215.10F and the resources that would be required to expand the pilot program to all counties."

Session Laws 2005-276, s. 12.7(c), effective July 1, 2005, provides: "No later than October 15, 2005, the Department of Environment and Natural Resources shall recommend to the Environmental Review Commission and the General Assembly whether to continue or expand the pilot program under this section. The Environmental Review Commission shall recommend to the 2006 Session of the General Assembly whether to continue or expand the pilot program under this section and may make any related legislative proposals."

**Editor's Note.** — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997.'"

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 1999-329, s. 13.8 contains a severability clause.

Session Laws 2001-254, s. 7, is a severability clause.

Session Laws 2003-266, s. 3, is a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

**Legal Periodicals.** — For note, "Hog Farms and Nuisance Law in Parker v. Barefoot: Has North Carolina Become a Hog Heaven and Waste Lagoon?" see 77 N.C. L. Rev. 2355 (1999).

For note, "Preemption Hogwash: North Carolina's Judicial Repeal of Local Authority to Regulate Hog Farms in Craig v. County of Chatham," see 80 N.C.L. Rev. 2121 (2002).

## CASE NOTES

**Generally.** — It was not the role of the judicial branch to pre-empt the legislative branch's policy considerations and appropriate authorization of an activity; where hog farming companies' lagoon waste management systems existed pursuant to express legislative authority, the trial court properly declined to enjoin the operation as a nuisance. Neuse River Found. v. Smithfield Foods, Inc., 155 N.C. App. 110, 574 S.E.2d 48, 2002 N.C. App. LEXIS 1637 (2002), cert. denied, 356 N.C. 675, 577 S.E.2d 628 (2003).

**Statutory Intent.** — Animal Waste Management Systems component of the statewide regulations indicated the General Assembly's intent to adopt a comprehensive, statewide approach to the regulation of animal waste systems, preempting a county's attempt to do the same. Craig v. County of Chatham, 356 N.C. 40, 565 S.E.2d 172, 2002 N.C. LEXIS 539 (2002).

**Cited** in Craig v. County of Chatham, 143 N.C. App. 30, 545 S.E.2d 455, 2001 N.C. App. LEXIS 221 (2001).

## OPINIONS OF ATTORNEY GENERAL

**Exception to Swine Farm Moratorium.** — A swine waste operation general permit and the certificates of coverage issued under this section on the morning of August 27, 1997, were effective, and construction or expansion thereunder could proceed as a statutory exception to the swine farm moratorium signed by the Governor in the afternoon of August 27, 1997. See opinion of Attorney General to Mr. Preston Howard, Director Division of Water Quality Department of Environment and Natural Resources, 1997 N.C.A.G. 59 (9/22/97).

## § 143-215.10B. Definitions.

As used in this Part:

(1) "Animal operation" means any agricultural feedlot activity involving 250 or more swine, 100 or more confined cattle, 75 or more horses, 1,000 or more sheep, or 30,000 or more confined poultry with a liquid animal waste management system, or any agricultural feedlot activity with a liquid animal waste management system that discharges to the surface waters of the State. A public livestock market regulated under Article 35 of Chapter 106 of the General Statutes is an animal operation for purposes of this Part.

(2) "Animal waste" means livestock or poultry excreta or a mixture of excreta with feed, bedding, litter, or other materials from an animal operation.

(3) "Animal waste management system" means a combination of structures and nonstructural practices serving a feedlot that provide for the collection, treatment, storage, or land application of animal waste.

(4) "Division" means the Division of Water Quality of the Department.

(5) "Feedlot" means a lot or building or combination of lots and buildings intended for the confined feeding, breeding, raising, or holding of animals and either specifically designed as a confinement area in which animal waste may accumulate or where the concentration of animals is such that an established vegetative cover cannot be maintained. A building or lot is not a feedlot unless animals are confined for 45 or more days, which may or may not be consecutive, in a 12-month period. Pastures shall not be considered feedlots for purposes of this Part.

(6) "Technical specialist" means an individual designated by the Soil and Water Conservation Commission, pursuant to rules adopted by that Commission, to certify animal waste management plans. (1995 (Reg. Sess., 1996), c. 626, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 27.34(b); 2001-326, s. 1; 2004-176, s. 1.)

**Cross References.** — As to a moratorium on the construction or expansion of swine farms or lagoons or animal waste management systems for swine farms, established by Session Laws 1997-458, ss. 1.1 and 1.2, as amended by Session Laws 1998-188, ss. 2 and 3, by Session Laws 1999-329, ss. 2.1 and 2.2, by Session Laws 2001-254, ss. 1 and 2, and by Session Laws 2003-266, ss. 1 and 2, see the Editor's notes following G.S. 143-215.10A.

**Editor's Note.** — Session Laws 2004-124, s. 12.7C, as amended by Session Laws 2006-38, s. 1, provides: "Before 1 September 2007, the requirements and qualifications for animal waste management systems technical specialists shall not be changed and the scope of the work that animal waste management systems technical specialists are authorized to perform shall not be decreased. As used in this section, 'animal waste management system' has the same meaning as in G.S. 143-215.10B."

Session Laws 2004-176, s. 4, provides: "An owner or operator of an animal operation or a dry litter poultry facility shall apply for a permit as follows:

"(1) An owner or operator of an animal operation in existence on or before 14 April 2003, and subject to regulation under federal regulations on or before 14 April 2003, shall maintain continuous permit coverage and comply with the phosphorous provisions of the most current nutrient management standard on or before 1 July 2007.

"(2) An owner or operator of a dry litter poultry facility in existence on or before 14 April 2003, and with a poultry population that made it subject to regulation under 40 Code of Federal Regulations § 122.23 (1 July 2003) only after 14 April 2003, shall apply for a permit no later than 13 April 2006.

"(3) An owner or operator of a dry litter poultry facility in existence on or before 14 April 2003, who increases the poultry population of the facility to a number that subjects the facility to regulation under 40 Code of Federal Regulations § 122.23 (1 July 2003) after, but not on or before, 14 April 2003, shall apply for a permit by 13 April 2006, or 90 days after the increase in population, whichever is later."

Session Laws 2004-176, s. 6, provides: "(1) In the event there is a final determination by a court of competent jurisdiction that part or all of the federal regulations governing dry litter poultry facilities are invalid, this act shall not be construed to implement the invalid parts of the regulations or to apply the invalid parts of the regulations to facilities otherwise made subject to those federal regulations.

"(2) This act shall not be construed to affect the provisions of Section 1.1 of S.L. 1997-458, as amended by Section 2 of S.L. 1998-188, Section 2.1 of S.L. 1999-329, Section 1 of S.L. 2001-254, and S.L. 2003-266.

"(3) This act shall not be construed to affect any federal permit requirement that was in effect on or before the date this act becomes effective."

### CASE NOTES

**Applied** in Craig v. County of Chatham, 356 N.C. 40, 565 S.E.2d 172, 2002 N.C. LEXIS 539 (2002).

**Cited** in Craig v. County of Chatham, 143 N.C. App. 30, 545 S.E.2d 455, 2001 N.C. App. LEXIS 221 (2001).

## § 143-215.10C. Applications and permits.

(a) No person shall construct or operate an animal waste management system for an animal operation or operate an animal waste management system for a dry litter poultry facility that is required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), without first obtaining an individual permit or a general permit under this Article. The Commission shall develop a system of individual and general permits for animal operations and dry litter poultry facilities based on species, number of animals, and other relevant factors. It is the intent of the General Assembly that most animal waste management systems be permitted under a general permit. The Commission, in its discretion, may require that an animal waste management system be permitted under an individual permit if the Commission determines that an individual permit is necessary to protect water quality, public health, or the environment. The owner or operator of an animal operation shall submit an application for a permit at least 180 days prior to construction of a new animal waste management system or expansion of an existing animal waste management system and shall obtain the permit prior to commencement of the construction or expansion. The owner or operator of a dry litter poultry facility that is required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), shall submit an application for a permit at least 180 days prior to operation of a new animal waste management system.

(a1) An owner or operator of an animal waste management system for an animal operation or a dry litter poultry facility that is required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), shall apply for an individual National Pollutant Discharge Elimination System (NPDES) permit or a general NPDES permit under this Article and may not discharge into waters of the State except in compliance with an NPDES permit.

(b) An animal waste management system that is not required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), shall be designed, constructed, and operated so that the animal operation served by the animal waste management system does not cause pollution in the waters of the State except as may result because of rainfall from a storm event more severe than the 25-year, 24-hour storm.

(b1) An existing animal waste management system that is required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), shall be designed, constructed, maintained, and operated in accordance with 40 Code of Federal Regulations § 412, as amended at 73 Federal Register 70418 (November 20, 2008), so that the animal operation served by the animal waste management system does not cause pollution in waters of the State except as may result because of rainfall from a storm event more severe than the 25-year, 24-hour storm. A new animal operation or dry litter poultry facility that is required to be permitted under 40 Code of Federal Regulations § 412.46, as amended at 73 Federal Register 70418 (November 20, 2008), shall be designed, constructed, maintained, and operated so that there is no discharge of pollutants to waters of the State.

(c) The Commission shall act on a permit application as quickly as possible and may conduct any inquiry or investigation it considers necessary before acting on an application.

(d) All applications for permits or for renewal of an existing permit shall be in writing, and the Commission may prescribe the form of the applications. All applications shall include an animal waste management system plan approved by a technical specialist. The Commission may require an applicant to submit additional information the Commission considers necessary to evaluate the application. Permits and renewals issued pursuant to this section shall be effective until the date specified therein or until rescinded unless modified or revoked by the Commission.

(e) An animal waste management plan for an animal operation shall include all of the following components:

(1) A checklist of potential odor sources and a choice of site-specific, cost-effective remedial best management practices to minimize those sources.

(2) A checklist of potential insect sources and a choice of site-specific, cost-effective best management practices to minimize insect problems.

(3) Provisions that set forth acceptable methods of disposing of mortalities.

(4) Provisions regarding best management practices for riparian buffers or equivalent controls, particularly along perennial streams.

(5) Provisions regarding the use of emergency spillways and site-specific emergency management plans that set forth operating procedures to

follow during emergencies in order to minimize the risk of environmental damage.

(6) Provisions regarding periodic testing of waste products used as nutrient sources as close to the time of application as practical and at least within 60 days of the date of application and periodic testing, at least annually, of soils at crop sites where the waste products are applied. Nitrogen shall be a rate-determining element. Phosphorus shall be evaluated according to the nutrient management standard approved by the Soil and Water Conservation Commission and the Natural Resources Conservation Service of the United States Department of Agriculture for facilities that are required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008). If the evaluation demonstrates the need to limit the application of phosphorus in order to comply with the nutrient management standard, then phosphorus shall be a rate-determining element. Zinc and copper levels in the soils shall be monitored, and alternative crop sites shall be used when these metals approach excess levels.

(7) Provisions regarding waste utilization plans that assure a balance between nitrogen application rates and nitrogen crop requirements, that assure that lime is applied to maintain pH in the optimum range for crop production, and that include corrective action, including revisions to the waste utilization plan based on data of crop yields and crops analysis, that will be taken if this balance is not achieved as determined by testing conducted pursuant to subdivision (6) of this subsection.

(8) Provisions regarding the completion and maintenance of records on forms developed by the Department, which records shall include information addressed in subdivisions (6) and (7) of this subsection, including the dates and rates that waste products are applied to soils at crop sites, and shall be made available upon request by the Department.

(f) Any owner or operator of a dry litter poultry facility that is not required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), but that involves 30,000 or more birds shall develop an animal waste management plan that complies with the testing and record-keeping requirements under subdivisions (6) through (8) of subsection (e) of this section. Any operator of this type of animal waste management system shall retain records required under this section and by the Department on-site for three years.

(f1) An animal waste management plan for a dry litter poultry facility required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), shall include the components set out in subdivisions (3), (6), (7), and (8) of subsection (e) of this section, and to the extent required by 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), for land application discharges, subdivision (4) of subsection (e) of this section.

(g) The Commission shall encourage the development of alternative and innovative animal waste management technologies. The Commission shall provide sufficient flexibility in the regulatory process to allow for the timely evaluation of alternative and innovative animal waste management technologies and shall encourage operators of animal waste management systems to participate in the evaluation of these technologies. The Commission shall provide sufficient flexibility in the regulatory process to allow for the prompt implementation of alternative and innovative animal waste management technologies that are demonstrated to provide improved protection to public health and the environment.

(h) The owner or operator of an animal waste management system shall:

(1) In the event of a discharge of 1,000 gallons or more of animal waste to the surface waters of the State, issue a press release to all print and electronic news media that provide general coverage in the county where the discharge occurred setting out the details of the discharge. The owner or operator shall issue the press release within 48 hours after the owner or operator has determined that the discharge has reached the surface waters of the State. The owner or operator shall retain a copy of the press release and a list of the news media to which it was distributed for at least one year after the discharge and shall provide a copy of the press release and the list of the news media to which it was distributed to any person upon request.

(2) In the event of a discharge of 15,000 gallons or more of animal waste to the surface waters of the State, publish a notice of the discharge in a newspaper having general circulation in the county in which the discharge occurs and in each county downstream from the point of discharge that is significantly affected by the discharge. The Secretary shall determine, at the Secretary's sole discretion, which counties are significantly affected by the discharge and shall approve the form and content of the notice and the newspapers in which the notice is to be published. The notice shall be captioned "NOTICE OF DISCHARGE OF ANIMAL WASTE". The owner or operator shall publish the notice within 10 days after the Secretary has determined the counties that are significantly affected by the discharge and approved the form and content of the notice and the newspapers in which the notice is to be published. The owner or operator shall file a copy of the notice and proof of publication with the Department within 30 days after the notice is published. Publication of a notice of discharge under this subdivision is in addition to the requirement to issue a press release under subdivision (1) of this subsection.

(i) A person who obtains an individual permit under G.S. 143-215.1 for an animal waste management system that serves a public livestock market shall not be required to obtain a permit under this Part and is not subject to the requirements of this Part. (1995 (Reg. Sess., 1996), c. 626, s. 1; 1997-458, s. 9.2; 1999-329, s. 8.2; 1999-456, s. 68; 2001-254, ss. 3, 4; 2001-326, s. 2; 2004-176, s. 2; 2009-92, s. 1.)

**Editor's Note.** — Session Laws 1999-329, s. 13.7, provides that this act shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act. Every State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency.

Session Laws 2004-176, s. 4, provides: "An owner or operator of an animal operation or a dry litter poultry facility shall apply for a permit as follows:

"(1) An owner or operator of an animal operation in existence on or before 14 April 2003, and subject to regulation under federal regulations on or before 14 April 2003, shall maintain continuous permit coverage and comply with the phosphorous provisions of the most current nutrient management standard on or before 1 July 2007.

"(2) An owner or operator of a dry litter poultry facility in existence on or before 14 April 2003, and with a poultry population that made it subject to regulation under 40 Code of Federal Regulations § 122.23 (1 July 2003) only after 14 April 2003, shall apply for a permit no later than 13 April 2006.

"(3) An owner or operator of a dry litter poultry facility in existence on or before 14 April 2003, who increases the poultry population of the facility to a number that subjects the facility to regulation under 40 Code of Federal Regulations § 122.23 (1 July 2003) after, but not on or before, 14 April 2003, shall apply for a permit by 13 April 2006, or 90 days after the increase in population, whichever is later."

Session Laws 2004-176, s. 6, provides: "(1) In the event there is a final determination by a court of competent jurisdiction that part or all of the federal regulations governing dry litter poultry facilities are invalid, this act shall not be construed to implement the invalid parts of the regulations or to apply the invalid parts of the regulations to facilities otherwise made subject to those federal regulations.

"(2) This act shall not be construed to affect the provisions of Section 1.1 of S.L. 1997-458, as amended by Section 2 of S.L. 1998-188, Section 2.1 of S.L. 1999-329, Section 1 of S.L. 2001-254, and S.L. 2003-266.

"(3) This act shall not be construed to affect any federal permit requirement that was in effect on or before the date this act becomes effective."

**Effect of Amendments.** — Session Laws 2009-92, s. 1, effective June 11, 2009, rewrote the section.

### OPINIONS OF ATTORNEY GENERAL

**Certain Animal Feeding Operations (CAFOs).** — Subsection (b) is consistent with and at least as stringent as the federal NPDES requirements for certain animal feeding operations and, therefore, no permit terms can excuse a discharge of pollution to waters except as may result because of rainfall from a storm event more severe than the 25-year, 24-hour storm. See opinion of Attorney General to Daniel C. Oakley, General Counsel, North Carolina Department of Environment and Natural Resources, 2002 N.C. AG LEXIS 17 (5/17/02).

**Co-Permittees on NPDES General CAFO Permit.** — Any entity, including an integrator, that exercises substantial operational control over CAFOs and the owner/ooperator of the animal operation such that it can fairly be determined to be "constructing or operating" an animal waste management system, can be included as a required co-permittee on the NPDES general CAFO permit. See opinion of Attorney General to Daniel C. Oakley, General Counsel, North Carolina Department of Environment and Natural Resources, 2002 N.C. AG LEXIS 17 (5/17/02).

### CASE NOTES

**Applied** in Craig v. County of Chatham, 143 N.C. App. 30, 545 S.E.2d 455, 2001 N.C. App. LEXIS 221 (2001); Craig v. County of Chatham, 356 N.C. 40, 565 S.E.2d 172, 2002 N.C. LEXIS 539 (2002).

## § 143-215.10D. Operations review.

(a) The Division, in cooperation with the Division of Soil and Water Conservation, shall develop a reporting procedure for use by technical specialists who conduct operations reviews of animal operations. The reporting procedure shall be consistent with the Division's inspection procedure of animal operations and with this Part. The report shall include any corrective action recommended by the technical specialist to assist the owner or operator of the animal operation in complying with all permit requirements. The report shall be submitted to the Division within 10 days following the operations review unless the technical specialist observes a violation described in G.S. 143- 215.10E. If the technical specialist finds a violation described in G.S. 143-215.10E, the report shall be filed with the Division immediately.

(b) As part of its animal waste management plan, each animal operation shall have an operations review at least once a year. The operations review shall be conducted by a technical specialist employed by the Division of Soil and Water Conservation of the Department, a local Soil and Water Conservation District, or the federal Natural Resources Conservation Services working under the direction of the Division of Soil and Water Conservation.

(c) Operations reviews shall not be performed by technical specialists with a financial interest in any animal operation. (1995 (Reg. Sess., 1996), c. 626, s. 1.)

### CASE NOTES

**Cited** in Craig v. County of Chatham, 143 N.C. App. 30, 545 S.E.2d 455, 2001 N.C. App. LEXIS 221 (2001).

## § 143-215.10E. Violations requiring immediate notification.

(a) Any employee of a State agency or unit of local government lawfully on the premises and engaged in activities relating to the animal operation who observes any of the following violations shall immediately notify the owner or operator of the animal operation and the Division:

(1) Any direct discharge of animal waste into the waters of the State.
(2) Any deterioration or leak in a lagoon system that poses an immediate threat to the environment.
(3) Failure to maintain adequate storage capacity in a lagoon that poses an immediate threat to public health or the environment.
(4) Overspraying animal waste either in excess of the limits set out in the animal waste management plan or where runoff enters waters of the State.
(5) Any discharge that bypasses a lagoon system.

(b) Any employee of a federal agency lawfully on the premises and engaged in activities relating to the animal operation who observes any of the above violations is encouraged to immediately notify the Division. (1995 (Reg. Sess., 1996), c. 626, s. 1.)

### CASE NOTES

**Cited** in Craig v. County of Chatham, 143 N.C. App. 30, 545 S.E.2d 455, 2001 N.C. App. LEXIS 221 (2001).

## § 143-215.10F. Inspections.

The Division shall conduct inspections of all animal operations that are subject to a permit under G.S. 143-215.10C at least once a year to determine whether the system is causing a violation of water quality standards and whether the system is in compliance with its animal waste management plan or any other condition of the permit. (1995 (Reg. Sess., 1996), c. 626, s. 1.)

**Cross References.** — For note regarding pilot program for annual inspections of animal operations subject to a permit under Part 1A of Article 21 of Chapter 143, see Editor's Note under G.S. 143-215.10A regarding Session Laws 1997-443, s. 15.4.

### CASE NOTES

**Cited** in Craig v. County of Chatham, 143 N.C. App. 30, 545 S.E.2d 455, 2001 N.C. App. LEXIS 221 (2001).

## § 143-215.10G. Fees for animal waste management systems.

(a) The Department shall charge an annual permit fee to an animal operation that is subject to a permit under G.S. 143-215.10C for an animal waste management system according to the following schedule:

(1) For a system with a design capacity of 38,500 or more and less than 100,000 pounds steady state live weight, sixty dollars ($60.00).
(2) For a system with a design capacity of 100,000 or more and less than 800,000 pounds steady state live weight, one hundred eighty dollars ($180.00).

(3) For a system with a design capacity of 800,000 pounds or more steady state live weight, three hundred sixty dollars ($360.00).

(a1) The Department shall charge an annual permit fee to a dry litter poultry facility that is subject to a permit under G.S. 143-215.10C for an animal waste management system according to the following schedule:

(1) For a system with a permitted capacity of less than 25,000 laying chickens, less than 37,500 nonlaying chickens, or less than 16,500 turkeys, sixty dollars ($60.00).

(2) For a system with a permitted capacity of 25,000 or more but less than 200,000 laying chickens, 37,500 or more but less than 290,000 nonlaying chickens, 16,500 or more but less than 133,000 turkeys, one hundred eighty dollars ($180.00).

(3) For a system with a permitted capacity of more than 200,000 laying chickens, more than 290,000 nonlaying chickens, or more than 133,000 turkeys, three hundred sixty dollars ($360.00).

(b) An application for a new permit under this section shall be accompanied by an initial application fee equal to the annual fee for that permit. If a permit is issued, the application fee shall be applied as the annual fee for the first year that the permit is in effect. If the application is denied, the application fee shall not be refunded.

(c) Fees collected under this section shall be credited to the Water and Air Quality Account. The Department shall use fees collected pursuant to this section to cover the costs of administering this Part. (1995 (Reg. Sess., 1996), c. 626, s. 1; 1997-496, s. 14; 1998-212, s. 29A.11(d); 2004-176, s. 3; 2007-323, s. 30.3(b).)

**Editor's Note.** — Session Laws 1998-212, s. 29A.11(h), provides: "This section shall not be construed to relieve any person of the obligation to pay any fee due for any activity described in this section under the schedule of fees in effect prior to the date this section becomes effective."

Session Laws 2004-176, s. 4, provides: "An owner or operator of an animal operation or a dry litter poultry facility shall apply for a permit as follows:

"(1) An owner or operator of an animal operation in existence on or before 14 April 2003, and subject to regulation under federal regulations on or before 14 April 2003, shall maintain continuous permit coverage and comply with the phosphorous provisions of the most current nutrient management standard on or before 1 July 2007.

"(2) An owner or operator of a dry litter poultry facility in existence on or before 14 April 2003, and with a poultry population that made it subject to regulation under 40 Code of Federal Regulations § 122.23 (1 July 2003) only after 14 April 2003, shall apply for a permit no later than 13 April 2006.

"(3) An owner or operator of a dry litter poultry facility in existence on or before 14 April 2003, who increases the poultry population of the facility to a number that subjects the facility to regulation under 40 Code of Federal Regulations § 122.23 (1 July 2003) after, but not on or before, 14 April 2003, shall apply for a permit by 13 April 2006, or 90 days after the increase in population, whichever is later."

## § 143-215.10H. Swine integrator registration.

(a) Definitions. — As used in this section:

(1) "Grower" means a person who holds a permit for an animal waste management system under this Part or Part 1 of this Article for a swine farm, or who operates a swine farm that is subject to an operations review conducted pursuant to G.S. 143-215.10D or an inspection conducted pursuant to G.S. 143-215.10F.

(2) "Swine farm" has the same meaning as in G.S. 106-802.

(3) "Swine operation integrator" or "integrator" means a person, other than a grower, who provides 250 or more animals to a swine farm and who either has an ownership interest in the animals or otherwise establishes management and production standards for the permit

holder for the maintenance, care, and raising of the animals. An ownership interest includes a right or option to purchase the animals.

(b) Registration Required. — As part of an operations review conducted pursuant to G.S. 143-215.10D or an inspection conducted pursuant to G.S. 143-215.10F, the Department shall require a grower to register any swine operation integrator with which the grower has a contractual relationship to raise swine. The registration shall be in writing and shall include only:

(1) The name of the owner of the swine farm.
(2) The mailing address of the owner of the swine farm.
(3) The physical location of the swine farm.
(4) The swine farm facility number.
(5) A description of the animal waste management system for the swine farm.
(6) The name and address of the grower, if different from the owner of the swine farm.
(7) The name and mailing address of the integrator.

(c) Notice of Termination or New Relationship. — If the swine operation integrator removes all animals from a swine farm or terminates the integrator's relationship with the swine farm, the grower shall notify the Department of the termination or removal within 30 days. If the grower terminates the grower's relationship with the integrator or enters into a relationship with a different integrator, the grower shall notify the Department of the termination or new relationship within 30 days.

(d) Disclosure of Violations. — The Department shall notify a swine operation integrator of all notices of deficiencies and violations of laws and rules governing the animal waste management system at any swine farm for which the integrator has been registered with the Department. A notice of deficiency or violation of any law or rule governing an animal waste management system is a public record within the meaning of G.S. 132-1 and is subject to disclosure as provided in Chapter 132 of the General Statutes. (1998-188, s. 1.)

## § 143-215.10I. Performance standards for animal waste management systems that serve swine farms; lagoon and sprayfield systems prohibited.

(a) As used in this section:

(1) "Anaerobic lagoon" means a lagoon that treats waste by converting it into carbon dioxide, methane, ammonia, and other gaseous compounds; organic acids; and cell tissue through an anaerobic process.
(2) "Anaerobic process" means a biological treatment process that occurs in the absence of dissolved oxygen.
(3) "Lagoon" has the same meaning as in G.S. 106-802.
(4) "Swine farm" has the same meaning as in G.S. 106-802.

(b) The Commission shall not issue or modify a permit to authorize the construction, operation, or expansion of an animal waste management system that serves a swine farm that employs an anaerobic lagoon as the primary method of treatment and land application of waste by means of a sprayfield as the primary method of waste disposal. The Commission may issue a permit for the construction, operation, or expansion of an animal waste management system that serves a swine farm under this Article only if the Commission determines that the animal waste management system will meet or exceed all of the following performance standards:

(1) Eliminate the discharge of animal waste to surface water and groundwater through direct discharge, seepage, or runoff.
(2) Substantially eliminate atmospheric emission of ammonia.

(3) Substantially eliminate the emission of odor that is detectable beyond the boundaries of the parcel or tract of land on which the swine farm is located.

(4) Substantially eliminate the release of disease-transmitting vectors and airborne pathogens.

(5) Substantially eliminate nutrient and heavy metal contamination of soil and groundwater. (2007-523, s. 1(a).)

**Editor's Note.** — Session Laws 2007-523, s. 6, made this section effective September 1, 2007.

Session Laws 2007-523, s. 1(b)-(d), provides: "(b) Continued Operation. — An animal waste management system that serves a swine farm for which a permit was issued prior to 1 September 2007 and that does not meet the requirements of G.S. 143-215.10I, as enacted by subsection (a) of this section, may continue to operate under, and shall operate in compliance with, that permit, including any renewal of the permit.

"(c) Lagoon Replacement. — Notwithstanding G.S. 143-215.10I, as enacted by subsection (a) of this section, the Environmental Management Commission may modify a permit that was initially issued prior to 1 September 2007 for an animal waste management system that serves a swine farm to authorize the replacement of a lagoon that is a component of the animal waste management system if the Commission finds all of the following:

"(1) The permit holder has operated and maintained the animal waste management system in substantial compliance with the permit and all applicable federal and State laws, regulations, and rules.

"(2) The lagoon constitutes or will constitute an imminent hazard as defined in G.S. 130A-2.

"(3) Repair of the lagoon will not abate the imminent hazard.

"(4) Replacement of the lagoon will abate the imminent hazard and allow the permit holder to operate and maintain the replacement lagoon in compliance with all applicable requirements of federal and State laws, regulations, and rules.

"(5) Design and construction of the replacement lagoon shall meet all applicable requirements of federal and State laws, regulations, and rules; comply with the most recent Conservation Practice Standard published by the Natural Resources Conservation Service; and employ the best available technology that is economically and technically feasible. In determining best available technology and economic and technical feasibility, the Commission may consult with the Animal and Poultry Waste Management Center of North Carolina State University and with other persons who have specialized training or experience related to animal waste management systems.

"(6) The replacement lagoon shall not be located in the 100-year floodplain.

"(7) All equipment associated with operation of the replacement lagoon and with land application of waste from the lagoon shall be upgraded to meet all applicable requirements of federal and State laws, regulations, and rules and to comply with the most recent Conservation Practice Standard published by the Natural Resources Conservation Service.

"(8) The replacement will not result in an increase in the permitted capacity, stated as steady state live weight, of the animal waste management system.

"(9) The lagoon to be replaced shall be closed in accordance with all applicable requirements of federal and State laws, regulations, and rules and with the most recent Conservation Practice Standard published by the Natural Resources Conservation Service.

"(d) Rule Making. — The Environmental Management Commission shall adopt rules to implement G.S. 143-215.10I, as enacted by subsection (a) of this section. Until rules to implement G.S. 143-215.10I become effective, the Commission, in implementing G.S. 143-215.10I, shall refer to the report entitled 'Development of Environmentally Superior Technologies — Phase 3 Report: for Technology Determinations per Agreements Between the Attorney General of North Carolina and Smithfield Foods, Premium Standard Farms, and Frontline Farmers' dated 8 March 2006. The Commission shall consult with the Animal and Poultry Waste Management Center of North Carolina State University regarding the application and modification of technical standards required to implement G.S. 143-215.10I."

Session Laws 2007-523, s. 2(a)-(f), provides: "(a) Definitions. — The definitions set out in G.S. 143-215.10I(a), as enacted by Section 1 of this act, apply to this section. As used in this section, an 'innovative animal waste management system' means an animal waste management system that serves a swine farm that may be permitted under G.S. 143-215.10I(b), as enacted by Section 1 of this act.

"(b) Lagoon Conversion Program. — The Lagoon Conversion Program is hereby established. The Program shall provide grants to assist in the conversion of animal waste management systems that serve swine farms in operation on or before 1 September 2007 that employ anaerobic lagoons as the primary method of treatment to innovative animal waste management systems. Grants under the Program may also be used to:

"(1) Assist in the closure of sprayfield and lagoon systems that are replaced by innovative animal waste management systems if the closure is performed in accordance with applicable federal and State laws, regulations, and rules.

"(2) Establish centralized waste collection and treatment systems that serve innovative animal waste management systems.

"(c) Program Administration. — The Program shall be administered by the Division of Soil and Water Conservation in the Department of Environment and Natural Resources through the Agriculture Cost Share Program for Nonpoint Source Pollution Control established pursuant to G.S. 143-215.74. The Division shall administer the Program as provided in this section and Part 9 of Article 21 of Chapter 143 of the General Statutes.

"(d) Program Functions. — Under the Lagoon Conversion Program, the Division of Soil and Water Conservation in the Department of Environment and Natural Resources, through the Agriculture Cost Share Program for Nonpoint Source Pollution Control, shall:

"(1) Within funds available to the Swine Farm Waste Management System Conversion Account established by Section 3 of this act, provide grants subject to all of the following limitations and requirements:

"a. For grants approved on or before 30 June 2012, State funding shall be limited to:

"1. Ninety percent (90%) of the average cost for each practice with the assisted person providing ten percent (10%) of the cost, which may include in-kind support of the practice.

"2. A maximum of five hundred thousand dollars ($500,000) per year to each applicant.

"b. For grants approved on or after 1 July 2012 and on or before 30 June 2017, State funding shall be limited to:

"1. Eighty percent (80%) of the average cost for each practice with the assisted person providing twenty percent (20%) of the cost, which may include in-kind support of the practice.

"2. A maximum of four hundred fifty thousand dollars ($450,000) per year to each applicant.

"c. For grants approved on or after 1 July 2017, State funding shall be limited to:

"1. Seventy-five percent (75%) of the average cost for each practice with the assisted person providing twenty-five percent (25%) of the cost, which may include in-kind support of the practice.

"2. A maximum of four hundred thousand dollars ($400,000) per year to each applicant.

"d. All other limitations and requirements set out in Part 9 of Article 21 of Chapter 143 of the General Statutes, as modified by this section.

"(2) Establish criteria to prioritize the installation of innovative animal waste management systems that serve swine farms. Priority shall be given to systems that are affordable, easily maintained, produce marketable by-products, reduce or eliminate the emission of ammonia and greenhouse gases, and are capable of being connected to a centralized waste collection and treatment.

"(3) Establish criteria for the selection of applicants who are eligible for participation in the Program. Priority shall be given to applicants whose participation in the Program will result in the removal of animal waste management systems from floodplains; who have substantially complied with federal and State laws, regulations, and rules for the protection of the environment, natural resources, and public health; and who have a limited ability to pay for or finance an innovative swine waste management system through private or cooperative credit at reasonable rates and terms.

"(4) Develop a process for soliciting and reviewing applications and for selecting persons to participate in the Program.

"(5) Investigate and pursue other funding sources to supplement State funds, including federal, local, and private funding sources.

"(6) Provide technical assistance to participating persons to assist with modifications of waste management systems and facilitate the timely transfer of technology among participating persons.

"(e) Advisory Committee. — The Director of the Division of Soil and Water Conservation may establish an advisory committee to assist the Division with the implementation of this act. If the Director establishes an advisory committee, the Director may direct the advisory committee to evaluate:

"(1) Markets for by-products derived from swine waste and make recommendations for development of the markets, including identification of regulatory obstacles.

"(2) Methods to encourage growers, integrators, and electric power suppliers to cooperate in the production and use of renewable energy or other marketable by-products derived from swine waste, including an examination of tax incentives, carbon sequestration credits, and trading mechanisms.

"(f) Report. — No later than 1 October of each year, the Division of Soil and Water Conservation in the Department of Environment and Natural Resources shall prepare a comprehensive report on the implementation of Sections 1, 2, and 3 of this act. The report shall be submitted to the Environmental Review Commission as a part of the report required by G.S. 143-215.10M. The first report required by this subsection shall be submitted to the Environmental Review Commission no later than 1 October 2008."

Session Laws 2007-523, s. 3, provides: "Account. — There is hereby established the Swine Farm Waste Management System Conversion Account within the Division of Soil and Water Conservation of the Department of Environment and Natural Resources. Funds in the Account shall be used only as provided in subsection (b) of Section 2 of this act. The Account shall consist of funds appropriated to the Account by the General Assembly; any federal funds available for this purpose; and any grants, gifts, or contributions to the State for this purpose. Funds in the Account shall not revert." Session Laws 2007-523, s. 6, provides in part, that Section 3 becomes effective 1 July 2007.

Session Laws 2007-523, s. 4(a)-(g), provides: "(a) Definitions. — The definitions set out in G.S. 143-215.10B and the following definitions apply to this section:

"(1) 'Commission' means the Utilities Commission.

"(2) 'Department' means the Department of Environment and Natural Resources.

"(3) 'Electric public utility' means an investor-owned public utility as defined in G.S. 62-3(23)a.1.

"(4) 'Permit holder' means a person who holds a permit issued under Article 21 of Chapter 143 of the General Statutes by the Environmental Management Commission for an animal waste management system that serves a swine farm.

"(5) 'Public Staff' means the Public Staff of the North Carolina Utilities Commission established pursuant to G.S. 62-15.

"(6) 'Swine farm' has the same meaning as in G.S. 106-802.

"(b) Program Established. — The Swine Farm Methane Capture Pilot Program is hereby established as a voluntary program to be administered jointly by the Department and the Commission.

"(c) Participant Selection. — An owner or operator of a swine farm who wishes to participate in the Swine Farm Methane Capture Pilot Program shall register with the Department and the Commission. From among those swine farms that are registered, the Department and the Commission may select a total of up to 50 swine farms for participation in the pilot program over the life of the program. The Department and the Commission shall select swine farms for participation in the pilot program so as to achieve as nearly as possible a representative sample of the types and locations of swine farms in the areas served by electric public utilities in the State, types of methane capture and electric power generating systems, and in the order in which they register. In selecting swine farms for participation in the pilot program, the Department and the Commission may also consider the ability of the methane capture system to reduce the emissions of other pollutants, including ammonia. The Department and the Commission may select a swine farm for participation only if the swine farm meets or will meet all the following criteria:

"(1) The permit holder has operated and maintained the animal waste management system in substantial compliance with the permit and all applicable federal and State laws, regulations, and rules.

"(2) The lagoon is covered, partially covered, or otherwise modified in a manner that captures a significant portion of the methane emitted by the lagoon.

"(3) The captured methane is used to generate electricity.

"(4) The swine farm generates electric power that is available for purchase by the electric public utility that serves the swine farm on or before 1 September 2010.

"(5) The electricity generated by the swine farm can be supplied to the distribution system of the electric public utility that serves the swine farm through an interconnection that meets the standards established by the Commission.

"(d) Implementation. — Each electric public utility that serves a swine farm that is selected for participation in the pilot program is required to purchase all electricity generated by the use of captured methane as a fuel by pilot program participants for seven years. The total of all electric power purchases under the program shall not exceed 25 megawatts at any point in time. The seven-year period begins on the date the swine farm first sells electricity to the electric public utility and ends seven years after the date on which the period begins. The Commission shall set a suggested purchase price that would allow program participants to recover reasonably and prudently incurred capital and operating costs and that would minimize the impact of the pilot program on ratepayers. The price of power purchased under the program shall be determined by agreement between each program participant and the electric public utility. Each purchase price agreement shall take into account the extent to which any capital or operating costs are paid to the program participant from any other source, including grants. A purchase price agreement may be revised at any time by agreement between the parties. In the event that a program participant and an electric public utility cannot agree on a purchase price, the Commission, with the advice of the Public Staff, shall set the purchase price. In no event, shall the suggested purchase price, an agreed upon purchase price, or a purchase price set by the Commission in the event that a program participant and an electric public utility cannot agree on a purchase price exceed eighteen cents

(18¢) per kilowatt hour. The Commission, with the advice of the Public Staff, may review any agreement between a program participant and an electric public utility. All costs incurred by an electric public utility to comply with the provisions of this section may be recovered as costs of fuel pursuant to G.S. 62-133.2.

"(e) Adoption of Rules. — The Commission may adopt rules to implement this section as provided in Chapter 62 of the General Statutes. The Department may adopt rules to implement this section as provided in Chapter 150B of the General Assembly.

"(f) Effect of Section. — It is the intent of the General Assembly that this section applies only to the particular circumstances that are the subject of this section. This section does not establish a precedent with respect to purchase or sale of renewable energy.

"(g) Report. — The Department and the Commission shall jointly report to the Environmental Review Commission and the Joint Legislative Utility Review Committee on or before 1 January of each year on the implementation of this section. The report shall include a program evaluation based on an assessment of the costs and benefits of the program and any specific findings and recommendations, including any legislative proposals, that the Department and the Commission determine to be appropriate. The first report will be due 1 January 2009." Session Laws 2007-523, s. 6, provides in part, that Section 4 of that act expires on 1 September 2017.

Session Laws 2007-523, s. 5, provides: "Certain Agreements Not Affected. — This act shall not be construed to alter the obligations of any party to any of the following agreements:

"(1) The agreement among the Attorney General of North Carolina; Smithfield Foods, Inc.; Brown's of North Carolina, Inc.; Carroll's Foods, Inc.; Murphy Farms, Inc.; Carroll's Foods of Virginia, Inc.; and Quarter M Farms, Inc., of 25 July 2000.

"(2) The agreement between the Attorney General of North Carolina and Smithfield Foods, Inc., of 30 September 2000.

"(3) The agreement among the Attorney General of North Carolina and Premium Standard Farms, Inc.; The Lundy Packing Company, Inc.; Dogwood Farms, Inc.; Dogwood Farms II, LLC; L&S Farms, a partnership; and L&H Farms, LLC, of 29 September 2000.

"(4) The agreement between the Attorney General of North Carolina and Frontline Farmers, Inc., of 13 March 2002.

"(5) The agreement among North Carolina State University, the Attorney General of North Carolina, and Smithfield Foods, Inc., of 30 September 2000, including an amendment of 12 February 2004."

## §§ 143-215.10J through 143-215.10L: Reserved for future codification purposes.

## § 143-215.10M. Reports.

(a) The Department shall report to the Environmental Review Commission and the Fiscal Research Division on or before 1 October of each year as required by this section. Each report shall include:

(1) The number of permits for animal waste management systems, itemized by type of animal subject to such permits, issued since the last report.

(2) The number of operations reviews of animal waste management systems that the Division of Soil and Water Conservation has conducted since the last report.

(3) The number of operations reviews of animal waste management systems conducted by agencies other than the Division of Soil and Water Conservation that have been conducted since the last report.

(4) The number of reinspections associated with operations reviews conducted by the Division of Soil and Water Conservation since the last report.

(5) The number of reinspections associated with operations reviews conducted by agencies other than the Division of Soil and Water Conservation since the last report.

(6) The number of compliance inspections of animal waste management systems that the Division of Water Quality has conducted since the last report.

(7) The number of follow-up inspections associated with compliance inspections conducted by the Division of Water Quality since the last report.

(8) The average length of time for each category of reviews and inspections under subdivisions (2) through (7) of this subsection.

(9) The number of violations found during each category of review and inspection under subdivisions (2) through (7) of this subsection, the status of enforcement actions taken and pending, and the penalties imposed, collected, and in the process of being negotiated for each such violation.

(10) Any other information that the Department determines to be appropriate or that is requested by the Environmental Review Commission or the Fiscal Research Division.

(b) The information to be included in the reports pursuant to subsection (a) of this section shall be itemized by each regional office of the Department, with totals for the State indicated.

(c) Repealed by Session Laws 2002-148, s. 6 effective October 9, 2002. (1998-221, s. 4.2; 2002-148, s. 6.)

**Editor's Note.** — This section was enacted as G.S. 143-215.10H, and was recodified as this section at the direction of the Revisor of Statutes.

## Part 2. Regulation of Use of Water Resources.

### § 143-215.11. Short title.

This Part shall be known and may be cited as the Water Use Act of 1967. (1967, c. 933, s. 1.)

**Legal Periodicals.** — For article, "The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation," see 29 Campbell L. Rev. 535 (2007).

### § 143-215.12. Declaration of purpose.

It is hereby declared that the general welfare and public interest require that the water resources of the State be put to beneficial use to the fullest extent to which they are capable, subject to reasonable regulation in order to conserve these resources and to provide and maintain conditions which are conducive to the development and use of water resources. (1967, c. 933, s. 2.)

### § 143-215.13. Declaration of capacity use areas.

(a) The Environmental Management Commission may declare and delineate from time to time, and may modify, capacity use areas of the State where it finds that the use of groundwater or surface water or both require coordination and limited regulation for protection of the interests and rights of residents or property owners of such areas or of the public interest.

(b) Within the meaning of this Part "a capacity use area" is one where the Commission finds that the aggregate uses of groundwater or surface water, or both, in or affecting said area (i) have developed or threatened to develop to a degree which requires coordination and regulation, or (ii) exceed or threaten to exceed, or otherwise threaten or impair, the renewal or replenishment of such waters or any part of them.

(c) The Commission may declare and delineate capacity use areas in accordance with the following procedures:

(1) Whenever the Commission believes that a capacity use situation exists or may be emerging in any area of the State, it may direct the Department to investigate and report to the Commission thereon.

(2) In conducting its investigation the Department shall consult with all interested persons, groups and agencies; may retain consultants; and shall consider all factors relevant to the conservation and use of water in the area, including established or pending water classifications under Part 1 of this Article and the criteria for such classifications. Following its investigation the Department shall render a written report to the Commission. This report shall indicate whether the water use problems of the area involve surface waters, groundwaters or both and shall identify the Department's suggested boundaries for any capacity use area that may be proposed. It shall present such alternatives as the Department deems appropriate, including actions by any agency or person which might preclude the need for additional regulation at that time, and measures which might be employed limited to surface water or groundwater.

(3) If the Commission finds, following its review of the departmental report (or thereafter following its evaluation of measures taken falling short of regulation) that a capacity use area should be declared, it may adopt a rule declaring said capacity use area. A rule declaring an area to be a capacity use area shall delineate the boundaries of the area.

(4) to (6) Repealed by Session Laws 1981, c. 585, s. 3.

(7) Repealed by Session Laws 1987, c. 827, s. 167.

(d) The Commission may conduct a public hearing pursuant to the provisions of this subsection in any area of the State, whether or not a capacity use area has been declared, when it has reason to believe that the withdrawal of water from or the discharge of water pollutants to the waters in such area is having an unreasonably adverse effect upon such waters. If the Commission determines that withdrawals of water from or discharge of water pollutants to the waters within such area has resulted or probably will result in a generalized condition of water depletion or water pollution within the area to the extent that the availability or fitness for use of such water has been impaired for existing or proposed uses and that injury to the public health, safety or welfare will result if increased or additional withdrawals or discharges occur, the Commission may issue a rule:

(1) Prohibiting any person withdrawing waters in excess of 100,000 gallons per day from increasing the amount of the withdrawal above such limit as may be established in the rule.

(2) Prohibiting any person from constructing, installing or operating any new well or withdrawal facilities having a capacity in excess of a rate established in the rule; but such prohibition shall not extend to any new well or facility having a capacity of less than 10,000 gallons per day.

(3) Prohibiting any person discharging water pollutants to the waters from increasing the rate of discharge in excess of the rate established in the rule.

(4) Prohibiting any person from constructing, installing or operating any facility that will or may result in the discharge of water pollutants to the waters in excess of the rate established in the rule.

(5) Prohibiting any agency or political subdivision of the State from issuing any permit or similar document for the construction, installation, or operation of any new or existing facilities for withdrawing water from or discharging water pollutants to the waters in such area in excess of the rates established in the rule.

The determination of the Commission shall be based upon the record of the public hearing and other information considered by the Commission in the rule-making proceeding. The rule shall describe the geographical area of the State affected thereby with particularity and shall provide that the prohibitions set forth therein shall continue pending a determination by the Commission that the generalized condition of water depletion or water pollution within the area has ceased.

Upon issuance of any rule by the Commission pursuant to this subsection, a certified copy of such rule shall be mailed by registered or certified mail to the governing body of every county, city, town, and affected political subdivision lying, in whole or in part, within the area and to every affected or interested State and federal agency. A certified copy of the rule shall be posted at the courthouse in every county lying, in whole or in part, within the area, and a notice setting forth the substantive provisions and effective date of the rule shall be published once a week for two successive weeks in a newspaper or newspapers having general circulation within the area. After publication of notice is completed, any person violating any provision of such rule after the effective date thereof shall be subject to the penalties and proceedings set forth in G.S. 143-215.17. (1967, c. 933, s. 3; 1973, c. 698, s. 14; c. 1262, s. 23; 1977, c. 771, s. 4; 1981, c. 585, ss. 1-4; 1987, c. 827, ss. 154, 167.)

**Legal Periodicals.** — For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

## CASE NOTES

**Environmental Management Commission's determination of capacity use areas is discretionary.** High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 51 N.C. App. 275, 276 S.E.2d 472 (1981).

**As to the scope of judicial review** for the Environmental Management Commission's determination that a given area should or should not be declared a capacity use area, see High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 51 N.C. App. 275, 276 S.E.2d 472 (1981).

**Refusal by Commission to declare Yadkin River Basin a capacity use area was not arbitrary** or capricious. See High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 51 N.C. App. 275, 276 S.E.2d 472 (1981).

**Informal Rule-Making Procedure Held Not Subject to Review.** — An informal hearing conducted by the Commission to consider whether to initiate a proceeding to declare the Yadkin River Basin a capacity use area was no more than a rule-making type procedure, and thus plaintiffs were not entitled to judicial review under G.S. 150B-43 et seq. High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 39 N.C. App. 699, 252 S.E.2d 109 (1979), decided prior to the 1987 amendments to this section.

**Subsection (d) of this section operates as a statutory limitation on the standing of parties** interested in or affected by the action to seek judicial review. High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 39 N.C. App. 699, 252 S.E.2d 109 (1979).

**Plaintiffs Held Not Entitled to Judicial Review.** — A hearing held by the Commission to serve the function of a general information gathering tool to inject public participation at a stage of decision-making generally reserved to staff participation was an informal stage of the decision-making process with respect to this section's considerations, and the use of evidence presented at that hearing to consider whether to initiate a proceeding under this section was purely within the discretion of the Commission. Since no order was issued by the Commission which in turn could have adversely affected plaintiffs, they were not entitled to judicial review under this section. High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 39 N.C. App. 699, 252 S.E.2d 109 (1979).

**Applied** in Biddix v. Henredon Furn. Indus., Inc., 76 N.C. App. 30, 331 S.E.2d 717 (1985).

## § 143-215.14. Rules within capacity use areas; scope and procedures.

(a) Following the declaration of a capacity use area by the Commission, it shall prepare proposed rules to be applied in said area, containing such of the following provisions as the Commission finds appropriate concerning the use of surface waters or groundwaters or both:

(1) Provisions requiring water users within the area to submit reports not more frequently than at 30-day intervals concerning quantity of water used or withdrawn, sources of water and the nature of the use thereof.

(2) With respect to surface waters, groundwaters, or both: provisions concerning the timing of withdrawals; provisions to protect against or abate salt water encroachment; provisions to protect against or abate unreasonable adverse effects on other water users within the area, including but not limited to adverse effects on public use.

(3) With respect to groundwaters: provisions concerning well-spacing controls; and provisions establishing a range of prescribed pumping levels (elevations below which water may not be pumped) or maximum pumping rates, or both, in wells or for the aquifer or for any part thereof based on the capacities and characteristics of the aquifer.

(4) Such other provisions not inconsistent with this Part as the Commission finds necessary to implement the purposes of this Part.

(b) In adopting rules for a capacity use area, the Commission shall consider the factors listed in G.S. 143-215.15(h). (1967, c. 933, s. 4; 1973, c. 1262, s. 23; 1981, c. 585, s. 5; 1987, c. 827, ss. 154, 168.)

### CASE NOTES

**Applied** in High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 39 N.C. App. 699, 252 S.E.2d 109 (1979).

## § 143-215.15. Permits for water use within capacity use areas — Procedures.

(a) In areas declared by the Commission to be capacity use areas no person shall (after the expiration of such period, not in excess of six months, as the Commission may designate) withdraw, obtain, or utilize surface waters or groundwaters or both, as the case may be, in excess of 100,000 gallons per day for any purpose unless such person shall first obtain a permit therefor from the Commission.

(b) When sufficient evidence is provided by the applicant that the water withdrawn or used from a stream or the ground is not consumptively used, a permit therefor shall be issued by the Commission without a hearing and without the conditions provided in subsection (c) of this section. Applications for such permits shall set forth such facts as the Commission shall deem necessary to enable it to establish and maintain adequate records of all water uses within the capacity use area.

(c) In all cases in which sufficient evidence of a nonconsumptive use is not presented the Department shall notify each person required by this Part to secure a permit of the Commission's proposed action concerning such permit, and shall transmit with such notice a copy of any permit it proposes to issue to such persons, which permit will become final unless a request for a hearing is made within 15 days from the date of service of such notice. If sufficient evidence of a nonconsumptive use is not presented, the Commission may: (i) grant such permit with conditions as the Commission deems necessary to implement the rules adopted pursuant to G.S. 143-215.14; (ii) grant any temporary permit for such period of time as the Commission shall specify where conditions make such temporary permit essential, even though the action allowed by such permit may not be consistent with the Commission's rules applicable to such capacity use area; (iii) modify or revoke any permit upon not less than 60 days' written notice to any person affected; and (iv) deny such permit if the application therefor or the effect of the water use proposed or described therein upon the water resources of the area is found to be contrary to public interest. Before issuing a permit under this subsection, the Commission shall notify the permit applicant of its proposed action by sending the permit applicant a copy of the permit the Commission proposes to issue. Unless the permit applicant contests the proposed permit, the proposed permit shall become effective on the date set in the proposed permit. A water user who is dissatisfied with a decision of the Commission concerning that user's or another user's permit application or permit may commence a contested case under G.S. 150B-23.

(d) The Commission shall give notice of receipt of an application for a permit under this Part to all other holders of permits and applicants for permits under this Part within the same capacity use area, and to all other persons who have requested to be notified of permit applications. Notice of receipt of an application shall be given within 10 days of the receipt of the application by the Commission. The Commission shall also give notice of its proposed action on any permit application under this Part to all permit holders or permit applicants within the same capacity use area at least 18 days prior to the effective date of the proposed action. Notices of receipt of applications for permits and notice of proposed action on permits shall be by first-class mail and shall be effective upon depositing the notice, postage prepaid, in the United States mail.

(e) Repealed by Session Laws 1981, c. 585, s. 8.

(f)(1) Recodified as 143-215.4(d) by Session Laws 1987, c. 827, s. 169.

(2), (3) Repealed by Session Laws 1987, c. 827, s. 169.

(g) Repealed by Session Laws 1987, c. 827, s. 169.

(h) In determining whether to issue, modify, revoke, or deny a permit under this section, the Commission shall consider:

(1) The number of persons using an aquifer or stream and the object, extent and necessity of their respective withdrawals or uses;
(2) The nature and size of the stream or aquifer;
(3) The physical and chemical nature of any impairment of the aquifer or stream, adversely affecting its availability or fitness for other water uses (including public use);
(4) The probable severity and duration of such impairment under foreseeable conditions;
(5) The injury to public health, safety or welfare which would result if such impairment were not prevented or abated;
(6) The kinds of businesses or activities to which the various uses are related;
(7) The importance and necessity of the uses claimed by permit applicants (under this section), or of the water uses of the area (under G.S. 143-215.14) and the extent of any injury or detriment caused or expected to be caused to other water uses (including public use);
(8) Diversion from or reduction of flows in other watercourses or aquifers; and
(9) Any other relevant factors. (1967, c. 933, s. 5; 1973, c. 108, s. 89; c. 698, s. 15; c. 1262, s. 23; 1977, c. 771, s. 4; 1981, c. 585, ss. 6-10; 1987, c. 827, ss. 154, 169.)

## CASE NOTES

**Applied** in High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 39 N.C. App. 699, 252 S.E.2d 109 (1979).

**Cited** in State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).

### § 143-215.16. Permits for water use within capacity use areas — Duration, transfer, reporting, measurement, present use, fees and penalties.

(a) No permit under G.S. 143-215.15 shall be issued for a longer period than the longest of the following: (i) 10 years, or (ii) the duration of the existence of a capacity use area, or (iii) the period found by the Commission to be necessary for reasonable amortization of the applicant's water-withdrawal and water-using facilities. Permits may be renewed following their expiration upon compliance with the provisions of G.S. 143-215.15.

(b) Permits shall not be transferred except with the approval of the Commission.

(c) Every person in a capacity use area who is required by this Part to secure a permit shall file with the Commission in the manner prescribed by the Commission a certified statement of quantities of water used and withdrawn, sources of water, and the nature of the use thereof not more frequently than 30-day intervals. Such statements shall be filed on forms furnished by the Department within 90 days after the adoption of an order by the Commission declaring a capacity use area. Water users in a capacity use area not required to secure a permit shall comply with procedures established to protect and manage the water resources of the area. Such procedures shall be adapted to the specific needs of the area, shall be within the provisions of this and other North Carolina water resource acts, and shall be adopted after public hearing in the area. The requirements embodied in the two preceding sentences shall not apply to individual domestic water use.

(d) If any person who is required to secure a permit under this Part is unable to furnish accurate information concerning amounts of water being withdrawn or used, or if there is evidence that his certified statement is false or inaccurate or that he is withdrawing or using a larger quantity of water or under different conditions than has been authorized by the Commission, the Commission shall have the authority to require such person to install water meters, or some other more economical means for measuring water use acceptable to the Commission. In determining the amount of water being withdrawn or used by a permit holder or applicant the Commission may use the rated capacity of his pumps, the rated capacity of his cooling system, data furnished by the applicant, or the standards or methods employed by the United States Geological Survey in determining such quantities or by any other accepted method.

(e) In any case where a permit applicant can prove to the Commission's satisfaction that the applicant was withdrawing or using water prior to the date of declaration of a capacity use area, the Commission shall take into consideration the extent to which such prior use or withdrawal was reasonably necessary in the judgment of the Commission to meet its needs, and shall grant a permit which shall meet those reasonable needs. Provided, however, that the granting of such permit shall not have unreasonably adverse effects upon other water uses in the area, including public use, and including potential as well as present use.

(f) The Commission shall also take into consideration in the granting of any permit the prior investments of any person in lands, and plans for the usage of water in connection with such lands which plans have been submitted to the Commission within a reasonable time after June 27, 1967. Provided, however, that the granting of such permit shall not have unreasonably adverse effects upon other water uses in the area, including public use, and including potential as well as present use.

(g) It is the intention of the General Assembly that if the provisions of subsection (e) or subsection (f) of this section are held invalid as a grant of an exclusive or separate emolument or privilege, within the meaning of Article I, Sec. 7 of the North Carolina Constitution, the remainder of this Part shall be given effect without the invalid provision or provisions.

(h) Pending the issuance or denial of a permit pursuant to subsection (e) or (f) of this section, the applicant may continue the same withdrawal or use which existed prior to the date of declaration of the capacity use area. (1967, c. 933, s. 6; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1987, c. 827, s. 154.)

**Editor's Note.** — The reference to the Constitution in subsection (g) is to the Constitution adopted in 1868, as amended. See now N.C. Const., Art. I, § 32.

CASE NOTES

**Applied** in High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n, 39 N.C. App. 699, 252 S.E.2d 109 (1979).

## § 143-215.17. Enforcement procedures.

(a) Criminal Penalties. — Any person who shall be adjudged to have violated any provision of this Part shall be guilty of a Class 3 misdemeanor and shall only be liable to a penalty of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) for each violation. In addition, if any person is adjudged to have committed such violation willfully, the court may determine that each day during which such violation continued constitutes a separate violation subject to the foregoing penalty.

(b) Civil Penalties. —

(1) The Secretary may assess a civil penalty of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) against any person who violates any provisions of, or any order issued pursuant to this Part, or who violates a rule of the Commission implementing this Part.

(2) If any action or failure to act for which a penalty may be assessed under this Part is willful, the Secretary may assess a penalty not to exceed one thousand dollars ($1,000) per day for each day of violation.

(3) In determining the amount of the penalty the Secretary shall consider the factors set out in G.S. 143B-282.1(b). The procedures set out in G.S. 143B-282.1 shall apply to civil penalty assessments that are presented to the Commission for final agency decision.

(4) The Secretary shall notify any person assessed a civil penalty of the assessment and the specific reasons therefor by registered or certified mail, or by any means authorized by G.S. 1A-1, Rule 4. Contested case petitions shall be filed within 30 days of receipt of the notice of assessment.

(5) Requests for remission of civil penalties shall be filed with the Secretary. Remission requests shall not be considered unless made within 30 days of receipt of the notice of assessment. Remission requests must be accompanied by a waiver of the right to a contested case hearing pursuant to Chapter 150B and a stipulation of the facts on which the assessment was based. Consistent with the limitations in G.S. 143B-282.1(c) and (d), remission requests may be resolved by the Secretary and the violator. If the Secretary and the violator are unable to resolve the request, the Secretary shall deliver remission requests and his recommended action to the Committee on Civil Penalty Remissions of the Environmental Management Commission appointed pursuant to G.S. 143B-282.1(c).

(6) If any civil penalty has not been paid within 30 days after notice of assessment has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment, unless the violator contests the assessment as provided in subdivision (4) of this subsection, or requests remission of the assessment in whole or in part as provided in subdivision (5) of this subsection. If any civil penalty has not been paid within 30 days after the final agency decision or court order has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment.

(7) Repealed by Session Laws 1995 (Regular Session, 1996), c. 743, s. 15.

(8) The clear proceeds of civil penalties assessed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(c) Injunctive Relief. — Upon violation of any of the provisions of this Part, a rule implementing this Part, or an order issued under this Part, the Secretary may, either before or after the institution of proceedings for the collection of the penalty imposed by this Part for such violations, request the Attorney General to institute a civil action in the superior court of the county or counties where the violation occurred in the name of the State upon the relation of the Department for injunctive relief to restrain the violation or require corrective action, and for such other or further relief in the premises as said court shall deem proper. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this Part for any violation of same. (1967, c. 933, s. 7; 1973, c. 698, s. 16; c. 1262, s. 23; 1975, c. 842, s. 2; 1977, c. 771, s. 4; 1981, c. 585, s. 11; 1987, c. 827, ss. 154, 170; 1989 (Reg. Sess., 1990), c. 1036, s. 4; 1993, c. 539, s. 1020; 1994, Ex. Sess., c. 24, s. 14(c); 1995 (Reg. Sess., 1996), c. 743, s. 15; 1998-215, s. 64; 2009-134, s. 1.)

**Effect of Amendments.** — Session Laws 2009-134, s. 1, effective June 19, 2009, and applicable to violations that occur on or after that date, substituted "one thousand dollars ($1,000)" for "two hundred fifty dollars ($250.00)" in subdivisions (b)(1) and (2).

## § 143-215.18. Map or description of boundaries of capacity use areas.

(a) The Commission in designating and the Department in recommending the boundaries of any capacity use area may define such boundaries by showing them on a map or drawings, by a written description, or by any combination thereof, to be designated appropriately and filed permanently with the Department. Alterations in these lines shall be indicated by appropriate entries upon or additions to such map or description. Such entries shall be made under the direction of the Secretary of Environment and Natural Resources. Photographic, typed or other copies of such map or description, certified by the Secretary of Environment and Natural Resources, shall be admitted in evidence in all courts and shall have the same force and effect as would the original map or description. If the boundaries are changed pursuant to other provisions of this Part, the Department may provide for the redrawing of any such map. A redrawn map shall supersede for all purposes the earlier map or all maps which it is designated to replace.

(b) The Department shall file with the Secretary of State a certified copy of the map, drawings, description or combination thereof, showing the boundaries of any capacity use area designated by the Commission; and a certified copy of any redrawn or altered map or drawing, and of any amendments or additions to written descriptions, showing alterations to said boundaries. (1967, c. 933, s. 8; 1973, c. 1262, s. 23; c. 1331, s. 3; 1977, c. 771, s. 4; 1987, c. 827, ss. 154, 171; 1989, c. 727, s. 218(107); 1997-443, s. 11A.119(a).)

## § 143-215.19. Administrative inspection; reports.

(a) When necessary for enforcement of this Part, and when authorized by rules of the Commission, employees of the Commission may inspect any property, public or private, to investigate:

(1) The condition, withdrawal or use of any waters;
(2) Water sources; or
(3) The installation or operation of any well or surface water withdrawal or use facility.

(b) The Commission's rules must state appropriate standards for determining when property may be inspected under subsection (a).

(c) Entry to inspect property may be made without the possessor's consent only if the employee seeking to inspect has a valid administrative inspection warrant issued pursuant to G.S. 15-27.2.

(d) The Commission may also require the owner or possessor of any property to file written statements or submit reports under oath concerning the installation or operation of any well or surface water withdrawal or use facility.

(e) The Commission shall accompany any request or demand for information under this section with a notice that any trade secrets or confidential information concerning business activities is entitled to confidentiality as provided in this subsection. Upon a contention by any person that records, reports or information or any particular part thereof to which the Commission has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets or would divulge confidential information concerning business activities, the Commission shall consider the material referred to as confidential, except that it may be made available in a separate file marked "Confidential Business Information" to employees of the department concerned with carrying out the provisions of this Part for that purpose only. The disclosure or use of such information in any administrative or judicial proceeding shall be governed by the rules of evidence, but the affected business shall be notified by the Commission at least seven days prior to any such proposed disclosure or use of information, and the Commission will not oppose a motion by any affected business to intervene as a party to the judicial or administrative proceeding. (1967, c. 933, s. 9; 1973, c. 1262, s. 23; 1981, c. 585, s. 12; 1987, c. 827, ss. 154, 172.)

**§ 143-215.20:** Repealed by Session Laws 1987, c. 827, s. 173.

## § 143-215.21. Definitions.

Unless the context otherwise requires, the following terms as used in this Part are defined as follows:

(1), (2) Repealed by Session Laws 1987, c. 827, s. 174.
(3) "Consumptive use" means any use of water withdrawn from a stream or the ground other than a "nonconsumptive use," as defined in this Part.
(4) Repealed by Session Laws 1987, c. 827, s. 174.

(5) "Nonconsumptive use" means (i) the use of water withdrawn from a stream in such a manner that it is returned to the stream without substantial diminution in quantity at or near the point from which it was taken; or, if the user owns both sides of the stream at the point of withdrawal, the water is returned to the stream upstream of the next property below the point of diversion on either side of the stream; (ii) the use of water withdrawn from a groundwater system or aquifer in such a manner that it is returned to the groundwater system or aquifer from which it was withdrawn without substantial diminution in quantity or substantial impairment in quality at or near the point from which it was withdrawn; (iii) provided, however, that (in determining whether a use of groundwater is nonconsumptive) the Commission may take into consideration whether any material injury or detriment to other water users of the area by reason of reduction of water pressure in the aquifer or system has not been adequately compensated by the permit applicant who caused or substantially contributed to such injury or detriment.

(6), (7) Repealed by Session Laws 1987, c. 827, s. 174. (1967, c. 933, s. 11; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1987, c. 827, ss. 154, 174.)

## § 143-215.22. Law of riparian rights not changed.

Nothing contained in this Part shall change or modify existing common or statutory law with respect to the relative rights of riparian owners concerning the use of surface water in this State. (1967, c. 933, s. 12.)

### CASE NOTES

**Applied** in Biddix v. Henredon Furn. Indus., Inc., 76 N.C. App. 30, 331 S.E.2d 717 (1985).

## § 143-215.22A. Water withdrawal policy; remedies.

(a) It is against the public policy of North Carolina to withdraw water from any major river or reservoir if both of the following factors are present: (i) the withdrawal will cause the natural flow of water in the river or a portion of the reservoir to be reversed; and (ii) substantial portions of the water are not returned to the river system after use. For purposes of this section, a withdrawal will cause natural flow to be reversed if as a result of the withdrawal, the rate of flow in the river or discrete portion of the reservoir is 15 cubic feet per second or more, moving in a generally opposite direction than prior to the withdrawal, over a distance of more than one mile. To correct for periodic effects, including tidal influences and reservoir fluctuations, flow speed and direction shall be calculated by using annual average flow data to determine pre-withdrawal flows, and projected annual average flow assuming the maximum practical rate of withdrawal, to determine post-withdrawal flows.

(b) This section shall not be construed to create an independent cause of action by the State or by any person. This section shall not apply to any project or facility for which a withdrawal of water began prior to the date this section is effective. (1991, c. 567, s. 1; c. 712, ss. 5, 6.)

## § 143-215.22B. Roanoke River Basin water rights.

The State reserves and allocates to itself, as protector of the public interest, all rights in the water located in those portions of Kerr Lake and Lake Gaston that are in the State. (1995, c. 504, s. 1.)

## §§ 143-215.22C through 143-215.22F: Reserved for future codification purposes.

## Part 2A. Registration of Water Withdrawals and Transfers; Regulation of Surface Water Transfers.

## § 143-215.22G. Definitions.

In addition to the definitions set forth in G.S. 143-212 and G.S. 143-213, the following definitions apply to this Part.

(1) "River basin" means any of the following river basins designated on the map entitled "Major River Basins and Sub-basins in North Carolina" and filed in the Office of the Secretary of State on 16 April 1991. The term "river basin" includes any portion of the river basin that extends into another state. Any area outside North Carolina that is not included in one of the river basins listed in this subdivision comprises a separate river basin.

| | | |
|---|---|---|
| a. | 1-1 | Broad River. |
| b. | 2-1 | Haw River. |
| c. | 2-2 | Deep River. |
| d. | 2-3 | Cape Fear River. |
| e. | 2-4 | South River. |
| f. | 2-5 | Northeast Cape Fear River. |
| g. | 2-6 | New River. |
| h. | 3-1 | Catawba River. |
| i. | 3-2 | South Fork Catawba River. |
| j. | 4-1 | Chowan River. |
| k. | 4-2 | Meherrin River. |
| *l.* | 5-1 | Nolichucky River. |
| m. | 5-2 | French Broad River. |
| n. | 5-3 | Pigeon River. |
| o. | 6-1 | Hiwassee River. |
| p. | 7-1 | Little Tennessee River. |
| q. | 7-2 | Tuskasegee (Tuckasegee) River. |
| r. | 8-1 | Savannah River. |
| s. | 9-1 | Lumber River. |
| t. | 9-2 | Big Shoe Heel Creek. |
| u. | 9-3 | Waccamaw River. |
| v. | 9-4 | Shallotte River. |
| w. | 10-1 | Neuse River. |
| x. | 10-2 | Contentnea Creek. |
| y. | 10-3 | Trent River. |
| z. | 11-1 | New River. |
| aa. | 12-1 | Albemarle Sound. |
| bb. | 13-1 | Ocoee River. |
| cc. | 14-1 | Roanoke River. |
| dd. | 15-1 | Tar River. |
| ee. | 15-2 | Fishing Creek. |
| ff. | 15-3 | Pamlico River and Sound. |
| gg. | 16-1 | Watauga River. |
| hh. | 17-1 | White Oak River. |
| ii. | 18-1 | Yadkin (Yadkin-Pee Dee) River. |
| jj. | 18-2 | South Yadkin River. |
| kk. | 18-3 | Uwharrie River. |
| *ll.* | 18-4 | Rocky River. |

(2) "Surface water" means any of the waters of the State located on the land surface that are not derived by pumping from groundwater.

(3) "Transfer" means the withdrawal, diversion, or pumping of surface water from one river basin and discharge of all or any part of the water in a river basin different from the origin. However, notwithstanding the basin definitions in G.S. 143-215.22G(1), the following are not transfers under this Part:
  a. The discharge of water upstream from the point where it is withdrawn.
  b. The discharge of water downstream from the point where it is withdrawn. (1991, c. 712, s. 1; 1993, c. 348, s. 1; 1997-443, s. 15.48(b).)

**Cross References.** — As to establishment of a pilot program for the removal of abandoned vessels in the Neuse River Basin, see the Editor's Note at G.S. 76-40.

**Allocation of Surface Water Resources Study** — Session Laws 2007-518, s. 1(a), as amended by Session Laws 2008-10, s. 1, provides: "The Environmental Review Commission, with the assistance of the Department of Environment and Natural Resources, shall study the allocation of surface water resources and their availability and maintenance in the State, including issues related to the transfer of water from one river basin to another, the withdrawal of water for consumptive use, and the accuracy and tolerance of equipment used to measure the flow of water transferred from one river basin to another river basin. The Commission shall evaluate the benefits of establishing formal and informal procedures for negotiating transfers of water from one river basin to another. The Commission shall also study and recommend measures to: (i) ensure that the purposes of the Regional Water Supply Planning Act of 1971, as set out in G.S. 162A-21, are fulfilled; (ii) provide for a comprehensive system for regulating surface water withdrawals for consumptive and nonconsumptive uses; (iii) provide for the establishment of a statewide plan for water resources development projects; (iv) provide for adequate resources for the Department so that it may develop and implement a comprehensive approach to water resources management; (v) ensure that all State laws regulating water resources are consistent with and fully integrated into the comprehensive system for regulating surface water withdrawals and the statewide plan for water resources development projects; and (vi) ensure that potential interstate conflicts related to water resources are avoided or minimized. In the conduct of this study, the Environmental Review Commission may employ independent consultants as provided in G.S. 120-32.02 and G.S. 120-70.44. The Environmental Review Commission may submit interim reports to the 2008 and 2009 regular sessions of the General Assembly and shall submit a final report of its findings and recommendations, including any legislative proposals, to the General Assembly on or before 1 October 2010."

Session Laws 2008-125, s. 2, provides: "As a part of the study by the Environmental Review Commission of the allocation of water resources in this State pursuant to subsection (a) of Section 1 of S.L. 2007-518, the Environmental Review Commission shall study the delineation of major river basins and subbasins within the State. The Commission shall determine whether the definition of 'river basin' set out in G.S. 143-215.22G and the accompanying map should be revised. The Commission shall report its findings and recommendations as provided in subsection (a) of Section 1 of S.L. 2007-518, as amended."

Session Laws 2008-143, s. 6, provides: "The Environmental Review Commission, as part of its ongoing study of the allocation of water resources in the State required by Section 1 of S.L. 2007-518, shall study issues related to increasing water supply, including issues related to reservoir construction and State laws and rules governing reservoir construction. The Environmental Review Commission shall report its findings and recommendations, including any legislative proposals, to the General Assembly as provided by Section 1 of S.L. 2007-518, as amended."

**Editor's Note.** — This Part was enacted by Session Laws 1991, c. 712, s. 1, which enacted sections numbered G.S. 143-215.22A and 143-215.22B. These sections were renumbered as G.S. 143-215.22G and 143-215.22H, and this section was placed in this Part, by the Revisor of Statutes.

Session Laws 2007-518, s. 1(b), provides: "The Division of Water Resources of the Department of Environment and Natural Resources, in consultation with the Environmental Review Commission, shall prepare a revised map entitled 'Major River Basins and Sub-basins in North Carolina'. The revised map shall be prepared as a recommended replacement for the map referenced in G.S. 143-215.22G. The revised map shall define the extent to which any river basin that encompasses any river that flows from another state into North Carolina or that flows from North Carolina into another state extends into an adjacent state. The Environmental Review Commission shall recommend a revised map and a conforming legislative proposal to amend the definition of 'river basin' set out in G.S. 143-215.22G to the 2008 Regular Session of the General Assembly."

**Legal Periodicals.** — For article, "The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation," see 29 Campbell L. Rev. 535 (2007).

## § 143-215.22H. Registration of water withdrawals and transfers required.

(a) Any person who withdraws 100,000 gallons per day or more of water from the surface or groundwaters of the State or who transfers 100,000 gallons per day or more of water from one river basin to another shall register the withdrawal or transfer with the Commission. A person registering a water withdrawal or transfer shall provide the Commission with the following information:

(1) The maximum daily amount of the water withdrawal or transfer expressed in thousands of gallons per day.

(1a) The monthly average withdrawal or transfer expressed in thousands of gallons per day.

(2) The location of the points of withdrawal and discharge and the capacity of each facility used to make the withdrawal or transfer.

(3) The monthly average discharge expressed in thousands of gallons per day.

(b) Any person initiating a new water withdrawal or transfer of 100,000 gallons per day or more shall register the withdrawal or transfer with the Commission not later than two months after the initiation of the withdrawal or transfer. The information required under subsection (a) of this section shall be submitted with respect to the new withdrawal or transfer.

(b1) Subsections (a) and (b) of this section shall not apply to a person who withdraws or transfers less than 1,000,000 gallons per day of water for activities directly related or incidental to the production of crops, fruits, vegetables, ornamental and flowering plants, dairy products, livestock, poultry, and other agricultural products, or to the creation or maintenance of waterfowl impoundments.

(b2) Registration of a withdrawal or transfer of water under this section or information that is provided by a water user pursuant to G.S. 106-24 and authorized for release to the Commission by the individual water user may be used as evidence of historic water use in the event that it becomes necessary or desirable to allocate available water resources among specific classes, persons, or individuals who use water resources.

(c) A unit of local government that has completed a local water supply plan that meets the requirements of G.S. 143-355(l) and that has periodically revised and updated its plan as required by the Department has satisfied the requirements of this section and is not required to separately register a water withdrawal or transfer or to update a registration under this section.

(d) Any person who is required to register a water withdrawal or transfer under this section shall update the registration by providing the Commission with a current version of the information required by subsection (a) of this section at five-year intervals following the initial registration. A person who submits information to update a registration of a water withdrawal or transfer is not required to pay an additional registration fee under G.S. 143-215.3(a)(1a) and G.S. 143-215.3(a)(1b), but is subject to the civil penalty established under this section in the event that updated information is not submitted as required by this subsection.

(e) Any person who is required to register a water transfer or withdrawal under this section and fails to do so shall pay, in addition to the registration fee required under G.S. 143-215.3(a)(1a) and G.S. 143-215.3(a)(1b), a civil penalty of one hundred dollars ($100.00). A person who is required to update a registration under this section and fails to do so shall pay a civil penalty of fifty dollars ($50.00). For each willful action or failure to act for which a penalty may be assessed under this subsection, the Commission may consider each day the action or inaction continues after notice is given of the violation as a separate violation. A separate penalty may be assessed for each separate violation. (1991, c. 712, s. 1; 1993, c. 344, s. 1; c. 553, s. 81; 1998-168, s. 3; 2008-143, s. 1; 2008-198, s. 11.6.)

**Editor's Note.** — Session Laws 1998-168, s. 8 provides any person who is required to register a water withdrawal or transfer as a result of the amendments to G.S. 143-215.22H made by Section 3 of S.L. 1998-168 shall provide the information required by G.S. 143-215.22H(a) on the basis of water withdrawn or transferred during the 1999 calendar year.

Session Laws 2008-143, s. 20, provides: "Nothing in this act shall be construed to expand or limit the authority of a unit of government or public water supply system to regulate water use from a well located outside of its jurisdiction, a well not connected to its water system, or any other private well."

Session Laws 2008-198, s. 11.6, was contingent on House Bill 2499 (Session Laws 2008-143) becoming law, which it did.

**Effect of Amendments.** — Session Laws 2008-143, s. 1, effective October 1, 2008, in subsection (b), substituted "two months" for "six months" in the first sentence; in subsection (b1), added "or to the creation or maintenance of waterfowl impoundments" at the end; added subsection (b2); and rewrote subsection (e).

Session Laws 2008-198, s. 11.6, effective August 8, 2008, substituted "civil penalty" for "late registration fee" in subsection (d).

**Legal Periodicals.** — For legislative survey, see 21 Campbell L. Rev. 323 (1999).

**§ 143-215.22I:** Repealed by Session Laws 2007-518, s. 2, effective August 31, 2007, and applicable to any petition for a certificate for a transfer of surface water from one river basin to another river basin for which preparation of an environmental assessment or an environmental impact statement has begun on or after August 31, 2007.

**Cross References.** — For present similar provisions concerning the regulation of surface water transfers, see G.S. 143-215.22L.

**Editor's Note.** — Session Laws 2007-518, s. 7(b), provides: "For a petition for a certificate for transfer of surface water from one river basin to another river basin to supplement ground water supplies in the fifteen counties designated as the Central Coastal Plain Capacity Use Area under 15A NCAC 2E.0501, this act becomes effective 1 January 2011. Prior to 1 January 2011, a petition for a certificate for transfer of surface water from one river basin to another river basin to supplement ground water supplies in the fifteen counties designated as the Central Coastal Plain Capacity Use Area shall be considered and acted upon by the Environmental Management Commission pursuant to the procedures and standards set out in G.S. 143-215.22I on 1 July 2007."

Session Laws 2007-518, s. 6 is a severability clause.

**§ 143-215.22J:** Repealed by Session Laws 2004-195, s. 3.1, effective August 17, 2004.

**§ 143-215.22K:** Repealed by Session Laws 2004-195, s. 3.1, effective August 17, 2004.

## § 143-215.22L. Regulation of surface water transfers.

(a) Certificate Required. — No person, without first obtaining a certificate from the Commission, may:

(1) Initiate a transfer of 2,000,000 gallons of water or more per day from one river basin to another.

(2) Increase the amount of an existing transfer of water from one river basin to another by twenty-five percent (25%) or more above the average daily amount transferred during the year ending 1 July 1993 if the total transfer including the increase is 2,000,000 gallons or more per day.

(3) Increase an existing transfer of water from one river basin to another above the amount approved by the Commission in a certificate issued under G.S. 162A-7 prior to 1 July 1993.

(b) Exception. — Notwithstanding the provisions of subsection (a) of this section, a certificate shall not be required to transfer water from one river basin to another up to the full capacity of a facility to transfer water from one basin to another if the facility was in existence or under construction on 1 July 1993.

(c) Notice of Intent to File a Petition. — An applicant shall prepare a notice of intent to file a petition that includes a nontechnical description of the applicant's request and an identification of the proposed water source. Within 90 days after the applicant files a notice of intent to file a petition, the applicant shall hold at least one public meeting in the source river basin upstream from the proposed point of withdrawal, at least one public meeting in the source river basin downstream from the proposed point of withdrawal, and at least one public meeting in the receiving river basin to provide information to interested parties and the public regarding the nature and extent of the proposed transfer and to receive comment on the scope of the environmental documents. Written notice of the public meetings shall be provided at least 30 days before the public meetings. At the time the applicant gives notice of the public meetings, the applicant shall request comment on the alternatives and issues that should be addressed in the environmental documents required by this section. The applicant shall accept written comment on the scope of the environmental documents for a minimum of 30 days following the last public meeting. Notice of the public meetings and opportunity to comment on the scope of the environmental documents shall be provided as follows:

(1) By publishing notice in the North Carolina Register.

(2) By publishing notice in a newspaper of general circulation in:

a. Each county in this State located in whole or in part of the area of the source river basin upstream from the proposed point of withdrawal.

b. Each city or county located in a state located in whole or in part of the surface drainage basin area of the source river basin that also falls within, in whole or in part, the area denoted by one of the following eight-digit cataloging units as organized by the United States Geological Survey:

03050105 (Broad River: NC and SC);
03050106 (Broad River: SC);
03050107 (Broad River: SC);
03050108 (Broad River: SC);
05050001 (New River: NC and VA);
05050002 (New River: VA and WV);
03050101 (Catawba River: NC and SC);
03050103 (Catawba River: NC and SC);
03050104 (Catawba River: SC);
03010203 (Chowan River: NC and VA);
03010204 (Chowan River: NC and VA);
06010105 (French Broad River: NC and TN);
06010106 (French Broad River: NC and TN);
06010107 (French Broad River: TN);

06010108 (French Broad River: NC and TN);
06020001 (Hiwassee River: AL, GA, TN);
06020002 (Hiwassee River: GA, NC, TN);
06010201 (Little Tennessee River: TN);
06010202 (Little Tennessee River: TN, GA, and NC);
06010204 (Little Tennessee River: NC and TN);
03060101 (Savannah River: NC and SC);
03060102 (Savannah River: GA, NC, and SC);
03060103 (Savannah River: GA and SC);
03060104 (Savannah River: GA);
03060105 (Savannah River: GA);
03040203 (Lumber River: NC and SC);
03040204 (Lumber River: NC and SC);
03040206 (Lumber River: NC and SC);
03040207 (Lumber River: NC and SC);
03010205 (Albemarle Sound: NC and VA);
06020003 (Ocoee River: GA, NC, and TN);
03010101 (Roanoke River: VA);
03010102 (Roanoke River: NC and VA);
03010103 (Roanoke River: NC and VA);
03010104 (Roanoke River: NC and VA);
03010105 (Roanoke River: VA);
03010106 (Roanoke River: NC and VA);
06010102 (Watauga River: TN and VA);
06010103 (Watauga River: NC and TN);
03040101 (Yadkin River: VA and NC);
03040104 (Yadkin River: NC and SC);
03040105 (Yadkin River: NC and SC);
03040201 (Yadkin River: NC and SC);
03040202 (Yadkin River: NC and SC).

c. Each county in this State located in whole or in part of the area of the source river basin downstream from the proposed point of withdrawal.

d. Any area in the State in a river basin for which the source river basin has been identified as a future source of water in a local water supply plan prepared pursuant to G.S. 143-355(*l*).

e. Each county in the State located in whole or in part of the receiving river basin.

(3) By giving notice by first-class mail or electronic mail to each of the following:

a. The board of commissioners of each county in this State or the governing body of any county or city that is politically independent of a county in any state that is located entirely or partially within the source river basin of the proposed transfer and that also falls within, in whole or in part, the area denoted by one of the eight-digit cataloging units listed in sub-subdivision b. of subdivision (2) of this subsection.

b. The board of commissioners of each county in this State or the governing body of any county or city that is politically independent of a county in any state that is located entirely or partially within the receiving river basin of the proposed transfer and that also falls within, in whole or in part, the area denoted by one of the eight-digit cataloging units listed in sub-subdivision b. of subdivision (2) of this subsection.

c. The governing body of any public water supply system that withdraws water upstream or downstream from the withdrawal point of the proposed transfer.

d. If any portion of the source or receiving river basins is located in another state, all state water management or use agencies, environmental protection agencies, and the office of the governor in that state upstream or downstream from the withdrawal point of the proposed transfer.

e. All persons who have registered a water withdrawal or transfer from the proposed source river basin under this Part or under similar law in an another state.

f. All persons who hold a certificate for a transfer of water from the proposed source river basin under this Part or under similar law in an another state.

g. All persons who hold a National Pollutant Discharge Elimination System (NPDES) wastewater discharge permit for a discharge of 100,000 gallons per day or more upstream or downstream from the proposed point of withdrawal.

h. To any other person who submits to the applicant a written request to receive all notices relating to the petition.

(d) Environmental Documents. — The definitions set out in G.S. 113A-9 apply to this section. The Department shall conduct a study of the environmental impacts of any proposed transfer of water for which a certificate is required under this section. The study shall meet all of the requirements set forth in G.S. 113A-4 and rules adopted pursuant to G.S. 113A-4. An environmental assessment shall be prepared for any petition for a certificate under this section. The determination of whether an environmental impact statement shall also be required shall be made in accordance with the provisions of Article 1 of Chapter 113A of the General Statutes; except that an environmental impact statement shall be prepared for every proposed transfer of water from one major river basin to another for which a certificate is required under this section. The applicant who petitions the Commission for a certificate under this section shall pay the cost of special studies necessary to comply with Article 1 of Chapter 113A of the General Statutes. An environmental impact statement prepared pursuant to this subsection shall include all of the following:

(1) A comprehensive analysis of the impacts that would occur in the source river basin and the receiving river basin if the petition for a certificate is granted.

(2) An evaluation of alternatives to the proposed interbasin transfer, including water supply sources that do not require an interbasin transfer and use of water conservation measures.

(3) A description of measures to mitigate any adverse impacts that may arise from the proposed interbasin transfer.

(e) Public Hearing on the Draft Environmental Document. — The Commission shall hold a public hearing on the draft environmental document for a proposed interbasin transfer after giving at least 30 days' written notice of the hearing in the Environmental Bulletin and as provided in subdivisions (2) and (3) of subsection (c) of this section. The notice shall indicate where a copy of the environmental document can be reviewed and the procedure to be followed by anyone wishing to submit written comments and questions on the environmental document. The Commission shall prepare a record of all comments and written responses to questions posed in writing. The record shall include complete copies of scientific or technical comments related to the potential impact of the interbasin transfer. The Commission shall accept written comment on the draft environmental documents for a minimum of 30 days following the last public hearing.

(f) Determination of Adequacy of Environmental Document. — The Commission shall not act on any petition for an interbasin transfer until the

Commission has determined that the environmental document is complete and adequate. A decision on the adequacy of the environmental document is subject to review in a contested case on the decision of the Commission to issue or deny a certificate under this section.

(g) Petition. — An applicant for a certificate shall petition the Commission for the certificate. The petition shall be in writing and shall include all of the following:

(1) A description of the facilities to be used to transfer the water, including the location and capacity of water intakes, pumps, pipelines, and other facilities.

(2) A description of all the proposed consumptive and nonconsumptive uses of the water to be transferred.

(3) A description of the water quality of the source river and receiving river, including information on aquatic habitat for rare, threatened, and endangered species; in-stream flow data for segments of the source and receiving rivers that may be affected by the transfer; and any waters that are impaired pursuant to section 303(d) of the federal Clean Water Act (33 U.S.C. § 1313(d)).

(4) A description of the water conservation measures used by the applicant at the time of the petition and any additional water conservation measures that the applicant will implement if the certificate is granted.

(5) A description of all sources of water within the receiving river basin, including surface water impoundments, groundwater wells, reinjection storage, and purchase of water from another source within the river basin, that is a practicable alternative to the proposed transfer that would meet the applicant's water supply needs. The description of water sources shall include sources available at the time of the petition for a certificate and any planned or potential water sources.

(6) A description of water transfers and withdrawals registered under G.S. 143-215.22H or included in a local water supply plan prepared pursuant to G.S. 143-355(*l*) from the source river basin, including transfers and withdrawals at the time of the petition for a certificate and any planned or reasonably foreseeable transfers or withdrawals by a public water system with service area located within the source river basin.

(7) A demonstration that the proposed transfer, if added to all other transfers and withdrawals required to be registered under G.S. 143-215.22H or included in any local water supply plan prepared by a public water system with service area located within the source basin pursuant to G.S. 143-355(*l*) from the source river basin at the time of the petition for a certificate, would not reduce the amount of water available for use in the source river basin to a degree that would impair existing uses, pursuant to the antidegradation policy set out in 40 Code of Federal Regulation § 131.12 (Antidegradation Policy) (1 July 2006 Edition) and the statewide antidegradation policy adopted pursuant thereto, or existing and planned consumptive and nonconsumptive uses of the water in the source river basin. If the proposed transfer would impact a reservoir within the source river basin, the demonstration must include a finding that the transfer would not result in a water level in the reservoir that is inadequate to support existing uses of the reservoir, including recreational uses.

(8) The applicant's future water supply needs and the present and reasonably foreseeable future water supply needs for public water systems with service area located within the source river basin. The analysis of future water supply needs shall include agricultural,

recreational, and industrial uses, and electric power generation. Local water supply plans prepared pursuant to G.S. 143-355(*l*) for water systems with service area located within the source river basin shall be used to evaluate the projected future water needs in the source river basin that will be met by public water systems.

(9) The applicant's water supply plan prepared pursuant to G.S. 143-355(*l*). If the applicant's water supply plan is more than two years old at the time of the petition, then the applicant shall include with the petition an updated water supply plan.

(10) Any other information deemed necessary by the Commission for review of the proposed water transfer.

(h) Settlement Discussions. — Upon the request of the applicant, any interested party, or the Department, or upon its own motion, the Commission may appoint a mediation officer. The mediation officer may be a member of the Commission, an employee of the Department, or a neutral third party but shall not be a hearing officer under subsections (e) or (j) of this section. The mediation officer shall make a reasonable effort to initiate settlement discussions between the applicant and all other interested parties. Evidence of statements made and conduct that occurs in a settlement discussion conducted under this subsection, whether attributable to a party, a mediation officer, or other person shall not be subject to discovery and shall be inadmissible in any subsequent proceeding on the petition for a certificate. The Commission may adopt rules to govern the conduct of the mediation process.

(i) Draft Determination. — Within 90 days after the Commission determines that the environmental document prepared in accordance with subsection (d) of this section is adequate or the applicant submits its petition for a certificate, whichever occurs later, the Commission shall issue a draft determination on whether to grant the certificate. The draft determination shall be based on the criteria set out in this section and shall include the conditions and limitations, findings of fact, and conclusions of law that would be required in a final determination. Notice of the draft determination shall be given as provided in subsection (c) of this section.

(j) Public Hearing on the Draft Determination. — Within 60 days of the issuance of the draft determination as provided in subsection (i) of this section, the Commission shall hold public hearings on the draft determination. At least one hearing shall be held in the affected area of the source river basin, and at least one hearing shall be held in the affected area of the receiving river basin. In determining whether more than one public hearing should be held within either the source or receiving river basins, the Commission shall consider the differing or conflicting interests that may exist within the river basins, including the interests of both upstream and downstream parties potentially affected by the proposed transfer. The public hearings shall be conducted by one or more hearing officers appointed by the Chair of the Commission. The hearing officers may be members of the Commission or employees of the Department. The Commission shall give at least 30 days' written notice of the public hearing as provided in subsection (c) of this section. The Commission shall accept written comment on the draft determination for a minimum of 30 days following the last public hearing. The Commission shall prepare a record of all comments and written responses to questions posed in writing. The record shall include complete copies of scientific or technical comments related to the potential impact of the interbasin transfer.

(k) Final Determination: Factors to be Considered. — In determining whether a certificate may be issued for the transfer, the Commission shall specifically consider each of the following items and state in writing its findings of fact and conclusions of law with regard to each item:

(1) The necessity and reasonableness of the amount of surface water proposed to be transferred and its proposed uses.

(2) The present and reasonably foreseeable future detrimental effects on the source river basin, including present and future effects on public, industrial, economic, recreational, and agricultural water supply needs, wastewater assimilation, water quality, fish and wildlife habitat, electric power generation, navigation, and recreation. Local water supply plans for public water systems with service area located within the source river basin prepared pursuant to G.S. 143-355(*l*) shall be used to evaluate the projected future water needs in the source river basin that will be met by public water systems. Information on projected future water needs for public water systems with service area located within the source river basin that is more recent than the local water supply plans may be used if the Commission finds the information to be reliable. The determination shall include a specific finding as to measures that are necessary or advisable to mitigate or avoid detrimental impacts on the source river basin.

(3) The cumulative effect on the source major river basin of any water transfer or consumptive water use that, at the time the Commission considers the petition for a certificate is occurring, is authorized under this section, or is projected in any local water supply plan for public water systems with service area located within the source river basin that has been submitted to the Department in accordance with G.S. 143-355(*l*).

(4) The present and reasonably foreseeable future beneficial and detrimental effects on the receiving river basin, including present and future effects on public, industrial, economic, recreational, and agricultural water supply needs, wastewater assimilation, water quality, fish and wildlife habitat, electric power generation, navigation, and recreation. Local water supply plans prepared pursuant to G.S. 143-355(*l*) that affect the receiving river basin shall be used to evaluate the projected future water needs in the receiving river basin that will be met by public water systems. Information on projected future water needs that is more recent than the local water supply plans may be used if the Commission finds the information to be reliable. The determination shall include a specific finding as to measures that are necessary or advisable to mitigate or avoid detrimental impacts on the receiving river basin.

(5) The availability of reasonable alternatives to the proposed transfer, including the potential capacity of alternative sources of water, the potential of each alternative to reduce the amount of or avoid the proposed transfer, probable costs, and environmental impacts. In considering alternatives, the Commission is not limited to consideration of alternatives that have been proposed, studied, or considered by the applicant. The determination shall include a specific finding as to why the applicant's need for water cannot be satisfied by alternatives within the receiving basin, including unused capacity under a transfer for which a certificate is in effect or that is otherwise authorized by law at the time the applicant submits the petition. The determination shall consider the extent to which access to potential sources of surface water or groundwater within the receiving river basin is no longer available due to depletion, contamination, or the declaration of a capacity use area under Part 2 of Article 21 of Chapter 143 of the General Statutes. The determination shall consider the feasibility of the applicant's purchase of water from other water suppliers within the receiving basin and of the transfer of water from another sub-basin within the receiving major river basin. Except in circumstances of technical or economic infeasibility or adverse envi-

ronmental impact, the Commission's determination as to reasonable alternatives shall give preference to alternatives that would involve a transfer from one sub-basin to another within the major receiving river basin over alternatives that would involve a transfer from one major river basin to another major river basin.

(6) If applicable to the proposed project, the applicant's present and proposed use of impoundment storage capacity to store water during high-flow periods for use during low-flow periods and the applicant's right of withdrawal under G.S. 143-215.44 through G.S. 143-215.50.

(7) If the water to be withdrawn or transferred is stored in a multipurpose reservoir constructed by the United States Army Corps of Engineers, the purposes and water storage allocations established for the reservoir at the time the reservoir was authorized by the Congress of the United States.

(8) Whether the service area of the applicant is located in both the source river basin and the receiving river basin.

(9) Any other facts and circumstances that are reasonably necessary to carry out the purposes of this Part.

(*l*) Final Determination: Information to be Considered. — In determining whether a certificate may be issued for the transfer, the Commission shall consider all of the following sources of information:

(1) The petition.

(2) The environmental document prepared pursuant to subsection (d) of this section.

(3) All oral and written comment and all accompanying materials or evidence submitted pursuant to subsections (e) and (j) of this section.

(4) Information developed by or available to the Department on the water quality of the source river basin and the receiving river basin, including waters that are identified as impaired pursuant to section 303(d) of the federal Clean Water Act (33 U.S.C. § 1313(d)), that are subject to a total maximum daily load (TMDL) limit under subsections (d) and (e) of section 303 of the federal Clean Water Act, or that would have their assimilative capacity impaired if the certificate is issued.

(5) Any other information that the Commission determines to be relevant and useful.

(m) Final Determination: Burden and Standard of Proof; Specific Findings. — The Commission shall grant a certificate for a water transfer if the Commission finds that the applicant has established by a preponderance of the evidence all of the following:

(1) The benefits of the proposed transfer outweigh the detriments of the proposed transfer. In making this determination, the Commission shall be guided by the approved environmental document and the policy set out in subsection (t) of this section.

(2) The detriments have been or will be mitigated to the maximum degree practicable.

(3) The amount of the transfer does not exceed the amount of the projected shortfall under the applicant's water supply plan after first taking into account all other sources of water that are available to the applicant.

(4) There are no reasonable alternatives to the proposed transfer.

(n) Final Determination: Certificate Conditions and Limitations. — The Commission may grant the certificate in whole or in part, or deny the certificate. The Commission may impose any conditions or limitations on a certificate that the Commission finds necessary to achieve the purposes of this Part including a limit on the period for which the certificate is valid. The conditions and limitations shall include any mitigation measures proposed by the applicant to minimize any detrimental effects within the source and receiving river basins. In addition, the certificate shall require all of the following conditions and limitations:

(1) A water conservation plan that specifies the water conservation measures that will be implemented by the applicant in the receiving river basin to ensure the efficient use of the transferred water. Except in circumstances of technical or economic infeasibility or adverse environmental impact, the water conservation plan shall provide for the mandatory implementation of water conservation measures by the applicant that equal or exceed the most stringent water conservation plan implemented by a community water system, as defined in G.S. 143-355(*l*), that withdraws water from the source river basin.

(2) A drought management plan that specifies how the transfer shall be managed to protect the source river basin during drought conditions or other emergencies that occur within the source river basin. Except in circumstances of technical or economic infeasibility or adverse environmental impact, this drought management plan shall include mandatory reductions in the permitted amount of the transfer based on the severity and duration of a drought occurring within the source river basin and shall provide for the mandatory implementation of a drought management plan by the applicant that equals or exceeds the most stringent water conservation plan implemented by a community water system, as defined in G.S. 143-355(*l*), that withdraws water from the source river basin.

(3) The maximum amount of water that may be transferred on a daily basis, and methods or devices required to be installed and operated that measure the amount of water that is transferred.

(4) A provision that the Commission may amend a certificate to reduce the maximum amount of water authorized to be transferred whenever it appears that an alternative source of water is available to the certificate holder from within the receiving river basin, including, but not limited to, the purchase of water from another water supplier within the receiving basin or to the transfer of water from another sub-basin within the receiving major river basin.

(5) A provision that the Commission shall amend the certificate to reduce the maximum amount of water authorized to be transferred if the Commission finds that the applicant's current projected water needs are significantly less than the applicant's projected water needs at the time the certificate was granted.

(6) A requirement that the certificate holder report the quantity of water transferred during each calendar quarter. The report required by this subdivision shall be submitted to the Commission no later than 30 days after the end of the quarter.

(7) Except as provided in this subdivision, a provision that the applicant will not resell the water that would be transferred pursuant to the certificate to another public water supply system. This limitation shall not apply in the case of a proposed resale or transfer among public water supply systems within the receiving river basin as part of an interlocal agreement or other regional water supply arrangement, provided that each participant in the interlocal agreement or regional water supply arrangement is a co-applicant for the certificate and will be subject to all the terms, conditions, and limitations made applicable to any lead or primary applicant.

(o) Administrative and Judicial Review. — Administrative and judicial review of a final decision by the Commission on a petition for a certificate under this section shall be governed by Chapter 150B of the General Statutes.

(p) Certain Preexisting Transfers. — In cases where an applicant requests approval to increase a transfer that existed on 1 July 1993, the Commission may approve or disapprove only the amount of the increase. If the Commission approves the increase, the certificate shall be issued for the amount of the preexisting transfer plus any increase approved by the Commission. A certificate for a transfer approved by the Commission under G.S. 162A-7 shall remain in effect as approved by the Commission and shall have the same effect as a certificate issued under this Part. A certificate for the increase of a preexisting transfer shall contain all of the conditions and limitations required by subsection (m) of this section.

(q) Emergency Transfers. — In the case of water supply problems caused by drought, a pollution incident, temporary failure of a water plant, or any other temporary condition in which the public health, safety, or welfare requires a transfer of water, the Secretary of Environment and Natural Resources may grant approval for a temporary transfer. Prior to approving a temporary transfer, the Secretary shall consult with those parties listed in subdivision (3) of subsection (c) of this section that are likely to be affected by the proposed transfer. However, the Secretary shall not be required to satisfy the public notice requirements of this section or make written findings of fact and conclusions of law in approving a temporary transfer under this subsection. If the Secretary approves a temporary transfer under this subsection, the Secretary shall specify conditions to protect other water users. A temporary transfer shall not exceed six months in duration, but the approval may be renewed for a period of six months by the Secretary based on demonstrated need as set forth in this subsection.

(r) Relationship to Federal Law. — The substantive restrictions, conditions, and limitations upon surface water transfers authorized in this section may be imposed pursuant to any federal law that permits the State to certify, restrict, or condition any new or continuing transfers or related activities licensed, relicensed, or otherwise authorized by the federal government. This section shall govern the transfer of water from one river basin to another unless preempted by federal law.

(s) Planning Requirements. — When any transfer for which a certificate was issued under this section equals or exceeds eighty percent (80%) of the maximum amount authorized in the certificate, the applicant shall submit to the Department a detailed plan that specifies how the applicant intends to address future foreseeable water needs. If the applicant is required to have a local water supply plan, then this plan shall be an amendment to the local water supply plan required by G.S.143-355(*l*). When the transfer equals or exceeds ninety percent (90%) of the maximum amount authorized in the certificate, the applicant shall begin implementation of the plan submitted to the Department.

(t) Statement of Policy. — It is the public policy of the State to maintain, protect, and enhance water quality within North Carolina. It is the public policy of this State that the reasonably foreseeable future water needs of a public water system with its service area located primarily in the receiving river basin are subordinate to the reasonably foreseeable future water needs of a public water system with its service area located primarily in the source river basin. Further, it is the public policy of the State that the cumulative impact of transfers from a source river basin shall not result in a violation of the antidegradation policy set out in 40 Code of Federal Regulations § 131.12 (1 July 2006 Edition) and the statewide antidegradation policy adopted pursuant thereto.

(u) Renewal of Certificate. — A petition to extend or renew a certificate shall be treated as a new petition. (1993, c. 348, s. 1; 1997-443, ss. 11A.119(a), 15.48(c); 1997-524, s. 1; 1998-168, s. 4; 2001-474, s. 28; 2007-484, s. 43.7C; 2007-518, s. 3; 2008-125, s. 1; 2008-198, s. 11.5.)

**Allocation of Surface Water Resources Study** — Session Laws 2007-518, s. 1(a), as amended by Session Laws 2008-10, s. 1, provides: "The Environmental Review Commission, with the assistance of the Department of Environment and Natural Resources, shall study the allocation of surface water resources and their availability and maintenance in the State, including issues related to the transfer of water from one river basin to another, the withdrawal of water for consumptive use, and the accuracy and tolerance of equipment used to measure the flow of water transferred from one river basin to another river basin. The Commission shall evaluate the benefits of establishing formal and informal procedures for negotiating transfers of water from one river basin to another. The Commission shall also study and recommend measures to: (i) ensure that the purposes of the Regional Water Supply Planning Act of 1971, as set out in G.S. 162A-21, are fulfilled; (ii) provide for a comprehensive system for regulating surface water withdrawals for consumptive and nonconsumptive uses; (iii) provide for the establishment of a statewide plan for water resources development projects; (iv) provide for adequate resources for the Department so that it may develop and implement a comprehensive approach to water resources management; (v) ensure that all State laws regulating water resources are consistent with and fully integrated into the comprehensive system for regulating surface water withdrawals and the statewide plan for water resources development projects; and (vi) ensure that potential interstate conflicts related to water resources are avoided or minimized. In the conduct of this study, the Environmental Review Commission may employ independent consultants as provided in G.S. 120-32.02 and G.S. 120-70.44. The Environmental Review Commission may submit interim reports to the 2008 and 2009 regular sessions of the General Assembly and shall submit a final report of its findings and recommendations, including any legislative proposals, to the General Assembly on or before 1 October 2010."

Session Laws 2008-125, s. 2, effective July 28, 2008, provides: "As a part of the study by the Environmental Review Commission of the allocation of water resources in this State pursuant to subsection (a) of Section 1 of S.L. 2007-518, the Environmental Review Commission shall study the delineation of major river basins and subbasins within the State. The Commission shall determine whether the definition of 'river basin' set out in G.S. 143-215.22G and the accompanying map should be revised. The Commission shall report its findings and recommendations as provided in subsection (a) of Section 1 of S.L. 2007-518, as amended."

Session Laws 2008-143, s. 6, provides: "The Environmental Review Commission, as part of its ongoing study of the allocation of water resources in the State required by Section 1 of S.L. 2007-518, shall study issues related to increasing water supply, including issues related to reservoir construction and State laws and rules governing reservoir construction. The Environmental Review Commission shall report its findings and recommendations, including any legislative proposals, to the General Assembly as provided by Section 1 of S.L. 2007-518, as amended."

**Editor's Note.** — Session Laws 2007-518, s. 7(a), as amended by Session Laws 2007-484, s. 43.7C, made this section effective August 31, 2007, and applicable to any petition for a certificate for a transfer of surface water from one river basin to another river basin for which preparation of an environmental assessment or an environmental impact statement has begun on or after August 31, 2007.

Session Laws 2007-518, s. 2, repealed former G.S. 143-215.22I, effective August 31, 2007. The historical citation for former G.S. 143-215.22I has been carried under new G.S. 143-215.22L at the direction of the Revisor of Statutes.

Session Laws 2007-518, s. 1(b), provides: "The Division of Water Resources of the Department of Environment and Natural Resources, in consultation with the Environmental Review Commission, shall prepare a revised map entitled 'Major River Basins and Sub-basins in North Carolina'. The revised map shall be prepared as a recommended replacement for the map referenced in G.S. 143-215.22G. The revised map shall define the extent to which any river basin that encompasses any river that flows from another state into North Carolina or that flows from North Carolina into another state extends into an adjacent state. The Environmental Review Commission shall recommend a revised map and a conforming legislative proposal to amend the definition of 'river basin' set out in G.S. 143-215.22G to the 2008 Regular Session of the General Assembly."

Session Laws 2007-518, s. 6 is a severability clause.

Session Laws 2007-518, s. 7(b), provides: "For a petition for a certificate for transfer of surface water from one river basin to another river basin to supplement ground water supplies in the fifteen counties designated as the Central Coastal Plain Capacity Use Area under 15A NCAC 2E.0501, this act becomes effective 1 January 2011. Prior to 1 January 2011, a petition for a certificate for transfer of surface water from one river basin to another river basin to supplement ground water supplies in the fifteen counties designated as the Central Coastal Plain Capacity Use Area shall be considered and acted upon by the Environmental Management Commission pursuant to the procedures and standards set out in G.S. 143-215.22I on 1 July 2007."

This section was amended by Session Laws 2008-198, s. 11.5, in the coded bill drafting format provided by G.S. 120-20.1. In sub-subdivisions e. and f. of subdivision (c)(3), the word "an" that now appears preceding "another state" was not struck through. Sub-subdivisions e. and f. of subdivision (c)(3) are set out above as amended by Session Laws 2008-198, s. 11.5.

Session Laws 2008-198, s. 11.5, was contingent on House Bill 821 (Session Laws 2008-125) becoming law, which it did.

**Effect of Amendments.** — Session Laws 2008-125, s. 1, effective July 28, 2008, rewrote subdivision (c)(2)b.; deleted "or in an adjacent state" following "in this State" in subdivision (c)(2)c.; in subdivisions (c)(3)a. and (c)(3)b., deleted "adjacent" preceding "state" and added "and that also falls ....subdivision (2) of this subsection" at the end; and substituted "another" for "an adjacent" in subdivision (c)(3)d.

Session Laws 2008-198, s. 11.5, effective August 8, 2008, rewrote subdivision (c)(2)b; substituted "that" for "each adjacent" in subdivision (c)(3)d; and substituted "another" for "adjacent" in subdivisions (c)(3)e and (c)(3)f.

**Legal Periodicals.** — For legislative survey, see 21 Campbell L. Rev. 323 (1999).

## CASE NOTES

***Editor's Note.*** — *The cases cited below were decided under former G.S. 162A-7, dealing with prerequisites to acquisition of water, etc., by eminent domain.*

**Procedures for eminent domain governing cities and counties apply** to water and sewer authorities. Orange Water and Sewer Auth. v. Estate of Armstrong, 34 N.C. App. 162, 237 S.E.2d 486, cert. denied, 293 N.C. 593, 239 S.E.2d 265 (1977).

**With additional requirement that a certificate of authorization be obtained** before an action in eminent domain is commenced. Orange Water and Sewer Auth. v. Estate of Armstrong, 34 N.C. App. 162, 237 S.E.2d 486, cert. denied, 293 N.C. 593, 239 S.E.2d 265 (1977).

**But water and sewer authority's right of eminent domain is not dormant before certification.** Orange Water and Sewer Auth. v. Estate of Armstrong, 34 N.C. App. 162, 237 S.E.2d 486, cert. denied, 293 N.C. 593, 239 S.E.2d 265 (1977).

**And Authority May Enter and Survey Prior to Instituting Proceedings.** — A water and sewer authority, having the power of eminent domain possessed by cities, may enter lands for the purpose of making surveys prior to the institution of eminent domain proceedings. Orange Water and Sewer Auth. v. Estate of Armstrong, 34 N.C. App. 162, 237 S.E.2d 486, cert. denied, 293 N.C. 593, 239 S.E.2d 265 (1977).

**Factors to Be Considered.** — The legislature, in granting the Environmental Management Commission authority to issue certificates authorizing land and water rights acquisition, intended that the Commission consider carefully not only the development of water resources, but also the effect of that development on present beneficial users within the watershed. In re Environmental Mgt. Comm'n, 53 N.C. App. 135, 280 S.E.2d 520 (1981), aff'd, 80 N.C. App. 1, 341 S.E.2d 588 (1986).

Former G.S. 162A-7(c) required only that the Environmental Management Commission "specifically consider" the listed factors. It did not require the Environmental Management Commission to make findings regarding each factor. In re Environmental Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588, cert. denied, 317 N.C. 334, 346 S.E.2d 139 (1986), endorsing the making of findings as a means of insuring that each factor is specifically considered.

The seventh listed factor in former G.S. 162A-7 was a "catch all" provision that allowed the Environmental Management Commission to consider all other factors as would, in the board's opinion, produce the maximum beneficial use of water for affected areas of the estate. In re Environmental Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588, cert. denied, 317 N.C. 334, 346 S.E.2d 139 (1986).

**Not Limited to Listed Factors.** — While directing that the Environmental Management Commission shall specifically consider the listed factors, former G.S. 162A-7 contained no language limiting the Environmental Management Commission's consideration to those factors. Clearly, the Environmental Management Commission has some latitude and discretion as to the factors to consider in each situation and the weight to be given them in reaching a decision. The only limitation is that the Environmental Management Commission's consideration of any factor relate to the maximum beneficial use of the State's water resources. In re Environmental Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588, cert. denied, 317 N.C. 334, 346 S.E.2d 139 (1986).

**Water quality is not only a permissible consideration** for the Environmental Management Commission, but also one that is important if not essential to the responsible exercise of the police power. In re Environmental Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588, cert. denied, 317 N.C. 334, 346 S.E.2d 139 (1986).

**Local or Regional Factors.** — The Environmental Management Commission is required to give paramount consideration to the statewide effect of the proposed project. However, this does not preclude consideration by the Environmental Management Commission of local or regional factors. On the contrary, the language of the statute assumes that some consideration will be given to local and regional concerns, but requires that the larger interest of the State be of "paramount" concern. In re Environmental Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588, cert. denied, 317 N.C. 334, 346 S.E.2d 139 (1986).

**Alternatives to Proposed Projects.** — Former G.S. 162A-7 contemplated the consideration of one or more alternatives to the project for which the certificate of authority was sought. In re Environmental Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588, cert. denied, 317 N.C. 334, 346 S.E.2d 139 (1986).

**Proceedings Governed by Administrative Procedure Act.** — The Environmental Management Commission's proceedings under former G.S. 162A-7 were governed by the Administrative Procedure Act, G.S. 150B-1 et seq. The evidentiary standards set forth therein apply equally to any findings made by the agency. In re Environmental Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588, cert. denied, 317 N.C. 334, 346 S.E.2d 139 (1986).

## Part 3. Dam Safety Law.

## § 143-215.23. Short title.

This Part shall be known and may be cited as the Dam Safety Law of 1967. (1967, c. 1068, s. 1.)

**Legal Periodicals.** — For article, "North Carolina Employment Law After Coman: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

For article, "The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation," see 29 Campbell L. Rev. 535 (2007).

## § 143-215.24. Declaration of purpose.

It is the purpose of this Part to provide for the certification and inspection of dams in the interest of public health, safety, and welfare, in order to reduce the risk of failure of dams; to prevent injuries to persons, damage to downstream property and loss of reservoir storage; and to ensure maintenance of minimum stream flows of adequate quantity and quality below dams. (1967, c. 1068, s. 2; 1977, c. 878, s. 1; 1993, c. 394, s. 1.)

### CASE NOTES

**Applied** in Wells v. Benson, 40 N.C. App. 704, 253 S.E.2d 602 (1979).

## § 143-215.25. Definitions.

As used in this Part, unless the context otherwise requires:

(1) "Dam" means a structure and appurtenant works erected to impound or divert water.

(2) "Minimum stream flow" or "minimum flow" means a stream flow of a quantity and quality sufficient in the judgment of the Department to meet and maintain stream classifications and water quality standards established by the Department under G.S. 143-214.1 and applicable to the waters affected by the project under consideration, and to maintain aquatic habitat in the length of the stream that is affected. (1967, c. 1068, s. 3; 1973, c. 1262, ss. 23, 38; 1977, c. 771, s. 4; c. 878, ss. 2, 4; 1983, c. 306; 1987, c. 827, ss. 154, 175; 1993, c. 394, s. 2.)

## § 143-215.25A. Exempt dams.

(a) Except as otherwise provided in this Part, this Part does not apply to any dam:

(1) Constructed by the United States Army Corps of Engineers, the Tennessee Valley Authority, or another agency of the United States government, when the agency designed or approved plans for the dam and supervised its construction.

(2) Constructed with financial assistance from the United States Soil Conservation Service, when that agency designed or approved plans for the dam and supervised its construction.

(3) Licensed by the Federal Energy Regulatory Commission, or for which a license application is pending with the Federal Energy Regulatory Commission.

(4) For use in connection with electric generating facilities regulated by the Nuclear Regulatory Commission.

(5) Under a single private ownership that provides protection only to land or other property under the same ownership and that does not pose a threat to human life or property below the dam.

(6) That is less than 15 feet in height or that has an impoundment capacity of less than 10 acre-feet, unless the Department determines that failure of the dam could result in loss of human life or significant damage to property below the dam.

(b) The exemption from this Part for a dam described in subdivisions (1) and (2) of subsection (a) of this section does not apply after the supervising federal agency relinquishes authority for the operation and maintenance of the dam to a local entity. (1993, c. 394, s. 3; 2009-390, s. 3(a).)

**Editor's Note.** — Session Laws 2009-390, s. 3(b), provides: "Any impoundments or other facilities that were in use on the effective date of this section in connection with nonnuclear electric generating facilities under the jurisdiction of the North Carolina Utilities Commission, and that had been exempted under the provisions of G.S. 143-215.25A(4), prior to amendment by Section 3(a) of this act, shall be deemed to have received all of the necessary approvals from the Department of Environment and Natural Resources and the Commission for Dam Safety, and shall not be required to submit application, certificate, or other materials in connection with the continued normal operation and maintenance of those facilities."

**Effect of Amendments.** — Session Laws 2009-390, s. 3(a), effective January 1, 2010, substituted "regulated by the Nuclear Regulatory Commission" for "under the jurisdiction of the North Carolina Utilities Commission, except that a dam operated by a small power producer, as defined in G.S. 62-3(27a), shall be subject to the provisions of this Part even though the dam is constructed pursuant to a certificate of public convenience and necessity issues by the North Carolina Utilities Commission" at the end of subdivision (a)(4).

## § 143-215.26. Construction of dams.

(a) No person shall begin the construction of any dam until at least 10 days after filing with the Department a statement concerning its height, impoundment capacity, purpose, location and other information required by the Department. A person who constructs a dam, including a dam that is otherwise exempt from this Part under subdivisions (4) or (5) of G.S. 143-215.25A(a), shall comply with the malaria control requirements of the Department. If on the basis of this information the Department is of the opinion that the proposed dam is not exempt from the provisions of this Part, it shall so notify the applicant, and construction shall not be commenced until a full application is filed by the applicant and approved as provided by G.S. 143-215.29. The Department may also require of applicants so notified the filing of any additional information it deems necessary, including, but not limited to, streamflow and rainfall data, maps, plans and specifications. Every applicant for approval of a dam subject to the provisions of this Part shall also file with the Department the certificate of an engineer legally qualified in this State. The certificate shall state that the person who files the certificate is responsible for the design of the dam and that the design is safe and adequate.

(b) The Department shall send a copy of each completed application to the State Health Director, the Wildlife Resources Commission, the Department of Transportation, and other State and local agencies it considers appropriate for review and comment. (1967, c. 1068, s. 4; 1973, c. 476, s. 128; c. 507, s. 5; c. 1262, s. 23; 1987, c. 827, s. 176; 1989, c. 727, s. 163; 1993, c. 394, s. 4; 1995, c. 509, s. 80.)

## § 143-215.27. Repair, alteration, or removal of dam.

(a) Before commencing the repair, alteration or removal of a dam, application shall be made for written approval by the Department, except as otherwise provided by this Part. The application shall state the name and address of the applicant, shall adequately detail the changes it proposes to effect and shall be accompanied by maps, plans and specifications setting forth such details and dimensions as the Department requires. The Department may waive any such requirements. The application shall give such other information concerning the dam and reservoir required by the Department, such information concerning the safety of any change as it may require, and shall state the proposed time of commencement and completion of the work. When an application has been completed it may be referred by the Department for agency review and report, as provided by subsection (b) of G.S. 143-215.26 in the case of original construction.

(b) When repairs are necessary to safeguard life and property they may be started immediately but the Department shall be notified forthwith of the proposed repairs and of the work under way, and they shall be made to conform to its orders. (1967, c. 1068, s. 5; 1979, c. 55, s. 1.)

### CASE NOTES

**Applied** in Wells v. Benson, 40 N.C. App. 704, 253 S.E.2d 602 (1979).

## § 143-215.28. Action by Commission upon applications.

(a) Following receipt of agency comments the Commission shall approve, disapprove, or approve subject to conditions necessary to ensure safety and to satisfy minimum stream flow requirements, all applications made pursuant to this Part.

(b) A defective application shall not be rejected but notice of the defects shall be sent to the applicant by registered mail. If the applicant fails to file a perfected application within 30 days the original shall be canceled unless further time is allowed.

(c) If the Commission disapproves an application, one copy shall be returned with a statement of its objections. If an application is approved, the approval shall be attached thereto, and a copy returned by registered mail. Approval shall be granted under terms, conditions and limitations which the Commission deems necessary to safeguard life and property.

(d) Construction shall be commenced within one year after the date of approval of the application or such approval is void. The Commission upon written application and good cause shown may extend the time for commencing construction. Notice by registered mail shall be given the Commission at least 10 days before construction is commenced. (1967, c. 1068, s. 6; 1973, c. 1262, s. 23; 1987, c. 827, s. 154.)

CASE NOTES

**Applied** in Wells v. Benson, 40 N.C. App. 704, 253 S.E.2d 602 (1979).

**Cited** in State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).

## § 143-215.28A. Application fees.

(a) In accordance with G.S. 143-215.3(a)(1a), the Commission may establish a fee schedule for processing applications for approvals of construction or removal of dams issued under this Part. In establishing the fee schedule, the Commission shall consider the administrative and personnel costs incurred by the Department for processing the applications and for related compliance activities. The total amount of fees collected in any fiscal year may not exceed one-third of the total personnel and administrative costs incurred by the Department for processing the applications and for related compliance activities in the prior fiscal year. An approval fee may not exceed the larger of two hundred dollars ($200.00) or two percent (2%) of the actual cost of construction or removal of the applicable dam. The provisions of G.S. 143-215.3(a)(1b) do not apply to these fees.

(b) The Dam Safety Account is established as a nonreverting account within the Department. Fees collected under this section shall be credited to the Account and shall be applied to the costs of administering this Part. (1989 (Reg. Sess., 1990), c. 976, s. 1; 1991 (Reg. Sess., 1992), c. 1039, s. 15; 1993, c. 394, s. 5.)

## § 143-215.29. Supervision by qualified engineers; reports and modification during work.

(a) Any project for which the Commission's approval is required under G.S. 143-215.26, 143-215.27, and 143-215.28, and any project undertaken pursuant to an order of the Commission issued pursuant to this section or G.S. 143-215.32 shall be designed and supervised by an engineer legally qualified in the State of North Carolina.

(b) During the construction, enlargement, repair, alteration or removal of a dam, the Commission may require such progress reports from the supervising engineer as it deems necessary.

(c) If during construction, reconstruction, repair, alteration or enlargement of any dam, the Commission finds the work is not being done in accordance with the provisions of the approval and the approved plans and specifications, it shall give written notice by registered mail or personal service to the person who received the approval and to the person in charge of construction at the dam. The notice shall state the particulars in which compliance has not been made, and shall order immediate compliance with the terms of the approval, and the approved plans and specifications. The Commission may order that no further construction work be undertaken until such compliance has been effected and approved by the Commission. A failure to comply with the approval and the approved plans and specifications shall render the approval revocable unless compliance is made after notice as provided in this section. (1967, c. 1068, s. 7; 1973, c. 1262, s. 23; 1977, c. 878, s. 5; 1987, c. 827, s. 154.)

CASE NOTES

**Cited** in State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).

## § 143-215.30. Notice of completion; certification of final approval.

(a) Immediately upon completion, enlargement, repair, alteration or removal of a dam, notice of completion shall be given the Commission. As soon as possible thereafter supplementary drawings or descriptive matter showing or describing the dam as actually constructed shall be filed with the Department in such detail as the Commission may require.

(b) When an existing dam is enlarged, the supplementary drawings and descriptive matter need apply only to the new work.

(c) The completed work shall be inspected by the supervising engineers, and upon finding that the work has been done as required and that the dam is safe and satisfies minimum streamflow requirements, they shall file with the Department a certificate that the work has been completed in accordance with approved design, plans, specifications and other requirements. Unless the Commission has reason to believe that the dam is unsafe or is not in compliance with any applicable rule or law, the Commission shall grant final approval of the work in accordance with the certificate, subject to such terms as it deems necessary for the protection of life and property.

(d) Pending issuance of the Commission's final approval, the dam shall not be used except on written consent of the Commission, subject to conditions it may impose. (1967, c. 1068, s. 8; 1973, c. 1262, s. 23; 1987, c. 827, ss. 154, 177.)

## § 143-215.31. Supervision over maintenance and operation of dams.

(a) The Commission shall have jurisdiction and supervision over the maintenance and operation of dams to safeguard life and property and to satisfy minimum streamflow requirements. The Commission may adopt standards for the maintenance and operation of dams as may be necessary for the purposes of this Part. The Commission may vary the standards applicable to various dams, giving due consideration to the minimum flow requirements of the stream, the type and location of the structure, the hazards to which it may be exposed, and the peril of life and property in the event of failure of a dam to perform its function.

(b) The Department, consistent with rules adopted by the Commission, may impose any condition or requirement in orders and written approvals issued under this Part that is necessary to ensure that stream classifications, water quality standards, and aquatic habitat requirements are met and maintained, including conditions and requirements relating to the release or discharge of designated flows from dams, the location and design of water intakes and outlets, the amount and timing of the withdrawal of water from a reservoir, and the construction of submerged weirs or other devices intended to maintain minimum streamflows.

The Commission shall adopt rules that specify the minimum streamflow in the length of the stream affected.

(c) The minimum streamflow in the length of the stream affected by a dam that is operated by a small power producer, as defined in G.S. 62-3(27a), that diverts water from 4,000 feet or less of the natural streambed and where the water is returned to the same stream shall be:

(1) The minimum average flow for a period of seven consecutive days that would have an average occurrence of once in 10 years in the absence of the dam, or ten percent (10%) of the average annual flow of the stream in the absence of the dam, whichever is less, if prior to 1 January 1995 the small power producer was either licensed by the Federal Energy Regulatory Commission or held a certificate of public

convenience and necessity issued by the North Carolina Utilities Commission.

(2) The minimum average flow for a period of seven consecutive days that would have an average occurrence of once in 10 years in the absence of the dam, or ten percent (10%) of the average annual flow of the stream in the absence of the dam, whichever is greater, if subdivision (1) of this subsection does not apply.

(3) To protect the habitat of the Cape Fear Shiner and other aquatic species, 28 cubic feet per second for any dam that diverts water from 2,500 feet or more of the natural streambed of any stream on which six or more dams operated by small power producers were located on 1 January 1995, notwithstanding subdivisions (1) and (2) of this subsection.

(d) Subsection (c) of this section establishes the policy of this State with respect to minimum streamflows in the length of the stream affected by a dam that is operated by a small power producer, as defined in G.S. 62-3(27a), that diverts water from 4,000 feet or less of the natural streambed and where the water is returned to the same stream, whether the dam is subject to or exempt from this Part. In its comments and recommendations to the Federal Energy Regulatory Commission regarding the minimum streamflow in the length of the stream affected by a dam that is operated by a small power producer, as defined in G.S. 62-3(27a), that diverts water from 4,000 feet or less of the natural streambed and where the water is returned to the same stream, the Commission and the Department shall not advocate or recommend a minimum streamflow that exceeds the minimum streamflow that would be required under subsection (c) of this section.

(e) The minimum streamflow in the length of the stream affected by a dam to which subsections (c) and (d) of this section do not apply shall be established as provided in subsection (b) of this section. Subsections (c) and (d) of this section do not apply if the length of the stream affected:

(1) Receives a discharge of waste from a treatment works for which a permit is required under Part 1 of this Article; or

(2) Includes any part of a river or stream segment that:

  a. Is designated as a component of the State Natural and Scenic Rivers System by G.S. 113A-35.1 or G.S. 113A-35.2.

  b. Is designated as a component of the national Wild and Scenic Rivers System by 16 U.S.C. § 1273 and 1274. (1967, c. 1068, s. 9; 1973, c. 1262, s. 23; 1987, c. 827, s. 154; 1993, c. 394, s. 6; c. 553, s. 80; 1995, c. 184, s. 1; c. 439, s. 1.)

### CASE NOTES

**Cited** in State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).

## § 143-215.32. Inspection of dams.

(a) The Department may at any time inspect any dam, including a dam that is otherwise exempt from this Part, upon receipt of a written request of any affected person or agency, or upon a motion of the Environmental Management Commission. Within the limits of available funds the Department shall endeavor to provide for inspection of all dams at intervals of approximately five years.

(b) If the Department upon inspection finds that any dam is not sufficiently strong, is not maintained in good repair or operating condition, is dangerous to life or property, or does not satisfy minimum streamflow requirements, the

Department shall present its findings to the Commission and the Commission may issue an order directing the owner or owners of the dam to make at his or her expense maintenance, alterations, repairs, reconstruction, change in construction or location, or removal as may be deemed necessary by the Commission within a time limited by the order, not less than 90 days from the date of issuance of each order, except in the case of extreme danger to the safety of life or property, as provided by subsection (c) of this section.

(c) If at any time the condition of any dam becomes so dangerous to the safety of life or property, in the opinion of the Environmental Management Commission, as not to permit sufficient time for issuance of an order in the manner provided by subsection (b) of this section, the Environmental Management Commission may immediately take such measures as may be essential to provide emergency protection to life and property, including the lowering of the level of a reservoir by releasing water impounded or the destruction in whole or in part of the dam or reservoir. The Environmental Management Commission may recover the costs of such measures from the owner or owners by appropriate legal action.

(d) An order issued under this Part shall be served on the owner of the dam as provided in G.S. 1A-1, Rule 4. (1967, c. 1068, s. 10; 1973, c. 1262, s. 23; 1977, c. 878, s. 3; 1987, c. 827, s. 154; 1993, c. 394, s. 7.)

### CASE NOTES

**Threat of Damage to Surrounding Property Owners Prerequisite to Requiring Repair of Dam.** — The evils which the Dam Safety Law seeks to prevent are evils which ensue from dam failure. It is only in the event that the condition of a dam is such as to present a threat of physical damage to surrounding property owners that the Commission is empowered to require owners to repair the dam. Wells v. Benson, 40 N.C. App. 704, 253 S.E.2d 602 (1979).

The Dam Safety Law does not authorize the Environmental Management Commission to require the owners of a private washed-out dam to repair rather than remove the dam when the condition of the dam is not such as to present a threat of physical damage to surrounding property owners. Wells v. Benson, 40 N.C. App. 704, 253 S.E.2d 602 (1979).

## § 143-215.33. Administrative hearing.

A person to whom a decision or a dam safety order is issued under this Part may contest the decision or order by filing a contested case petition in accordance with G.S. 150B-23. A person to whom a decision is issued must file a contested case petition within 30 days after the decision is mailed to that person. A person to whom a dam safety order is issued must file a contested case petition within 10 days after the order is served. (1967, c. 1068, s. 11; 1973, c. 1262, s. 23; 1975, c. 842, s. 4; 1977, c. 878, s. 6; 1979, c. 55, s. 2; 1987, c. 827, s. 178; 1993, c. 394, s. 8.)

### CASE NOTES

**Threat of Damage to Surrounding Property Owners Prerequisite to Requiring Repair of Dam.** — The evils which the Dam Safety Law seeks to prevent are evils which ensue from dam failure. It is only in the event that the condition of a dam is such as to present a threat of physical damage to surrounding property owners that the Commission is empowered to require owners to repair the dam. Wells v. Benson, 40 N.C. App. 704, 253 S.E.2d 602 (1979).

The Dam Safety Law does not authorize the Environmental Management Commission to require the owners of a private washed-out dam to repair rather than remove the dam when the condition of the dam is not such as to present a

threat of physical damage to surrounding property owners. Wells v. Benson, 40 N.C. App. 704, 253 S.E.2d 602 (1979).

**Petitioners Held Not Entitled to Notice of Commission's Actions and Orders.** — Petitioners who were not landowners whose property would be endangered by a failure of a private dam were not entitled to notice of actions and orders of the Environmental Management Commission with respect to the dam. Wells v. Benson, 40 N.C. App. 704, 253 S.E.2d 602 (1979).

## § 143-215.34. Investigations by Department; employment of consultants.

The Department shall make such investigations and assemble such data as it deems necessary for a proper review and study of the design and construction of dams, reservoirs and appurtenances, and for such purposes may enter upon private property. The Department may employ or make such agreements with geologists, engineers, or other expert consultants and such assistants as it deems necessary to carry out the provisions of this Part. (1967, c. 1068, s. 12; 1973, c. 1262, s. 23; 1987, c. 827, s. 179.)

## § 143-215.35. Liability for damages.

No action shall be brought against the State of North Carolina, the Department, or the Commission or any agent of the Commission or any employee of the State or the Department for damages sustained through the partial or total failure of any dam or its maintenance by reason of any supervision or other action taken pursuant to or under this Part. Nothing in this Part shall relieve an owner or operator of a dam from the legal duties, obligations and liabilities arising from such ownership or operation. (1967, c. 1068, s. 13; 1973, c. 1262, s. 23; 1987, c. 827, s. 154.)

## § 143-215.36. Enforcement procedures.

(a) Criminal Penalties. — Any person who shall be adjudged to have violated this Article shall be guilty of a Class 3 misdemeanor and shall only be liable to a penalty of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) for each violation. In addition, if any person is adjudged to have committed such violation willfully, the court may determine that each day during which such violation continued constitutes a separate violation subject to the foregoing penalty.

(b) Civil Penalties. —

(1) The Secretary may assess a civil penalty of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) against any person who violates any provisions of this Part, a rule implementing this Part, or an order issued under this Part.

(2) If any action or failure to act for which a penalty may be assessed under this Part is willful, the Secretary may assess a penalty not to exceed five hundred dollars ($500.00) per day for each day of violation.

(3) In determining the amount of the penalty, the Secretary shall consider the factors set out in G.S. 143B-282.1(b). The procedures set out in G.S. 143B-282.1 shall apply to civil penalty assessments that are presented to the Commission for final agency decision.

(4) The Secretary shall notify any person assessed a civil penalty of the assessment and the specific reasons therefor by registered or certified mail, or by any means authorized by G.S. 1A-1, Rule 4. Contested case petitions shall be filed in accordance with G.S. 150B-23 within 30 days of receipt of the notice of assessment.

(5) Requests for remission of civil penalties shall be filed with the Secretary. Remission requests shall not be considered unless made

within 30 days of receipt of the notice of assessment. Remission requests must be accompanied by a waiver of the right to a contested case hearing pursuant to Chapter 150B and a stipulation of the facts on which the assessment was based. Consistent with the limitations in G.S. 143B-282.1(c) and G.S. 143-282.1(d), remission requests may be resolved by the Secretary and the violator. If the Secretary and the violator are unable to resolve the request, the Secretary shall deliver remission requests and his recommended action to the Committee on Civil Penalty Remissions of the Environmental Management Commission appointed pursuant to G.S. 143B-282.1(c).

(6) If any civil penalty has not been paid within 30 days after notice of assessment has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment, unless the violator contests the assessment as provided in subdivision (4) of this subsection. If any civil penalty has not been paid within 30 days after the final agency decision or court order has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment. A civil action shall be filed within three years of the date the final agency decision was served on the violator.

(7) The Secretary may delegate his powers and duties under this section to the Director of the Division of Land Resources of the Department.

(8) The clear proceeds of civil penalties assessed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(c) Injunctive Relief. — Upon violation of any of the provisions of this Part, a rule implementing this Part, or an order issued under this Part, the Secretary may, either before or after the institution of proceedings for the collection of the penalty imposed by this Part for such violations, request the Attorney General to institute a civil action in the superior court of the county or counties where the violation occurred in the name of the State upon the relation of the Department for injunctive relief to restrain the violation or require corrective action, and for such other or further relief in the premises as said court shall deem proper. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this Part for any violation of the same. (1967, c. 1068, s. 14; 1973, c. 1262, s. 23; 1975, c. 842, s. 3; 1977, c. 771, s. 4; 1987, c. 827, ss. 154, 180; 1989 (Reg. Sess., 1990), c. 1036, s. 5; 1991, c. 342, ss. 10, 11; 1993, c. 394, s. 9; c. 539, s. 1021; 1994, Ex. Sess., c. 24, s. 14(c); 1998-215, s. 65.)

## § 143-215.37. Rights of investigation, entry, access, and inspection.

The Commission shall have the right to direct the conduct of such investigations as it may reasonably deem necessary to carry out its duties prescribed in this Part, and the Department shall have the right to conduct such investigations, and for this purpose the employees of the Department and agents of the Commission have the right to enter at reasonable times on any property, public or private, for the purpose of investigating the condition, construction, or operation of any dam or associated equipment facility or property, and to require written statements or the filing of reports under oath, with respect to pertinent questions relating to the construction or operation of any dam: Provided, that no person shall be required to disclose any secret formula, processes or methods used in any manufacturing operation or any confidential information concerning business activities carried on by him or under his supervision. No person shall refuse entry or access to any authorized representative of the Commission or Department who requests entry for purposes of inspection, and who presents appropriate credentials, nor shall any person obstruct, hamper or interfere with any such representative while in the process of carrying out his official duties. (1967, c. 1068, s. 15; 1973, c. 1262, s. 23.)

## Part 4. Federal Water Resources Development Projects.

### § 143-215.38. Short title.

This Part shall be known as and may be cited as the Federal Water Resources Development Law of 1969. (1969, cc. 724, 968.)

OPINIONS OF ATTORNEY GENERAL

**As to authority of state, counties, municipalities and local government units to contract with the Secretary of the Army for water resources projects,** see opinion of Attorney General to Major General R.H. Free, Division Engineer, U.S. Army Corps of Engineers, 41 N.C.A.G. 522 (1971).

### § 143-215.39. Public policy.

It is hereby declared the public policy of the State of North Carolina to encourage development of such river and harbor, flood control and other similar civil works projects as will accrue to the general or special benefit of any county or municipality of North Carolina or to any region of the State. To this end, it is also hereby declared that within the meaning of the North Carolina Constitution expenditures for such projects and obligations incurred for such projects are for public purposes, that county and municipal and other local government expenditures and obligations incurred therefor are necessary expenses, and that county expenditures therefor are for special purposes for which the special approval of the General Assembly is hereby given. (1969, cc. 724, 968.)

**Editor's Note.** — The reference to the Constitution in this section is to the Constitution adopted in 1868, as amended.

CASE NOTES

**Cited** in United States v. 30.60 Acres of Land, 535 F. Supp. 33 (E.D.N.C. 1981).

### § 143-215.40. Resolutions and ordinances assuring local cooperation.

(a) The boards of commissioners of the several counties, in behalf of their respective counties, the governing bodies of the several municipalities, in behalf of their respective municipalities, the governing bodies of any other local government units, in behalf of their units, and the North Carolina Environmental Management Commission, in behalf of the State of North Carolina, subject to the approval of the Governor, are hereby authorized to adopt such resolutions or ordinances as may be required giving assurances to any appropriate agency of the United States government for the fulfillment of the required items of local cooperation as expressed in acts of Congress or congressional documents, as conditions precedent to the accomplishment of river and harbor, flood control or other such civil works projects, when it shall appear, and is determined by such board or governing body that any such project will accrue to the general or special benefit of such county or municipality or to a region of the State. In each case where the subject of such local cooperation requirements comes before a board of county commissioners or the governing body of any municipality or other local unit a copy of its final action, whether it be favorable or unfavorable, shall be sent to the Secretary of Environment and Natural Resources for the information of the Governor.

(b) Within the meaning of this Part, a "local government unit" means any local subdivision or unit of government or local public corporate entity (other than a county or municipality), including any manner of special district or public authority. (1969, cc. 724, 968; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1983, c. 717, s. 69; 1985 (Reg. Sess., 1986), c. 955, ss. 91, 92; 1989, c. 727, s. 218(108); 1997-443, s. 11A.119(a); 2006-203, s. 89.)

**Editor's Note.** — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 89, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, deleted the last sentence in subsection (a) which read: "Prior to taking any action under this section, the Governor may consult with the Advisory Budget Commission."

## § 143-215.41. Items of cooperation to which localities and the State may bind themselves.

Such resolutions and ordinances may irrevocably bind such county, municipality, other local unit, or the State of North Carolina, acting through the Commission, to the following when included as requirements of local cooperation for a federal water resources development project:

(1) To provide, without cost to the United States, all lands, easements, and rights-of-way required for construction and subsequent maintenance of the project and for aids to navigation, if required, upon the request of the Chief of Engineers, or other official to be required in the general public interest for initial and subsequent disposal of spoil, and also necessary retaining dikes, bulkheads, and embankments therefor, or the costs of such retaining works;

(2) To hold and save the United States free from damages due to the construction works and subsequent maintenance of the project;

(3) To provide firm assurances that riverside terminal and transfer facilities will be constructed at the upper limit of the modified project to permit transfer of commodities from or to plants and barges;

(4) To provide and maintain, without cost to the United States, depths in berthing areas and local access channels serving the terminals commensurate with depths provided in related project areas;

(5) To accomplish, without cost to the United States, such alterations, if any, as required in sewer, water supply, drainage, electrical power lines, and other utility facilities, as well as their maintenance;

(6) To provide, without cost to the United States, all lands, easements, rights-of-way, utility relocations and alterations, and, with the concurrence and under the direction of the Board of Transportation,

highway or highway bridge construction and alterations necessary for project construction;

(7) To adjust all claims concerning water rights;

(8) To maintain and operate the project after completion, without cost to the United States, in accordance with regulations prescribed by the Secretary of the Army or other responsible federal official, board, or agency;

(9) To provide a cash contribution for project costs assigned to project features other than flood control;

(10) To prevent future encroachment which might interfere with proper functioning of the project for flood control;

(11) To provide or satisfy any other items or conditions of local cooperation as stipulated in the congressional or other federal document covering the particular project involved.

This section shall not be interpreted as limiting but as descriptive of the items of local cooperation, the accomplishment of which counties, municipalities and the State are herein authorized to irrevocably bind themselves; it being intended to authorize counties, municipalities and the Commission in behalf of the State to comply fully and completely with all of the items of local cooperation as contemplated by Congress and as stipulated in the congressional acts or documents concerned, or project reports by the Army Chief of Engineers, the Administrator of the Soil Conservation Service, the Board of Directors of the Tennessee Valley Authority, or other responsible federal official, board or agency. (1969, cc. 724, 968; 1973, c. 507, s. 5; c. 1262, s. 23; c. 1446, s. 14; 1987, c. 827, s. 154.)

## § 143-215.42. Acquisition of lands.

(a) For the purpose of complying with the terms of local cooperation as specified in this Part, and as stipulated in the congressional document covering the particular project involved, any county, municipality, other local government unit or the State of North Carolina, acting on behalf of the Commission, may acquire the necessary lands, or interest in lands, by lease, purchase, gift or condemnation. A municipality, county or other local government unit may acquire such lands by any of the aforesaid means outside as well as inside its territorial boundaries, if the local governing body finds that substantial benefits will accrue to property inside such territorial boundaries as a result of such acquisition.

(b) The power of condemnation herein granted to counties, municipalities and other local government units may be exercised only after:

(1) The municipality, county or other local unit makes application to the Commission, identifying the land sought to be condemned and stating the purposes for which said land is needed; and

(2) The Commission finds that the land is sought to be acquired for a proper purpose within the intent of this Part. The findings of the Commission will be conclusive in the absence of fraud, notwithstanding any other provision of law.

(c) The Department shall certify copies of the Commission's findings to the applicant municipality, county, or other local unit, and to the clerk of superior court of the county or counties wherein any of the land sought to be condemned lies for recordation in the special proceedings thereof.

(d) For purposes of this section:

(1) The term "interest in land" means any land, right-of-way, rights of access, privilege, easement, or other interest in or relating to land. Said "interest in land" does not include an interest in land which is held or used in whole or in part for a public water supply, unless such

"interest in land" is not necessary or essential for such uses or purposes.

(2) A "description" of land shall be sufficient if the boundaries of the land are described in such a way as to convey an intelligent understanding of the location of the land. In the discretion of the applicant, boundaries may be described by any of the following methods or by any combination thereof: by reference to a map; by metes and bounds; by general description referring to natural boundaries, or to boundaries of existing political subdivisions or municipalities, or to boundaries of particular tracts or parcels of land.

(e) The procedure in all condemnation proceedings pursuant to this section shall conform as nearly as possible to the procedure provided in Article 3 of Chapter 40A of the General Statutes.

(f) Interests in land acquired pursuant to this section may be used in such manner and for such purpose as the condemning authority deems best. If the local government unit so determines, such lands may be sold, leased, or rented, subject to the prior approval of the Commission. The State may sell, lease or rent any lands acquired by it, and if the Commission is participating with any local government unit or units in a water resources project under this Article, may convey such lands or interests to the unit or units as a part of its participation therein.

(g) This section is intended to confer supplementary and additional authority, and not to confer exclusive authority nor to impose cumulative requirements. If a municipality, county or other local government unit is authorized to acquire lands or interests in lands by some other law (such as by General Statutes Chapter 139, 153A, 160A, or 162A) as well as by this section, compliance with the requirements of this section or the requirements of such other law will be sufficient.

(h) This section shall not authorize acquisition by condemnation of interests in land within the boundaries of any project to be constructed by the Tennessee Valley Authority, its agents or subdivision or any project licensed by the Federal Power Commission or interests in land owned or held for use by a public utility, as defined in G.S. 62-3. No commission created pursuant to G.S. 158-8 shall condemn or acquire any property to be used by the Tennessee Valley Authority, its agents or subdivision. (1969, cc. 724, 968; 1973, c. 621, ss. 2-4; c. 1262, s. 23; 1977, c. 771, s. 4; 1987, c. 827, ss. 154, 181.)

### § 143-215.43. Additional powers.

For the purpose of complying with requirements of local cooperation as described in this Part, county and municipal governing bodies shall also have the power to accept funds, and to use general tax funds for necessary project purposes, including project maintenance. (1969, cc. 724, 968.)

## Part 5. Right of Withdrawal of Impounded Water.

### § 143-215.44. Right of withdrawal.

(a) A person who lawfully impounds water for the purpose of withdrawal shall have a right of withdrawal of excess volume of water attributable to the impoundment. Within the meaning of this subsection, the word "purpose" shall include one of several purposes in a multiple purpose impoundment.

(b) A "right of withdrawal," within the meaning of this Part, is an interest which establishes a right to withdraw an excess volume of water superior to other interests in the water.

(c) "Excess volume of water," within the meaning of this Part, is that volume which may be withdrawn from an impoundment or from a watercourse below the impoundment without foreseeably reducing the rate of flow of a watercourse below that which would obtain in that watercourse if the impoundment did not exist.

(d) "Impound," within the meaning of this Part, shall include but is not limited to financial contributions or the assurance of financial contributions in the construction or operation of an impoundment.

(e) Repealed by Session Laws 1987, c. 827, s. 182. (1971, c. 111, s. 1; 1987, c. 827, s. 182.)

## § 143-215.45. Transfer of right of withdrawal.

A person with a right of withdrawal may assign or transfer it in whole or in part to another, subject to those rights of reassignment or transfer by the State specified in G.S. 143-354(a)(11). A person who has a right of withdrawal of excess volume of water by virtue of an assignment or transfer has an interest in water superior to other interests only to the extent that his withdrawal is in accordance with the terms of the assignment or transfer. (1971, c. 111, s. 1; 1991, c. 342, s. 12.)

## § 143-215.46. Exercise of right of withdrawal.

A person may exercise right of withdrawal by withdrawing directly from the impoundment, from a watercourse below the impoundment, or from both; provided, however, that the exercise of the right of withdrawal shall not require any person other than the holder of said right to incur additional capital expenditures in order to enable the holder of said right to withdraw any excess volume of water from a watercourse below the impoundment. (1971, c. 111, s. 1.)

## § 143-215.47. Effect of right of withdrawal on discharges of water.

Neither a right of withdrawal nor any assignment or transfer of said right may be asserted in defense against a claim that the method of releasing or discharging water is improper, that the quality of water has been impaired by the withdrawal or release of the water or by its return to the stream following its use, that water has been diverted without authority from the basin from which it was withdrawn, or that water resulting from augmentation of the natural streamflow to control water quality has been withdrawn. (1971, c. 111, s. 1.)

## § 143-215.48. Determining streamflows.

(a) In litigation in which the rate of flow of water that would exist in the absence of an impoundment is in issue, that rate shall be deemed to be the minimum average flow for a period of seven consecutive days that have an average recurrence of once in 10 years unless a party to the litigation introduces a calculation that more closely approximates the actual rate. A determination made by the Commission (i) of either that minimum average flow, or (ii) that adopts a calculation that more closely approximates the actual rate of flow, and introduced by one of the parties to the litigation, shall be prima facie correct.

(b) The Commission is authorized to make the determinations specified in subsection (a) of this section and to require the submission of such reports and such inspections as are necessary to permit those determinations. (1971, c. 111, s. 1; 1973, c. 1262, s. 23; 1987, c. 827, s. 154.)

### § 143-215.49. Right of withdrawal for use in community water supply.

A person operating a municipal, county, community or other local water distribution or supply system and having a right of withdrawal may assert that right when its withdrawal is for use in any such water system as well as in other circumstances. (1971, c. 111, s. 1.)

### § 143-215.50. Interpretation with other statutes.

Whether rights of withdrawal shall have effect in a capacity use area declared by the Commission under the Water Use Act of 1967 shall be in the discretion of the Commission. This Part shall be subject to the provisions of the Water and Air Resources Act, and the Dam Safety Law of 1967. (1971, c. 111, s. 1; 1973, c. 1262, s. 23; 1987, c. 827, s. 154.)

## Part 6. Floodplain Regulation.

### § 143-215.51. Purposes.

The purposes of this Part are to:

(1) Minimize the extent of floods by preventing obstructions that inhibit water flow and increase flood height and damage.

(2) Prevent and minimize loss of life, injuries, property damage, and other losses in flood hazard areas.

(3) Promote the public health, safety, and welfare of citizens of North Carolina in flood hazard areas. (1971, c. 1167, s. 3; 1973, c. 621, s. 5; 2000-150, s. 1.)

**Legal Periodicals.** — For survey of 1983 developments in property law, see 62 N.C.L. Rev. 1346 (1984).

### § 143-215.52. Definitions.

(a) As used in this Part:

(1) "Artificial obstruction" means any obstruction to the flow of water in a stream that is not a natural obstruction, including any that, while not a significant obstruction in itself, is capable of accumulating debris and thereby reducing the flood-carrying capacity of the stream.

(1a) "Base flood" or "100-year flood" means a flood that has a one percent (1%) chance of being equaled or exceeded in any given year. The term "base flood" is used in the National Flood Insurance Program to indicate the minimum level of flooding to be addressed by a community in its floodplain management regulations.

(1b) "Base floodplain" or "100-year floodplain" means that area subject to a one percent (1%) or greater chance of flooding in any given year, as shown on the current floodplain maps prepared pursuant to the National Flood Insurance Program or approved by the Department.

(1c) "Department" means the Department of Crime Control and Public Safety.

(1d) "Flood hazard area" means the area designated by a local government, pursuant to this Part, as an area where development must be regulated to prevent damage from flooding. The flood hazard area must include and may exceed the base floodplain.

(2) Repealed by Session Laws 2000, c. 150, s. 1, effective August 2, 2000.

(3) "Local government" means any county or city, as defined in G.S. 160A-1.

(3a) "Lowest floor", when used in reference to a structure, means the lowest enclosed area, including a basement, of the structure. An unfinished or flood resistant enclosed area, other than a basement, that is usable solely for parking vehicles, building access, or storage is not a lowest floor.

(4) "Natural obstruction" includes any rock, tree, gravel, or other natural matter that is an obstruction and has been located within the 100-year floodplain by a nonhuman cause.

(4b) "Secretary" means the Secretary of Crime Control and Public Safety.

(5) "Stream" means a watercourse that collects surface runoff from an area of one square mile or greater.

(6) "Structure" means a walled or roofed building, including a mobile home and a gas or liquid storage tank.

(b) As used in this Part, the terms "artificial obstruction" and "structure" do not include any of the following:

(1) An electric generation, distribution, or transmission facility.

(2) A gas pipeline or gas transmission or distribution facility, including a compressor station or related facility.

(3) A water treatment or distribution facility, including a pump station.

(4) A wastewater collection or treatment facility, including a lift station.

(5) Processing equipment used in connection with a mining operation. (1971, c. 1167, s. 3; 2000-150, s. 1.)

**§ 143-215.53:** Repealed by Session Laws 2000-150, s. 1, effective August 2, 2000.

## § 143-215.54. Regulation of flood hazard areas; prohibited uses.

(a) A local government may adopt ordinances to regulate uses in flood hazard areas and grant permits for the use of flood hazard areas that are consistent with the requirements of this Part.

(b) The following uses may be made of flood hazard areas without a permit issued under this Part, provided that these uses comply with local land-use ordinances and any other applicable laws or regulations:

(1) General farming, pasture, outdoor plant nurseries, horticulture, forestry, mining, wildlife sanctuary, game farm, and other similar agricultural, wildlife and related uses;

(2) Ground level loading areas, parking areas, rotary aircraft ports and other similar ground level area uses;

(3) Lawns, gardens, play areas and other similar uses;

(4) Golf courses, tennis courts, driving ranges, archery ranges, picnic grounds, parks, hiking or horseback riding trails, open space and other similar private and public recreational uses.

(5) Land application of waste at agronomic rates consistent with a permit issued under Part 1 or Part 1A of Article 21 of Chapter 143 of the General Statutes or an approved animal waste management plan.

(6) Land application of septage consistent with a permit issued under G.S. 130A-291.1.

(c) New solid waste disposal facilities, hazardous waste management facilities, salvage yards, and chemical storage facilities are prohibited in the

100-year floodplain except as authorized under G.S. 143-215.54A(b). (1971, c. 1167, s. 3; 1973, c. 621, s. 8; 1979, c. 413, ss. 1, 2; 2000-150, s. 1.)

## § 143-215.54A. Minimum standards for ordinances; variances for prohibited uses.

(a) A flood hazard prevention ordinance adopted by a county or city pursuant to this Part shall, at a minimum:

(1) Meet the requirements for participation in the National Flood Insurance Program and of this section.

(2) Prohibit new solid waste disposal facilities, hazardous waste management facilities, salvage yards, and chemical storage facilities in the 100-year floodplain except as authorized under subsection (b) of this section.

(3) Provide that a structure or tank for chemical or fuel storage incidental to a use that is allowed under this section or to the operation of a water treatment plant or wastewater treatment facility may be located in a 100-year floodplain only if the structure or tank is either elevated above base flood elevation or designed to be watertight with walls substantially impermeable to the passage of water and with structural components capable of resisting hydrostatic and hydrodynamic loads and the effects of buoyancy.

(b) A flood hazard prevention ordinance may include a procedure for granting variances for uses prohibited under G.S. 143-215.54(c). A county or city shall notify the Secretary of its intention to grant a variance at least 30 days prior to granting the variance. A county or city may grant a variance upon finding that all of the following apply:

(1) The use serves a critical need in the community.

(2) No feasible location exists for the location of the use outside the 100-year floodplain.

(3) The lowest floor of any structure is elevated above the base flood elevation or is designed to be watertight with walls substantially impermeable to the passage of water and with structural components capable of resisting hydrostatic and hydrodynamic loads and the effects of buoyancy.

(4) The use complies with all other applicable laws and regulations. (2000-150, s. 1.)

## § 143-215.55. Acquisition of existing structures.

A local government may acquire, by purchase, exchange, or condemnation an existing structure located in a flood hazard area in the area regulated by the local government if the local government determines that the acquisition is necessary to prevent damage from flooding. The procedure in all condemnation proceedings pursuant to this section shall conform as nearly as possible to the procedure provided in Article 3 of Chapter 40A of the General Statutes. (1971, c. 1167, s. 3; 1987, c. 827, s. 183; 2000-150, s. 1.)

## § 143-215.56. Delineation of flood hazard areas and 100-year floodplains; powers of Department; powers of local governments and of the Department.

(a) For the purpose of delineating a flood hazard area and evaluating the possibility of flood damages, a local government may:

(1) Request technical assistance from the competent State and federal agencies, including the Army Corps of Engineers, the Natural Resources Conservation Service, the Tennessee Valley Authority, the Federal Emergency Management Agency, the North Carolina Department of Crime Control and Public Safety, the North Carolina Geodetic Survey, the North Carolina Geological Survey, and the U.S. Geological Survey, or successor agencies.

(2) Utilize the reports and data supplied by federal and State agencies as the basis for the exercise by local ordinance or resolution of the powers and responsibilities conferred on responsible local governments by this Part.

(b) The Department shall provide advice and assistance to any local government having responsibilities under this Part. In exercising this function the Department may furnish manuals, suggested standards, plans, and other technical data; conduct training programs; give advice and assistance with respect to delineation of flood hazard areas and the development of appropriate ordinances; and provide any other advice and assistance that the Department deems appropriate. The Department shall send a copy of every rule adopted to implement this Part to the governing body of each local government in the State.

(c) A local government may delineate any flood hazard area subject to its regulation by showing it on a map or drawing, by a written description, or any combination thereof, to be designated appropriately and filed permanently with the clerk of superior court and with the register of deeds in the county where the land lies. A local government may also delineate a flood hazard area by reference to a map prepared pursuant to the National Flood Insurance Program. Alterations in the lines delineated shall be indicated by appropriate entries upon or addition to the appropriate map, drawing, or description. Entries or additions shall be made by or under the direction of the clerk of superior court. Photographic, typed or other copies of the map, drawing, or description, certified by the clerk of superior court, shall be admitted in evidence in all courts and shall have the same force and effect as would the original map or description. A local government may provide for the redrawing of any map. A redrawn map shall supersede for all purposes the earlier map or maps that it is designated to replace upon the filing and approval thereof as designated and provided above.

(d) The Department may prepare a floodplain map that identifies the 100-year floodplain and base flood elevations for an area for the purposes of this Part if all of the following conditions apply:

(1) The 100-year floodplain and base flood elevations for the area are not identified on a floodplain map prepared pursuant to the National Flood Insurance Program within the previous five years.

(2) The Department determines that the 100-year floodplain and the base flood elevations for the area need to be identified and the use of the area regulated in accordance with the requirements of this Part in order to prevent damage from flooding.

(3) The Department prepares the floodplain map in accordance with the federal standards required for maps to be accepted for use in administering the National Flood Insurance Program.

(e) Prior to preparing a floodplain map pursuant to subsection (d) of this section, the Department shall advise each local government whose jurisdiction includes a portion of the area to be mapped.

(f) Upon completing a floodplain map pursuant to subsection (d) of this section, the Department shall both:

(1) Provide copies of the floodplain map to every local government whose jurisdiction includes a portion of the 100-year floodplain identified on the floodplain map.

(2) Submit the floodplain map to the Federal Emergency Management Agency for approval for use in administering the National Flood Insurance Program.

(g) Upon approval of a floodplain map prepared pursuant to subsection (d) of this section by the Federal Emergency Management Agency for use in administering the National Flood Insurance Program, it shall be the responsibility of each local government whose jurisdiction includes a portion of the 100-year floodplain identified in the floodplain map to incorporate the revised map into its floodplain ordinance. (1971, c. 1167, s. 3; 1973, c. 621, ss. 6, 7; c. 1262, s. 23; 1977, c. 374, s. 2; c. 771, s. 4; 1987, c. 827, ss. 154, 184; 2000-150, s. 1; 2002-165, s. 1.6.)

## § 143-215.56A. Floodplain Mapping Fund.

The Floodplain Mapping Fund is established as a special revenue fund. The Fund consists of the fees credited to it under G.S. 161-11.4. Revenue in the fund may be used only to offset the Department's cost in preparing floodplain maps and performing its other duties under this Part. (2008-107, s. 29.7(c).)

**Editor's Note.** — Session Laws 2008-107, s. 29.7(d), made this section effective October 1, 2008, and applicable to deeds of trust and mortgages registered or filed on or after that date.

The reference in this section to G.S. 161-11.4 has been substituted for G.S. 161-11.3 at the direction of the Revisor of Statutes.

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5 is a severability clause.

## § 143-215.57. Procedures in issuing permits.

(a) A local government may establish application forms and require maps, plans, and other information necessary for the issuance of permits in a manner consonant with the objectives of this Part. For this purpose a local government may take into account anticipated development in the foreseeable future that may be adversely affected by the obstruction, as well as existing development. They shall consider the effects of a proposed artificial obstruction in a stream in creating danger to life and property by:

(1) Water that may be backed up or diverted by the obstruction.

(2) The danger that the obstruction will be swept downstream to the injury of others.

(3) The injury or damage at the site of the obstruction itself.

(b) In prescribing standards and requirements for the issuance of permits under this Part and in issuing permits, local governments shall proceed as in the case of an ordinance for the better government of the county or city as the case may be. A city may exercise the powers granted in this Part not only within its corporate boundaries but also within the area of its extraterritorial zoning jurisdiction. A county may exercise the powers granted in this Part at any place within the county that is outside the zoning jurisdiction of a city in the county. If a city does not exercise the powers granted in this Part in the city's extraterritorial zoning jurisdiction, the county may exercise the powers granted in this Part in the city's extraterritorial zoning jurisdiction. The county may regulate territory within the zoning jurisdiction of any city whose governing body, by resolution, agrees to the regulation. The governing body of a city may, upon one year's written notice, withdraw its approval of the county regulations, and those regulations shall have no further effect within the city's jurisdiction.

(c) The local governing body is hereby empowered to adopt regulations it may deem necessary concerning the form, time, and manner of submission of applications for permits under this Part. These regulations may provide for the issuance of permits under this Part by the local governing body or by an agency designated by the local governing body, as prescribed by the governing body. Every final decision granting or denying a permit under this Part shall be subject to review by the superior court of the county, with the right of jury trial at the election of the party seeking review. The time and manner of election of a jury trial shall be governed by G.S. 1A-1, Rule 38(b) of the Rules of Civil Procedure. Pending the final disposition of an appeal, no action shall be taken that would be unlawful in the absence of a permit issued under this Part. (1971, c. 1167, s. 3; 2000-150, s. 1.)

## § 143-215.58. Violations and penalties.

(a) Any willful violation of this Part or of any ordinance adopted (or of the provisions of any permit issued) under the authority of this Part shall constitute a Class 1 misdemeanor.

(a1) A local government may use all of the remedies available for the enforcement of ordinances under Chapters 153A and 160A of the General Statutes to enforce an ordinance adopted pursuant to this Part.

(b) Failure to remove any artificial obstruction or enlargement or replacement thereof, that violates this Part or any ordinance adopted (or the provision of any permit issued) under the authority of this Part, shall constitute a separate violation of this Part for each day that the failure continues after written notice from the county board of commissioners or governing body of a city.

(c) In addition to or in lieu of other remedies, the county board of commissioners or governing body of a city may institute any appropriate action or proceeding to restrain or prevent any violation of this Part or of any ordinance adopted (or of the provisions of any permit issued) under the authority of this Part, or to require any person, firm or corporation that has committed a violation to remove a violating obstruction or restore the conditions existing before the placement of the obstruction. (1971, c. 1167, s. 3; 1993, c. 539, s. 1022; 1994, Ex. Sess., c. 24, s. 14(c); 2000-150, s. 1.)

## § 143-215.59. Other approvals required.

(a) The granting of a permit under the provisions of this Part shall in no way affect any other type of approval required by any other statute or ordinance of the State or any political subdivision of the State, or of the United States, but shall be construed as an added requirement.

(b) No permit for the construction of any structure to be located within a flood hazard area shall be granted by a political subdivision unless the applicant has first obtained the permit required by any local ordinance adopted pursuant to this Part. (1971, c. 1167, s. 3; 2000-150, s. 1.)

## § 143-215.60. Liability for damages.

No action for damages sustained because of injury or property damage caused by a structure or obstruction for which a permit has been granted under this Part shall be brought against the State or any political subdivision of the State, or their employees or agents. (1971, c. 1167, s. 3; 2000-150, s. 1.)

## § 143-215.61. Floodplain management.

The provisions of this Part shall not preclude the imposition by responsible local governments of land use controls and other regulations in the interest of floodplain management for the 100-year floodplain. (1971, c. 1167, s. 3; 2000-150, s. 1.)

## Part 6A. Hurricane Flood Protection and Beach Erosion Control Project Revolving Fund.

### § 143-215.62. Revolving fund established; conditions and procedures.

(a) There is established under the control and direction of the Department a Hurricane Flood Protection and Beach Erosion Control Project Revolving Fund, to consist of any moneys that may be appropriated for use through the fund by the General Assembly or that may be made available to it from any other source for the purpose of financing the local portion of the nonfederal share of the cost of hurricane flood protection and beach erosion control projects. The Department shall, when funds are available, and in accordance with priorities established by the Commission, make advances from the fund to any county or municipality for:

(1) Advance planning and engineering work necessary or desirable in order to promote the development, construction, or preservation of hurricane flood protection and beach erosion works or projects;
(2) Construction of hurricane flood protection and beach erosion control works or projects, or other related costs which are a responsibility of local government, including costs associated with construction, such as the acquisition of land or rights-of-way or the relocation of public roads and utilities;
(3) Maintenance and nourishment of the constructed works or project.

Such advances shall be subject to repayment by the recipient to the Department from the proceeds of bonds or other obligations for the beach erosion control and hurricane flood protection works or projects, or from other funds available to the recipient, including grants.

(b) Prior to making any advance to a county or municipal government the Commission shall advise the county or municipal government:

(1) Its opinion as to whether or not the projected works or project would further beach erosion control or provide protection to life or property from floodwaters resulting from hurricanes;
(2) Its opinion as to whether or not there is a reasonable prospect of federal aid in the financing of the projected works or project and whether or not the advance will exceed the local portion of the nonfederal share of the cost of the works or project to be financed by the county or municipality making the application;
(3) Its opinion as to whether or not the anticipated financial outlays in connection with the projected works or project for the county or municipality making the application would constitute an unreasonable burden on the citizens of the county or municipality.

The Commission shall authorize no advance to a county or municipal government without first receiving satisfactory assurances from such government that the projected works or project shall be undertaken and the funds advanced repaid as provided herein.

(c) Repayment of any advance may be in equal installments or in a lump sum, but the term for such repayment shall not exceed a term of 10 years. All moneys received from repayments on advances shall be paid into the revolving fund and shall be used for the purposes set forth in this section.

(d) Repealed by Session Laws 1987, c. 827, s. 185. (1971, c. 1159, s. 1; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1987, c. 827, ss. 154, 185.)

## Part 7. Water and Air Quality Reporting.

### § 143-215.63. Short title.

This Part shall be known and may be cited as the Water and Air Quality Reporting Act of 1971. (1971, c. 1167, s. 9.)

### § 143-215.64. Purpose.

The purpose of this Article is to require all persons who are subject to the provisions of G.S. 143-215.1, 143-215.108, or 143-215.109 to file reports with the Commission covering the discharge of waste and air contaminants to the waters and outdoor atmosphere of the State and to establish and maintain approved systems for monitoring the quantity and quality of such discharges and their effects upon the water and air resources of the State. (1971, c. 1167, s. 9; 1973, c. 1262, s. 23; 1987, c. 827, s. 154; 1989, c. 135, s. 3.)

### § 143-215.65. Reports required.

All persons subject to the provisions of G.S. 143-215.1, 143-215.108, or 143-215.109 who discharge wastes to the waters or emit air contaminants to the outdoor atmosphere of this State shall file at such frequencies as the Commission may specify and at least quarterly reports with the Commission setting forth the volume and characteristics of wastes discharged or air contaminants emitted daily or such other period of time as may be specified by the Commission in its rules. Such reports may be required less frequently than quarterly for any permit for a minor activity as defined in G.S. 143-215.1(b)(4)d and e. Such reports shall be filed on forms provided by the Department and approved by the Commission and shall include such pertinent data with reference to the total and average volume of wastes or air contaminants discharged, the strength and amount of each waste substance or air contaminant discharged, the type and degree of treatment such wastes or air contaminants received prior to discharge and such other information as may be specified by the Commission in its rules. The information shall be used by the Commission only for the purpose of air and water pollution control. The department shall provide proper and adequate facilities and procedures and the Commission shall adopt rules to safeguard the confidentiality of proprietary manufacturing processes except that confidentiality shall not extend to wastes discharged or air contaminants emitted. (1971, c. 1167, s. 9; 1973, c. 1262, s. 23; 1975, c. 655, s. 4; 1987, c. 827, ss. 154, 186; 1989, c. 135, s. 4; c. 453, s. 3.)

### § 143-215.66. Monitoring required.

In order to provide for adequately monitoring the discharge of wastes to the waters and the emission of contaminants to the outdoor atmosphere and their effects upon the quality of the environment, all persons subject to the provisions of G.S. 143-215.1, 143-215.108, or 143-215.109 who cause such discharges or emissions shall establish and maintain adequate water and air quality monitoring systems and report the data obtained therefrom to the Commission. Each monitoring system shall include the collection of water or air quality data as appropriate from such locations, in such detail, and with such frequency as required by rule of the Commission for evaluating the efficiency of treatment facilities or air-cleaning devices and the effects of the discharges or emissions upon the waters and air resources of the State. (1971, c. 1167, s. 9; 1973, c. 1262, s. 23; 1987, c. 827, ss. 154, 187; 1989, c. 135, s. 5.)

## § 143-215.67. Acceptance of wastes to disposal systems and air-cleaning devices.

(a) No person subject to the provisions of G.S. 143-215.1, 143-215.108, or 143-215.109 shall willfully cause or allow the discharge of any wastes or air contaminants to a waste-disposal system or air-cleaning device in excess of the capacity of the disposal system or cleaning device or any wastes or air contaminants which the disposal system or cleaning device cannot adequately treat. This subsection does not prohibit the discharge of waste to a treatment works operated by a public utility or unit of local government in excess of the capacity of the treatment works by any person who holds a valid building permit issued prior to the date on which the public utility or unit of local government receives the notice required by subsection (c) of this section if the Commission finds that the discharge of waste will not result in any significant degradation in the quality of the waters ultimately receiving the discharge as provided in subsection (b) of this section.

(b) The Commission may authorize a unit of government subject to the provisions of subsection (a) of this section to accept additional wastes to its waste-disposal system upon a finding by the Commission (i) that the unit of government has secured a grant or has otherwise secured financing for planning, design, or construction of a new or improved waste disposal system which will adequately treat the additional waste, and (ii) the additional waste will not result in any significant degradation in the quality of the waters ultimately receiving the discharge. The Commission may impose such conditions on permits issued under G.S. 143-215.1 as it deems necessary to implement the provisions of this subsection, including conditions on the size, character, and number of additional dischargers. Nothing in this subsection shall be deemed to authorize a unit of government to violate water quality standards, effluent limitations or the terms of any order or permit issued under Part 1 of this Article nor does anything herein preclude the Commission from enforcing by appropriate means the provisions of Part 1 of this Article.

(c) The Commission may impose a moratorium on the addition of waste to a treatment works if the Commission determines that the treatment works is not capable of adequately treating additional waste. The Commission shall give notice of its intention to impose a moratorium at least 45 days prior to the effective date of the moratorium to any person who holds a permit for a treatment works subject to the moratorium. Except to the extent that the provisions of subsection (b) of this section apply, the Commission shall not issue a permit for a sewer line that will connect to a treatment works that the Commission has determined to be incapable of treating additional waste from the date on which the Commission determines that the treatment works is incapable of adequately treating additional waste until the moratorium on the addition of waste to the treatment works is lifted.

(d) A public utility or unit of local government that operates a treatment works shall give notice of a moratorium on the discharge of additional waste to the treatment works within 15 days of the date on which the public utility or unit of local government receives notice of the moratorium from the Commission. The public utility or unit of local government shall give public notice of a moratorium by publication of the notice one time in a newspaper having general circulation in the county in which the treatment works is located. The Commission shall prescribe the form and content of the notice. (1971, c. 1167, s. 9; 1979, c. 566; 1987, c. 827, s. 154; 1989, c. 135, s. 6; 1995, c. 202, s. 1.)

**§ 143-215.68:** Repealed by Session Laws 1987, c. 827, s. 188.

## § 143-215.69. Enforcement procedures.

(a)(1) Criminal Penalties. — Except as provided in subdivision (2) of this subsection, any person who violates any provisions of this Part or any rules adopted by the Commission for its implementation shall be guilty of a Class 3 misdemeanor and shall be only liable to a penalty of not less than one hundred dollars ($100.00), nor more than one thousand dollars ($1,000) for each violation and each day such person shall fail to comply after having been officially notified by the Commission shall constitute a separate offense subject to the foregoing penalty.

(2) Any person who violates any provision of this Part or any rule adopted by the Commission to implement this Part that imposes a requirement that is also a requirement under Title V or any rule adopted by the Commission to implement Title V shall be subject to punishment as provided by G.S. 143-215.114B.

(b) Civil Penalties. — The Commission may assess a civil penalty against a person who violates this Part or a rule of the Commission implementing this Part. For persons subject to the provisions of G.S. 143-215.1, the amount of the penalty shall not exceed the maximum imposed in G.S. 143-215.6A and shall be assessed in accordance with the procedure set out in G.S. 143-215.6A for assessing a civil penalty. For persons subject to the provisions of Title V, G.S. 143-215.108, or G.S. 143-215.109, the amount of penalty shall not exceed the maximum imposed in G.S. 143-215.114A and shall be assessed in accordance with the procedure set out in G.S. 143-215.114A for assessing a civil penalty. The clear proceeds of civil penalties assessed under this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(c) Injunctive Relief. — Upon violation of any of the provisions of this Part, a rule implementing this Part, or an order issued under this Part, the Secretary may, either before or after the institution of proceedings for the collection of the penalty imposed by this Part for such violations, request the Attorney General to institute a civil action in the superior court of the county or counties where the violation occurred in the name of the State upon the relation of the Department for injunctive relief to restrain the violation or require corrective action, and for such other or further relief in the premises as said court shall deem proper. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this Part for any violation of same.

(d) Repealed by Session Laws 1987, c. 827, s. 189. (1971, c. 1167, s. 9; 1973, c. 1262, s. 23; 1975, c. 842, s. 5; 1977, c. 771, s. 4; 1987, c. 827, ss. 154, 189; 1989 (Reg. Sess., 1990), c. 1045, s. 10; 1993, c. 400, s. 6; c. 539, s. 1023; 1994, Ex. Sess., c. 24, s. 14(c); 1998-215, s. 66.)

## Part 8. Grants for Water Resources Development Projects.

## § 143-215.70. Secretary of Environment and Natural Resources authorized to accept applications.

The Secretary is authorized to accept applications for grants for nonfederal costs relating to water resources development projects from units of local government sponsoring such projects, except that this shall not include small watershed projects reviewed by the State Soil and Water Conservation Commission pursuant to G.S. 139-55. (1979, c. 1046, s. 1; 1987, c. 827, s. 154; 1989, c. 727, s. 218(109); 1997-443, s. 11A.119(a).)

## § 143-215.71. Purposes for which grants may be requested.

Applications for grants may be made for the nonfederal share of water resources development projects for the following purposes in amounts not to exceed the percentage of the nonfederal costs indicated:

(1) General navigation projects that are sponsored by local governments — eighty percent (80%);
(2) Recreational navigation projects — twenty-five percent (25%);
(3) Construction costs for water management (flood control and drainage) purposes, including utility and road relocations not funded by the State Department of Transportation — sixty-six and two-thirds percent (66 ⅔%), but only of that portion of the project specifically allocated for such flood control or drainage purposes;
(4) Stream restoration — sixty-six and two-thirds percent (66 ⅔%);
(5) Protection of privately owned beaches where public access is allowed and provided for — seventy-five percent (75%);
(6) Land acquisition and facility development for water-based recreation sites operated by local governments — fifty percent (50%);
(7) Aquatic weed control projects sponsored by local governments — fifty percent (50%). (1979, c. 1046, s. 1; 1983, c. 450; 1987, c. 781, s. 1.)

## § 143-215.72. Review of applications.

(a) The Secretary shall receive and review applications for the grants specified in this Part and approve, approve in part, or disapprove such applications.

(b) In reviewing each application, the Secretary shall consider:

(1) The economic, social, and environmental benefits to be provided by the projects;
(2) Regional benefits of projects to an area greater than the area under the jurisdiction of the local sponsoring entity;
(3) The financial resources of the local sponsoring entity;
(4) The environmental impact of the project;
(5) Any direct benefit to State-owned lands and properties. (1979, c. 1046, s. 1.)

## § 143-215.73. Recommendation and disbursal of grants.

After review of grant applications, project funds shall be disbursed and monitored by the Department. (1979, c. 1046, s. 1; 1983, c. 717, s. 70; 1985 (Reg. Sess., 1986), c. 955, s. 93; 1987, c. 827, s. 154; 2006-203, s. 90.)

**Editor's Note.** — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 90, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, deleted the second sentence which read: "After review, but before transfer of funds from the Department's reserve fund into accounts for specific projects, the Secretary may forward the applications to the Advisory Budget Commission for its review of the recommendations."

## Part 8A. Water Resources Development Projects.

### § 143-215.73A. Water Resources Development Plan.

(a) Plan prepared. — Before 1 July in each calendar year, the Department of Environment and Natural Resources shall prepare a statewide plan for water resources development projects for a period of six years into the future. The plan shall be known as the Water Resources Development Plan. If the plan differs from the Water Resources Development Plan adopted for the preceding calendar year, the Department shall indicate the changes and the reasons for such changes. The Department shall submit the plan to the Director of the Budget for review.

(b) Projects listed. — The plan shall list the following water resources development projects based on their status as of 1 May of the year in which the plan is prepared:

(1) Projects approved by the Congress of the United States.

(2) Projects for which the Congress of the United States has appropriated funds.

(3) Projects for which grant applications have been submitted under Part 8 of Article 21 of Chapter 143 of the General Statutes.

(4) Projects for which grant applications have been submitted under Article 4 of Chapter 139 of the General Statutes.

(5) Projects planned as federal reservoir projects but for which no federal funds are scheduled and for which local governments are seeking State financial assistance.

(c) Project priorities and funding recommendations. — The Department shall assign a priority to each project within each of the five categories listed under subsection (b) of this section either by giving the project a number, with "1" assigned to the highest priority, or by recommending no funding. The Department shall state its reasons for recommending the funding, deferral, or elimination of a project. The Department shall determine the priority of a project based on the following criteria: local interest in the project, the cost of the project to the State, the benefit of the project to the State, and the environmental impact of the project.

(d) Project information. — For each project listed under subsection (b) of this section, the Water Resources Development Plan shall:

(1) Provide a brief description.

(2) If federal, list the estimated cost of each of the following phases that have not been completed as of 1 July, (i) feasibility study, (ii) construction, (iii) operation and maintenance, and the amount of State funds required to match the federal funds needed.

(3) If State or local, list the estimated cost to complete the project and amount of State funds required under G.S. 143-215.71 or G.S. 139-54.

(4) Indicate the total cost to date and the State share of that cost.

(5) Indicate the status.

(6) Indicate the estimated completion date.

(e) Distribution of the plan. — The Director of the Budget shall provide copies of the plan to the General Assembly along with the recommended biennial budget and the recommended revised budget for the second year of the biennium.

(f) Budget recommendations. — The Director of the Budget shall determine which projects, if any, will be included in the recommended biennial budget and in the recommended revised budget for the second year of the biennium. The budget document transmitted to the General Assembly shall identify the projects or types of projects recommended for funding. (1991, c. 181, s. 1; 1997-443, s. 11A.119(a); 2006-203, s. 91.)

**Editor's Note.** — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 91, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, in subsection (e), deleted the former first sentence, which read: "The Director of the Budget shall provide copies of the plan to the members of the Advisory Budget Commission when the Advisory Budget Commission meets to deliberate on the biennial budget or on the revised budget for the second year of the biennium"; and deleted "also" preceding "provide copies."

## Part 9. Nonpoint Source Pollution Control Program.

### § 143-215.74. Agriculture cost share program.

(a) There is created the Agriculture Cost Share Program for Nonpoint Source Pollution Control. The program shall be created, implemented, and supervised by the Soil and Water Conservation Commission.

(b) The program shall be subject to the following requirements and limitations:

(1) The purpose of the program shall be to reduce the input of agricultural nonpoint source pollution into the watercourses of the State.

(2) The program shall initially include the present 16 nutrient sensitive watershed counties and 17 additional counties.

(3) Subject to subdivision (7) of this subsection, priority designations for inclusions in the program shall be under the authority of the Soil and Water Conservation Commission. The Soil and Water Conservation Commission shall retain the authority to allocate the cost share funds.

(4) Areas shall be included in the program as the funds are appropriated and the technical assistance becomes available from the local Soil and Water Conservation District.

(5) Funding may be provided to assist practices including conservation tillage, diversions, filter strips, field borders, critical area plantings, sedimentation control structures, sod-based rotations, grassed waterways, strip-cropping, terraces, cropland conversion to permanent vegetation, grade control structures, water control structures, closure of lagoons, emergency spillways, riparian buffers or equivalent controls, odor control best management practices, insect control best management practices, and animal waste management systems and application. Funding for animal waste management shall be allocated for practices in river basins such that the funds will have the greatest impact in improving water quality.

(6) Except as provided in subdivision (8) of this subsection, State funding shall be limited to seventy-five percent (75%) of the average cost for each practice with the assisted farmer providing twenty-five percent (25%) of the cost, which may include in-kind support of the practice, with a maximum of seventy-five thousand dollars ($75,000) per year to each applicant.

(7) Priority designation for inclusion in the program for State funding shall be given to projects that improve water quality. To be eligible for cost share funds under this subdivision, a project shall be evaluated before funding is awarded and after the project is completed to determine the impact on water quality.

(8) For practices that are eligible for funding from the federal Conservation Reserve Enhancement Program, State funding from the program shall be limited to seventy-five percent (75%) of the average cost of each practice, with the remainder paid from funding from the Con-

servation Reserve Enhancement Program, other available federal funds, other State funds, or the assisted farmer, whose contribution may include in-kind support of the practice. This subdivision is subject to subdivision (9) of this subsection.

(9) When the applicant is either (i) a limited-resource farmer, (ii) a beginning farmer, or (iii) a person farming land that is located in an enhanced voluntary agricultural district and is subject to a conservation agreement under G.S. 106-743.2 that remains in effect, State funding shall be limited to ninety percent (90%) of the average cost for each practice with the assisted farmer providing ten percent (10%) of the cost, which may include in-kind support of the practice, with a maximum of one hundred thousand dollars ($100,000) per year to each applicant. The following definitions apply in this subdivision:

a. Beginning farmer. — A farmer who has not operated a farm or who has operated a farm for not more than 10 years and who will materially and substantially participate in the operation of the farm.

a1. Enhanced voluntary agricultural district. — A district established by a county or a city by ordinance under Part 3 of Article 61 of Chapter 106 of the General Statutes.

b. Limited-resource farmer. — A farmer with direct and indirect annual gross farm sales that do not exceed one hundred thousand dollars ($100,000) and with an adjusted household income in each of the previous two years that is at or below the greater of the county median household income, as determined by the United States Department of Housing and Urban Development, or two times the national poverty level based on the federal poverty guidelines established by the United States Department of Health and Human Services and revised each April 1.

c. Materially and substantially participate.

1. In the case of an individual, for the individual, including members of the immediate family of the individual, to provide substantial day-to-day labor and management of the farm, consistent with the practices in the county in which the farm is located.

2. In the case of an entity, for all members of the entity, to participate in the operation of the farm, with some members providing management and some members providing labor and management necessary for day-to-day activities such that if the members did not provide the management and labor, the operation of the farm would be seriously impaired.

(c) The program shall be reviewed, prior to implementation, by the Committee created by G.S. 143-215.74B. The Technical Review Committee shall meet quarterly to review the progress of this program.

(d) State funds for the program shall remain available until expended for the program.

(e) The Soil and Water Conservation Commission shall report on or before 31 January of each year to the Environmental Review Commission and the Fiscal Research Division. This report shall include a list of projects that received State funding pursuant to the program, the results of the evaluations conducted pursuant to subdivision (7) of subsection (b) of this section, findings regarding the effectiveness of each of these projects to accomplish its primary purpose, and any recommendations to assure that State funding is used in the most cost-effective manner and accomplishes the greatest improvement in water quality. (1985 (Reg. Sess., 1986), c. 1014, s. 149(a); 1987, c. 827, s. 154; c. 830, s. 102; 1995 (Reg. Sess., 1996), c. 626, ss. 9, 10; 1996, 2nd Ex. Sess., c.

18, s. 27.22(a), (b); 1997-496, s. 15; 1998-221, s. 3.1; 2002-165, s. 2.18; 2003-284, s. 11.6; 2004-124, s. 12.6; 2005-390, s. 8; 2007-495, s. 18.)

**Cross References.** — For note regarding registration of operators of animal waste management systems and obtaining an approved animal waste management plan, see Editor's Note under G.S. 143-215.10A regarding Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 14.

As to moratorium on the construction or expansion of swine farms or lagoons or animal waste management systems for swine farms, established by Session Laws 1997-458, ss. 1.1 and 1.2, as amended by Session Laws 1998-188, ss. 2 and 3, by Session Laws 1999-329, ss. 2.1 and 2.2, by Session Laws 2001-254, ss. 1 and 2, and by Session Laws 2003-266, ss. 1 and 2, see the Editor's notes following G.S. 143-215.10A.

**Agricultural Drought Response Cost Share Program.** — Session Laws 2008-107, s. 12.4, provides: "(a) Agricultural Drought Response Cost Share Program. — The Agricultural Drought Response Cost Share Program is established. The Program shall provide cost share funds to assist North Carolina farmers who suffered damage from the severe and extreme drought conditions in North Carolina in 2007. These cost share funds shall be used to assist farmers with the following projects:

"(1) To redrill damaged wells or to drill new wells to be used as a water supply for livestock or for irrigation.

"(2) To renovate damaged or inadequate farm ponds or construct new farm ponds to be used as a water supply for livestock or for irrigation.

"(3) To renovate pastures depleted by the 2007 drought.

"(b) Program Administration. — The Program shall be implemented and supervised by the Soil and Water Conservation Commission through the Agriculture Cost Share Program for Nonpoint Source Pollution Control. The Commission shall administer this Program as provided in this section and in Part 9 of Article 21 of Chapter 143 of the General Statutes.

"(c) Program Functions. — Under the Agricultural Drought Response Cost Share Program, the Division shall:

"(1) Within funds available for this Program, provide cost share funds subject to all of the following limitations and requirements:

"a. Except as provided in G.S. 143-215.74(b)(9), State funding shall be limited to:

"1. Seventy-five percent (75%) of the average cost for each project with the assisted person providing twenty-five percent (25%) of the project cost, which may include in-kind support of the project.

"2. A maximum of seventy-five thousand dollars ($75,000) per year to each applicant.

"b. Applicants shall be limited to farmers who have an adjusted gross income in each of the previous two years that is at or below two hundred fifty thousand dollars ($250,000), unless at least seventy-five percent (75%) of this adjusted gross income is derived directly from farming, ranching, or forestry operations.

"c. To be eligible for cost share funds under subdivision (1) or subdivision (2) of subsection (a) of this section, applicants must demonstrate that their existing water supplies are insufficient to provide reliable water to meet current needs for livestock watering or irrigation.

"d. Applicants may apply for cost share funds for projects under subsection (a) of this section that were installed as of August 1, 2007, so long as the costs of installation are documented to the satisfaction of the Commission.

"e. The requirements and limitations under subdivisions (1), (2), (5), and (8) of subsection (b) of G.S. 143-215.74 do not apply. All other limitations and requirements set out in Part 9 of Article 21 of Chapter 143 of the General Statutes, as modified by this section, apply.

"(2) Establish criteria to prioritize the redrilling of damaged wells and the drilling of new wells, the renovation of damaged or inadequate farm ponds and the construction of new farm ponds, and the renovation of pastures depleted by the drought.

"(3) Establish criteria for the selection of applicants who are eligible for participation in the Program.

"(4) Develop a process for soliciting and reviewing applications and for selecting farmers to participate in the Program.

"(5) Investigate and pursue other funding sources to supplement State funds, including federal, local, and private funding sources.

"(6) Provide technical assistance to participating persons to assist with the projects that are eligible for cost share funds under subsection (a) of this section and to facilitate the timely transfer of technology among participating persons.

"(d) Report. — No later than 31 January of each year, the Division shall prepare a comprehensive report on the implementation of subsections (a) through (c) of this section. The report shall be submitted to the Environmental Review Commission as a part of the report required by G.S. 143-215.74(e). The first report required by this subsection shall be submitted to the Environmental Review Commission no later than 31 January 2009.

"(e) Program Funds. — The Soil and Water Conservation Commission may use up to one hundred fifteen thousand dollars ($115,000) of the funds appropriated in this act to the Department of Environment and Natural Resources for the 2008-2009 fiscal year to be used for the Agricultural Drought Response Cost Share Program for the Division of Soil and Water Conservation and for the Soil and Water Conservation Districts for the costs of providing engineering assistance, providing technical assistance, and administering the Program. Further, twenty-five percent (25%) of the remaining funds shall not be allocated during the initial funding cycle, but shall be retained to be allocated by the Commission consistent with the limitations under this section, for the purposes under this section, and to address future drought emergencies or to allocate to farmers who received cost share funds under this section who need additional funds to achieve the purpose of the initial cost share disbursement."

**Editor's Note.** — Session Laws 2007-523, s. 2(a)-(f), provides: "(a) Definitions. — The definitions set out in G.S. 143-215.10I(a), as enacted by Section 1 of this act, apply to this section. As used in this section, an "innovative animal waste management system" means an animal waste management system that serves a swine farm that may be permitted under G.S. 143-215.10I(b), as enacted by Section 1 of this act.

"(b) Lagoon Conversion Program. — The Lagoon Conversion Program is hereby established. The Program shall provide grants to assist in the conversion of animal waste management systems that serve swine farms in operation on or before 1 September 2007 that employ anaerobic lagoons as the primary method of treatment to innovative animal waste management systems. Grants under the Program may also be used to:

"(1) Assist in the closure of sprayfield and lagoon systems that are replaced by innovative animal waste management systems if the closure is performed in accordance with applicable federal and State laws, regulations, and rules.

"(2) Establish centralized waste collection and treatment systems that serve innovative animal waste management systems.

"(c) Program Administration. — The Program shall be administered by the Division of Soil and Water Conservation in the Department of Environment and Natural Resources through the Agriculture Cost Share Program for Nonpoint Source Pollution Control established pursuant to G.S. 143-215.74. The Division shall administer the Program as provided in this section and Part 9 of Article 21 of Chapter 143 of the General Statutes.

"(d) Program Functions. — Under the Lagoon Conversion Program, the Division of Soil and Water Conservation in the Department of Environment and Natural Resources, through the Agriculture Cost Share Program for Nonpoint Source Pollution Control, shall:

"(1) Within funds available to the Swine Farm Waste Management System Conversion Account established by Section 3 of this act, provide grants subject to all of the following limitations and requirements:

"a. For grants approved on or before 30 June 2012, State funding shall be limited to:

"1. Ninety percent (90%) of the average cost for each practice with the assisted person providing ten percent (10%) of the cost, which may include in-kind support of the practice.

"2. A maximum of five hundred thousand dollars ($500,000) per year to each applicant.

"b. For grants approved on or after 1 July 2012 and on or before 30 June 2017, State funding shall be limited to:

"1. Eighty percent (80%) of the average cost for each practice with the assisted person providing twenty percent (20%) of the cost, which may include in-kind support of the practice.

"2. A maximum of four hundred fifty thousand dollars ($450,000) per year to each applicant.

"c. For grants approved on or after 1 July 2017, State funding shall be limited to:

"1. Seventy-five percent (75%) of the average cost for each practice with the assisted person providing twenty-five percent (25%) of the cost, which may include in-kind support of the practice.

"2. A maximum of four hundred thousand dollars ($400,000) per year to each applicant.

"d. All other limitations and requirements set out in Part 9 of Article 21 of Chapter 143 of the General Statutes, as modified by this section.

"(2) Establish criteria to prioritize the installation of innovative animal waste management systems that serve swine farms. Priority shall be given to systems that are affordable, easily maintained, produce marketable by-products, reduce or eliminate the emission of ammonia and greenhouse gases, and are capable of being connected to a centralized waste collection and treatment.

"(3) Establish criteria for the selection of applicants who are eligible for participation in the Program. Priority shall be given to applicants whose participation in the Program will result in the removal of animal waste management systems from floodplains; who have substantially complied with federal and State laws, regulations, and rules for the protection of the environment, natural resources, and public health; and who have a limited ability to pay for or finance an innovative swine waste management system through private or cooperative credit at reasonable rates and terms.

"(4) Develop a process for soliciting and reviewing applications and for selecting persons to participate in the Program.

"(5) Investigate and pursue other funding sources to supplement State funds, including federal, local, and private funding sources.

"(6) Provide technical assistance to participating persons to assist with modifications of waste management systems and facilitate the timely transfer of technology among participating persons.

"(e) Advisory Committee. — The Director of the Division of Soil and Water Conservation may establish an advisory committee to assist the Division with the implementation of this act. If the Director establishes an advisory committee, the Director may direct the advisory committee to evaluate:

"(1) Markets for by-products derived from swine waste and make recommendations for development of the markets, including identification of regulatory obstacles.

"(2) Methods to encourage growers, integrators, and electric power suppliers to cooperate in the production and use of renewable energy or other marketable by-products derived from swine waste, including an examination of tax incentives, carbon sequestration credits, and trading mechanisms.

"(f) Report. — No later than 1 October of each year, the Division of Soil and Water Conservation in the Department of Environment and Natural Resources shall prepare a comprehensive report on the implementation of Sections 1, 2, and 3 of this act. The report shall be submitted to the Environmental Review Commission as a part of the report required by G.S. 143-215.10M. The first report required by this subsection shall be submitted to the Environmental Review Commission no later than 1 October 2008."

Session Laws 2007-523, s. 3, provides: "Account. — There is hereby established the Swine Farm Waste Management System Conversion Account within the Division of Soil and Water Conservation of the Department of Environment and Natural Resources. Funds in the Account shall be used only as provided in subsection (b) of Section 2 of this act. The Account shall consist of funds appropriated to the Account by the General Assembly; any federal funds available for this purpose; and any grants, gifts, or contributions to the State for this purpose. Funds in the Account shall not revert."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

## § 143-215.74A. Program participation.

Participation in the program shall be voluntary.

All participants in the program shall be required to match State funds at the same rate, and assistance from the Agriculture Extension Service at North Carolina State University shall also be used. (1985 (Reg. Sess., 1986), c. 1014, s. 149(a).)

## § 143-215.74B. Committee established.

Detailed plans for implementing the program shall be reviewed and suggested changes and reasons therefor shall be given by a committee consisting of the Master of the North Carolina State Grange, President of the North Carolina Farm Bureau Federation, the North Carolina Commissioner of Agriculture, the Dean of the School of Agriculture and Life Sciences at North Carolina State University, the Dean of the School of Agriculture at North Carolina Agricultural and Technical State University, the Chairman of the State Soil and Water Conservation Commission, the President of the North Carolina Association of Soil and Water Conservation Districts, the Executive Director of the Wildlife Resources Commission or a designee, and the Director of the Division of Marine Fisheries or a designee. The committee shall review the program prior to expenditure of any funds for the program. Certification documenting the committee's review of the program shall be made in writing to the Speaker of the House of Representatives, the President of the Senate, the Chairmen of the Appropriations Committees of the Senate and the House of Representatives, the Director of the Fiscal Research Division of the Legislative Services Office, and the Legislative Library. (1985 (Reg. Sess., 1986), c. 1014, s. 149(a); 1989, c. 500, s. 117; 1993, c. 321, s. 261.)

## Part 9A. Application of Animal Waste.

### §§ 143-215.74C through 143-215.74E: Repealed by Session Laws 1995 (Regular Session, 1996), c. 626, s. 13, effective January 1, 1997.

**Editor's Note.** — Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 13, provides in part: "A person certified under Part 9A of Article 21 of Chapter 143 of the General Statutes shall be certified as an animal waste management system operator by the Water Pollution Control System Operators Certification Commission without additional preexamination training, examination, or payment of an initial certification fee. A person certified under Part 9A of Article 21 of Chapter 143 of the General Statutes shall complete approved additional training and pay the annual renewal fee in order to maintain certification."

## Part 10. Stream Watch Program.

### § 143-215.74F. Program authorized.

The Department of Environment and Natural Resources may establish a Stream Watch Program to recognize and assist civic, environmental, educational, and other volunteer groups interested in good water resources management and protection. The goals of the Stream Watch Program are to encourage volunteer groups to adopt streams and other water bodies and to work toward their good management and protection; to increase public awareness of and involvement in water resources management; and to promote cooperative activities among volunteer groups, local government, industry, the Department of Environment and Natural Resources, and other agencies and entities for improved protection and management of water resources. (1989, c. 412, s. 1; c. 727, s. 218; 1997-443, s. 11A.119(a).)

### § 143-215.74G. Applications.

The Department may accept and approve applications to affiliate with the Stream Watch Program from volunteer groups willing to adopt a specific body of water and to conduct at least one project each year to promote the protection of the adopted body of water or to increase public understanding of water resources. (1989, c. 412, s. 1.)

### § 143-215.74H. Assistance.

The Department may provide technical, organizational, and financial assistance to stream watch groups from such resources as may be available to the Department. (1989, c. 412, s. 1.)

### § 143-215.74I. Projects.

The Department may encourage and assist stream watch groups to carry out projects for stream cleanup and restoration, stream surveillance and water quality monitoring, public education, the establishment of trails and greenways, recreational use of water bodies, and other activities in furtherance of the goals of the Stream Watch Program. (1989, c. 412, s. 1.)

### § 143-215.74J. throuhg 143-215.74L.

Reserved for future codification purposes.

## Part 11. Community Conservation Assistance Program.

### § 143-215.74M. Community Conservation Assistance Program.

(a) Program Established. — There is established the Community Conservation Assistance Program. The Program shall be implemented and supervised by the Soil and Water Conservation Commission.

(b) Purposes. — The purpose of the Program shall be to reduce the input of nonpoint source pollution into the waters of the State. The Program shall be subject to the following requirements and limitations:

(1) Subject to subdivision (5) of this subsection, priority designations for inclusion in the Program for State funding shall be established by the Soil and Water Conservation Commission. The Soil and Water Conservation Commission shall allocate the cost share and technical assistance funds under the Program.

(2) Areas shall be included in the Program as the funds are appropriated and technical assistance becomes available from the local Soil and Water Conservation District.

(3) Funding may be provided to assist community conservation practices approved by the Soil and Water Conservation Commission.

(4) State funding shall be limited to seventy-five percent (75%) of the average cost for each practice with the assisted applicant providing twenty-five percent (25%) of the cost, which may include in-kind support of the practice, with a maximum of seventy-five thousand dollars ($75,000) per year to each applicant.

(5) Priority designation for inclusion in the Program for State funding shall be given to projects that improve water quality. To be eligible for cost-share funds under this subdivision, a project shall be evaluated before funding is awarded and after the project is completed to determine the impact on water quality.

(6) Participation in the Program shall be voluntary.

(c) Availability of Funds. — State funds for the Program shall remain available until expended.

(d) Advisory Committee. — The Program shall be reviewed, prior to implementation, by the Community Conservation Assistance Program Advisory Committee. The Advisory Committee shall meet quarterly to review the progress of the Program. The Advisory Committee shall consist of the following members:

(1) The Director of the Division of Soil and Water Conservation or the Director's designee, who shall serve as the Chair of the Advisory Committee.

(2) The President of the North Carolina Association of Soil and Water Conservation Districts or the President's designee.

(3) The Director of the Cooperative Extension Service at North Carolina State University or the Director's designee.

(4) The Executive Director of the North Carolina Association of County Commissioners or the Executive Director's designee.

(5) The Executive Director of the North Carolina League of Municipalities or the Executive Director's designee.

(6) The State Conservationist of the Natural Resources Conservation Service of the United States Department of Agriculture or the State Conservationist's designee.

(7) The Executive Director of the Wildlife Resources Commission or the Executive Director's designee.

(8) The President of the North Carolina Conservation District Employees Association or the President's designee.

(9) The President of the North Carolina Association of Resource Conservation and Development Councils or the President's designee.

(10) The Director of the Division of Water Quality or the Director's designee.

(11) The Director of the Division of Forest Resources or the Director's designee.

(12) The Director of the Division of Land Resources or the Director's designee.

(13) The Director of the Division of Coastal Management or the Director's designee.

(14) The Director of the Division of Water Resources or the Director's designee.

(15) The President of the Carolinas Land Improvement Contractors Association or the President's designee.

(e) Report. — The Soil and Water Conservation Commission shall report no later than 31 January of each year to the Environmental Review Commission and the Fiscal Research Division. The report shall include a summary of projects that received State funding pursuant to the Program, the results of the evaluation conducted pursuant to subdivision (5) of subsection (b) of this section, findings regarding the effectiveness of each project to accomplish its primary purpose, and any recommendations to assure that State funding is used in the most cost-effective manner and accomplishes the greatest improvement in water quality. (2006-78, s. 1.)

**Cross References.** — As to powers of districts and supervisors, see G.S. 139-8.

**Editor's Note.** — Session Laws 2006-78, s. 7, made this section effective July 10, 2006.

Session Laws 2006-78, s. 6, effective July 10, 2006, provides: "The first report required pursuant to G.S. 143-215.74M(e), as enacted by Section 1 of this act, is due on or before 31 January 2008."

## ARTICLE 21A.

## *Oil Pollution and Hazardous Substances Control.*

## Part 1. General Provisions.

### § 143-215.75. Title.

This Article shall be known and may be cited as the "Oil Pollution and Hazardous Substances Control Act of 1978." (1973, c. 534, s. 1; 1979, c. 535, s. 1.)

**Cross References.** — As to enforcement of environmental requirements in manufacturing redevelopment districts, see G.S. 66-343.

**Editor's Note.** — Session Laws 2007-107, s. 5.1(a), provides: "The Division of Information Technology Services of the Department of Environment and Natural Resources, in collaboration with the Division of Emergency Management of the Department of Crime Control and Public Safety, shall establish a Tier II Hazardous Chemicals Inventory Database and Web-based access application that will accept uploads of Tier II data from local government systems acting as partners in the project and from the University of Texas at Dallas E-Plan repository until all Tier II hazardous chemical inventory is in the database. The database shall include data on sites listed in the planned Toxic Release Inventory exchange and the Department's existing Facilities Registry System. The Facilities Registry System is a database of facilities for which the Department has environmental concerns, including facilities that are subject to an environmental permit for water, air, waste, land quality, wetlands, public water supply, wastewater treatment, and other environmental permits. The database shall be connected via Web services to the North Carolina Exchange Node. The purposes of this database are to provide a one-stop, real-time information source for all hazardous and toxic materials release sites and all sites that are subject to an environmental permit in order to enhance the operational effectiveness of the Department of Environment and Natural Resources, the Division of Emergency Management of the Department of Crime Control and Public Safety, first responders and emergency management officials, local government officials, and any others with a role in emergency management or planning; to remove the burden of data reentry in multiple systems; to reduce the dependence on paper submissions for Tier II reporting; to extend the Network for the Exchange Node community; and to reuse information already deployed at the Department. The Tier II Hazardous Chemicals Inventory Database and Web-based access application shall be maintained by the Division of Emergency Management of the Department of Crime Control and Public Safety."

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note, "Spillover from the Exxon Valdez: North Carolina's New Offshore Oil Spill Statute," see 68 N.C.L. Rev. 1214 (1990).

## CASE NOTES

**Action Against Sellers Where Land Found to Be Contaminated.** — This article, which imposes a cleanup obligation for unlawful discharges of oil or hazardous substances only on persons who have control over such substances immediately prior to a discharge, and thus would not threaten subsequent purchasers with liability, could not be used to create a claim for breach of provision, in contract for the sale of land subsequently found by purchasers to be contaminated with chemicals, that there be no government regulations preventing their enjoyment of the property. Cameron v. Martin Marietta Corp., 729 F. Supp. 1529 (E.D.N.C. 1990).

**Strict Liability Claim Not Preempted.** — Developer's strict liability claim based on migration of methane gases from city landfill based on the North Carolina Oil Pollution and Hazardous Substances Control Act of 1978 was not preempted by the inverse condemnation provision (G.S. 40A-51). Ashley Park Charlotte Assocs. v. City of Charlotte, 827 F. Supp. 1223 (W.D.N.C. 1993).

**Summary judgment based on statute of limitations was inappropriate** on claims brought in 1988 under the Oil Pollution and Hazardous Substances Control Act (G.S. 143-215.75 et seq.) and for negligence, premised on contamination of well water with gasoline, where plaintiffs did not associate the bad taste in their well water with gasoline until 1986, several years after they stopped drinking it, and in that same year were officially informed that their water was contaminated with gasoline. James v. Clark, 118 N.C. App. 178, 454 S.E.2d 826 (1995).

**Discharge Not Shown.** — Plaintiff failed to prove that the defendants released a hazardous substance in sufficient quantities to constitute a discharge under the Oil Pollution and Hazardous Substances Control Act of 1978. Rudd v. Electrolux Corp., 982 F. Supp. 355 (M.D.N.C. 1997).

**Common Law Not Abrogated.** — The enactment of various environmental statutes has not abrogated common law protection of property encompassed by actions for negligence, trespass, or nuisance. Rudd v. Electrolux Corp., 982 F. Supp. 355 (M.D.N.C. 1997).

**Cited** in State Props., LLC v. Ray, 155 N.C. App. 65, 574 S.E.2d 180, 2002 N.C. App. LEXIS 1701 (2002).

## OPINIONS OF ATTORNEY GENERAL

**Dumping Waste Is Prohibited Within Three Miles of Seashore.** — North Carolina General Statutes specifically prohibit the dumping of waste materials such as bags of medical refuse and other forms of ocean dumping or the introduction of other pollutants in coastal waters if the waste materials are dumped within three miles of the Atlantic seashore. See opinion of the Attorney General to Lieutenant Governor Robert B. Jordan, III, 58 N.C.A.G. 57 (Aug. 24, 1988).

## § 143-215.76. Purpose.

It is the purpose of this Article to promote the health, safety, and welfare of the citizens of this State by protecting the land and the waters over which this State has jurisdiction from pollution by oil, oil products, oil by-products, and other hazardous substances. It is not the intention of this Article to exercise jurisdiction over any matter as to which the United States government has exclusive jurisdiction, nor in any wise contrary to any governing provision of federal law, and no provision of this Article shall be so construed. The General Assembly further declares that it is the intent of this Article to support and complement applicable provisions of the Federal Water Pollution Control Act, as amended, 33 U.S.C. section 1251 et seq., as amended, and the National Contingency Plan for removal of oil adopted pursuant thereto. (1973, c. 534, s. 1; 1979, c. 535, s. 2.)

### CASE NOTES

**Cited** in Ashley Park Charlotte Assocs. v. City of Charlotte, 827 F. Supp. 1223 (W.D.N.C. 1993); Jordan v. Foust Oil Co., 116 N.C. App. 155, 447 S.E.2d 491 (1994).

## § 143-215.77. Definitions.

As used in this Article, unless the context otherwise requires:

(1) "Barrel" shall mean 42 U.S. gallons at 60 degrees Fahrenheit.

(2) "Commission" means the North Carolina Environmental Management Commission.

(3) "Secretary" shall mean the North Carolina Secretary of Environment and Natural Resources.

(4) "Discharge" shall mean, but shall not be limited to, any emission, spillage, leakage, pumping, pouring, emptying, or dumping of oil or other hazardous substances into waters of the State or into waters outside the territorial limits of the State which affect lands, waters or uses related thereto within the territorial limits of the State, or upon land in such proximity to waters that oil or other hazardous substances is reasonably likely to reach the waters, but shall not include amounts less than quantities which may be harmful to the public health or welfare as determined pursuant to G.S. 143-215.77A; provided, however, that this Article shall not be construed to prohibit the oiling of driveways, roads or streets for reduction of dust or routine maintenance; provided further, that the use of oil or other hazardous substances, oil-based products, or chemicals on the land or waters by any State, county, or municipal government agency in any program of mosquito or other pest control, or their use by any person in accepted agricultural, horticultural, or forestry practices, or in connection with aquatic weed control or structural pest and rodent control, in a manner approved by the State, county, or local agency charged with authority over such uses, shall not constitute a discharge; provided, further, that the use of a pesticide regulated by the North Carolina Pesticide Board in a manner consistent with the labelling required by the North Carolina Pesticide Law shall not constitute a "discharge" for purposes of this Article. The word "discharge" shall also include any discharge upon land, whether or not in proximity to waters, which is intentional, knowing or willful.

(5) "Having control over oil or other hazardous substances" shall mean, but shall not be limited to, any person, using, transferring, storing, or transporting oil or other hazardous substances immediately prior to a discharge of such oil or other hazardous substances onto the land or into the waters of the State, and specifically shall include carriers and bailees of such oil or other hazardous substances. This definition shall not include any person supplying or delivering oil into a petroleum underground storage tank that is not owned or operated by the person, unless:

a. The person knows or has reason to know that a discharge is occurring from the petroleum underground storage tank at the time of supply or delivery;
b. The person's negligence is a proximate cause of the discharge; or
c. The person supplies or delivers oil at a facility that requires an operating permit under G.S. 143-215.94U and a currently valid operating permit certificate is not held or displayed at the time of the supply or delivery.

(5a) "Hazardous substance" shall mean any substance, other than oil, which when discharged in any quantity may present an imminent and substantial danger to the public health or welfare, as designated pursuant to G.S. 143-215.77A.

(6) Repealed by Session Laws 1979, c. 981, s. 5.

(7) "Department" shall mean the Department of Environment and Natural Resources.

(8) "Oil" shall mean oil of any kind and in any form, including, but specifically not limited to, petroleum, crude oil, diesel oil, fuel oil, gasoline, lubrication oil, oil refuse, oil mixed with other waste, oil sludge, petroleum related products or by-products, and all other liquid hydrocarbons, regardless of specific gravity, whether singly or in combination with other substances.

(9) "Bailee" shall mean any person who accepts oil or other hazardous substances to hold in trust for another for a special purpose and for a limited period of time.

(10) "Carrier" shall mean any person who engages in the transportation of oil or other hazardous substances for compensation.

(11) "Oil terminal facility" shall mean any facility of any kind and related appurtenances located in, on or under the surface of any land, or water, including submerged lands, which is used or capable of being used for the purpose of transferring, transporting, storing, processing, or refining oil; but shall not include any facility having a storage capacity of less than 500 barrels, nor any retail gasoline dispensing operation serving the motoring public. A vessel shall be considered an oil terminal facility only in the event that it is utilized to transfer oil from another vessel to an oil terminal facility; or to transfer oil between one oil terminal facility and another oil terminal facility; or is used to store oil.

(12) "Operator" shall mean any person owning or operating an oil terminal facility or pipeline, whether by lease, contract, or any other form of agreement.

(13) "Person" shall mean any and all natural persons, firms, partnerships, associations, public or private institutions, municipalities or political subdivisions, governmental agencies, or private or public corporations organized or existing under the laws of this State or any other state or country.

(14) "Pipeline" shall mean any conduit, pipe or system of pipes, and any appurtenances related thereto and used in conjunction therewith, used, or capable of being used, for transporting or transferring oil to, from, or between oil terminal facilities.

(15) "Restoration" or "restore" shall mean any activity or project undertaken in the public interest or to protect public interest or to protect public property or to promote the public health, safety or welfare for the purpose of restoring any lands or waters affected by an oil or other hazardous substances discharge as nearly as is possible or desirable to the condition which existed prior to the discharge.

(16) "Transfer" shall mean the transportation, on-loading or off-loading of oil or other hazardous substances between or among two or more oil

terminal facilities; between or among oil terminal facilities and vessels; and between or among two or more vessels.

(17) "Vessel" shall include every description of watercraft or other contrivance used, or capable of being used, as a means of transportation on water, whether self-propelled or otherwise, and shall include, but shall not be limited to, barges and tugs; provided that the term "vessel" as used herein shall not apply to any pleasure, sport or commercial fishing vessel which has a fuel capacity of less than 500 gallons and is not used to transport petroleum, petroleum products, or general cargo.

(18) "Waters" shall mean any stream, river, creek, brook, run, canal, swamp, lake, sound, tidal estuary, bay, reservoir, waterway, wetlands, or any other body or accumulation of water, surface or underground, public or private, natural or artificial, which is contained within, flows through, or borders upon this State, or any portion thereof, including those portions of the Atlantic Ocean over which this State has jurisdiction. (1973, c. 534, s. 1; c. 1262, s. 23; 1977, c. 771, s. 4; 1979, c. 535, ss. 3-10; c. 981, ss. 3-5; 1979, 2nd Sess., c. 1209, ss. 1, 2; 1987, c. 827, s. 155; 1989, c. 656, s. 1; c. 727, s. 218(111); 1995, c. 377, s. 12; 1997-443, s. 11A.119(a).)

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

## CASE NOTES

**Statutory "control over" oil is not necessarily coextensive with physical control or possession of oil** or ownership of oil at the time of its discharge, and since carriers and bailees are expressly included in the definition of "having control over," one need not have an ownership interest in oil to "have control over" it. Jordan v. Foust Oil Co., 116 N.C. App. 155, 447 S.E.2d 491 (1994), cert. denied, 339 N.C. 613, 454 S.E.2d 252 (1995).

**Discharge Not Shown.** — Plaintiff failed to prove that the defendants released a hazardous substance in sufficient quantities to constitute a discharge under the Oil Pollution and Hazardous Substances Control Act of 1978. Rudd v. Electrolux Corp., 982 F. Supp. 355 (M.D.N.C. 1997).

**Control Not Shown.** — Trial court properly granted a city's motion for summary judgment regarding administrators' claim that it violated G.S. ch. 143 because the city obtained an easement across certain property to construct and maintain a waterline that connected its water system to another city's water system, and at no time was the city using, transferring, storing, or transporting oil or other hazardous substances through its easement. Michael v. Huffman Oil Co., 190 N.C. App. 256, 661 S.E.2d 1, 2008 N.C. App. LEXIS 823 (2008).

**Cited** in Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990); Cameron v. Martin Marietta Corp., 729 F. Supp. 1529 (E.D.N.C. 1990); Carpenter v. Brewer Hendley Oil Co., 145 N.C. App. 493, 549 S.E.2d 886, 2001 N.C. App. LEXIS 653 (2001); Springer-Eubank Co. v. Four County Elec. Membership Corp., 142 N.C. App. 496, 543 S.E.2d 197, 2001 N.C. App. LEXIS 140 (2001).

**Applied** in Ellison v. Gambill Oil Co., 186 N.C. App. 167, 650 S.E.2d 819, 2007 N.C. App. LEXIS 2123 (2007).

## § 143-215.77A. Designation of hazardous substances and determination of quantities which may be harmful.

(a) Those substances designated as hazardous as of June 1, 1980, by the Administrator of the United States Environmental Protection Agency under 33 U.S.C. 1321(b)(2)(A) are designated as hazardous substances for purposes of this Article.

(b) Such quantities of hazardous substances as may be harmful as determined as of June 1, 1980, by the Administrator of the United States Environmental Protection Agency under 33 U.S.C. 1321(b)(4) are quantities which may be harmful for purposes of this Article.

(c) Changes by Administrator of the United States Environmental Protection Agency in the designation of hazardous substances and the determination of quantities which may be harmful shall be deemed to be made to the designation of hazardous substances and the determination of quantities for purposes of this Article, unless the Commission objects within 120 days of publication of the action in the Federal Register. The Commission may object to a change by the Administrator on the basis that the change is not consistent with the standards for determining hazardous substances or harmful quantities. Upon objection by the Commission to a change, the Commission shall initiate rule-making proceedings on the change. The change will not be made pending the hearing and a final determination by the Commission. After the hearing, the Commission may reject the change upon a finding that the change is not consistent with the standards for determining hazardous substances or harmful quantities. (1979, 2nd Sess., c. 1209, s. 3; 1987, c. 827, s. 190.)

### CASE NOTES

**Discharge Not Shown.** — Plaintiff failed to prove that the defendants released a hazardous substance in sufficient quantities to constitute a discharge under the Oil Pollution and Hazardous Substances Control Act of 1978. Rudd v. Electrolux Corp., 982 F. Supp. 355 (M.D.N.C. 1997).

## § 143-215.78. Oil pollution control program.

The Department shall establish an oil pollution control program for the administration of this Article. The Department may employ and prescribe the duties of employees assigned to this activity. (1973, c. 534, s. 1; c. 1262, s. 23; 1979, c. 535, s. 11.)

## § 143-215.79. Inspections and investigations; entry upon property.

The Commission, through its authorized representatives, is empowered to conduct such inspections and investigations as shall be reasonably necessary to determine compliance with the provisions of this Article; to determine the person or persons responsible for violation of this Article; to determine the nature and location of any oil or other hazardous substances discharged to the land or waters of this State; and to enforce the provisions of this Article. The authorized representatives of the Commission are empowered upon presentation of their credentials to enter upon any private or public property, including boarding any vessel, for the purpose of inspection or investigation or in order to conduct any project or activity to contain, collect, disperse or remove oil or other hazardous substances discharges or to perform any restoration necessitated by an oil or other hazardous substances discharge. Neither the State nor its agencies, employees or agents shall be liable in trespass or damages arising out of the conduct of any inspection, investigation, or oil or other hazardous substances removal or restoration project or activity other than liability for damage to property or injury to persons arising out of the negligent or willful conduct of an employee or agent of the State during the course of an inspection, investigation, project or activity. (1973, c. 534, s. 1; c. 1262, s. 23; 1979, c. 535, s. 12; 1987, c. 827, s. 154.)

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

## § 143-215.80. Confidential information.

Any information relating to a secret process, device or method of manufacturing or production discovered or obtained in the course of an inspection, investigation, project or activity conducted pursuant to this Article shall not be revealed except as may be required by law or lawful order or process. (1973, c. 534, s. 1.)

## § 143-215.81. Authority supplemental.

The authority and powers granted under this Article shall be in addition to, and not in derogation of, any authority or powers vested in the Commission under any other provision of law, except to the extent that such other powers or authority may conflict directly with the powers and authority granted under this Article. (1973, c. 534, s. 1; c. 1262, s. 23; 1987, c. 827, ss. 154, 191.)

## § 143-215.82. Local ordinances.

Nothing in the Article shall be construed to deny any county, municipality, sanitary district, metropolitan sewerage district or other authorized local governmental entity, by ordinance, regulation or law, from exercising police powers with reference to the prevention and control of oil or other hazardous substances discharges to sewers or disposal systems. (1973, c. 534, s. 1; 1979, c. 535, s. 13.)

## Part 2. Oil Discharge Controls.

## § 143-215.83. Discharges.

(a) Unlawful Discharges. — It shall be unlawful, except as otherwise provided in this Part, for any person to discharge, or cause to be discharged, oil or other hazardous substances into or upon any waters, tidal flats, beaches, or lands within this State, or into any sewer, surface water drain or other waters that drain into the waters of this State, regardless of the fault of the person having control over the oil or other hazardous substances, or regardless of whether the discharge was the result of intentional or negligent conduct, accident or other cause.

(b) Excepted Discharges. — This section shall not apply to discharges of oil or other hazardous substances in the following circumstances:

(1) When the discharge was authorized by an existing rule of the Commission.

(2) When any person subject to liability under this Article proves that a discharge was caused by any of the following:

  a. An act of God.
  b. An act of war or sabotage.
  c. Negligence on the part of the United States government or the State of North Carolina or its political subdivisions.
  d. An act or omission of a third party, whether any such act or omission was or was not negligent.
  e. Any act or omission by or at the direction of a law-enforcement officer or fireman.

(c) Permits. — Any person who desires or proposes to discharge oil or other hazardous substances onto the land or into the waters of this State shall first make application for and secure the permit required by G.S. 143-215.1. Application shall be made pursuant to the rules adopted by the Commission. Any permit granted pursuant to this subsection may contain such terms and conditions as the Commission shall deem necessary and appropriate to conserve and protect the land or waters of this State and the public interest therein. (1973, c. 534, s. 1; c. 1262, s. 23; 1979, c. 535, s. 14; 1987, c. 827, ss. 154, 192.)

### CASE NOTES

**Action Against Sellers Where Land Found to Be Contaminated.** — This article, which imposes a cleanup obligation for unlawful discharges of oil or hazardous substances only on persons who have control over such substances immediately prior to a discharge, and thus would not threaten subsequent purchasers with liability, could not be used to create a claim for breach of provision, in contract for the sale of land subsequently found by purchasers to be contaminated with chemicals, that there be no government regulations preventing their enjoyment of the property. Cameron v. Martin Marietta Corp., 729 F. Supp. 1529 (E.D.N.C. 1990).

**Refusal to Charge on Third Party Exception Was Error.** — Refusal to charge the jury on the G.S. 143-215.83(b)(2)(d) third party exception to the strict liability provisions of the North Carolina Oil Pollution and Hazardous Substances Control Act was error because there was sufficient evidence to allow a reasonable inference that the actions of a third party installer and repairer caused the gasoline discharge at issue; the exception applied to an act or omission of a third party, whether or not such was negligent, and thus an instruction to the third party's negligence did not correctly convey the exception. There was no precedent showing a duty to affirmatively plead the third-party exception. Ellison v. Gambill Oil Co., 186 N.C. App. 167, 650 S.E.2d 819, 2007 N.C. App. LEXIS 2123 (2007).

**Discharge Not Shown.** — Plaintiff failed to prove that the defendants released a hazardous substance in sufficient quantities to constitute a discharge under the Oil Pollution and Hazardous Substances Control Act of 1978. Rudd v. Electrolux Corp., 982 F. Supp. 355 (M.D.N.C. 1997).

**Applied** in Biddix v. Henredon Furn. Indus., Inc., 76 N.C. App. 30, 331 S.E.2d 717 (1985).

**Cited** in Jordan v. Foust Oil Co., 116 N.C. App. 155, 447 S.E.2d 491 (1994).

## § 143-215.84. Removal of prohibited discharges.

(a) Person Discharging. — Any person having control over oil or other hazardous substances discharged in violation of this Article shall immediately undertake to collect and remove the discharge and to restore the area affected by the discharge as nearly as may be to the condition existing prior to the discharge. If it is not feasible to collect and remove the discharge, the person responsible shall take all practicable actions to contain, treat and disperse the discharge; but no chemicals or other dispersants or treatment materials which will be detrimental to the environment or natural resources shall be used for such purposes unless they shall have been previously approved by the Commission. The owner of an underground storage tank who is the owner of the tank only because he is the owner of the land on which the underground storage tank is located, who did not know or have reason to know that the underground storage tank was located on his property, and who did not become the owner of the land as the result of a transfer or transfers to avoid liability for the underground storage tank shall not be deemed to be responsible for a release or discharge from the underground storage tank.

(a1) The Commission shall not require collection or removal of a discharge or restoration of an affected area under subsection (a) of this section if the person having control over oil or other hazardous substances discharged in violation of this Article complies with rules governing the collection and removal of a discharge and the restoration of an affected area adopted by the Commission pursuant to G.S. 143-214.1 or G.S. 143-215.94V. This subsection shall not be construed to affect the rights of any person under this Article or any other provision of law.

(b) Removal by Department. — Notwithstanding the requirements of subsection (a) of this section, the Department is authorized and empowered to utilize any staff, equipment and materials under its control or supplied by other cooperating State or local agencies and to contract with any agent or contractor that it deems appropriate to take such actions as are necessary to collect, investigate, perform surveillance over, remove, contain, treat or disperse oil or other hazardous substances discharged onto the land or into the waters of the State and to perform any necessary restoration. The Secretary shall keep a record of all expenses incurred in carrying out any project or activity authorized under this section, including actual expenses incurred for services performed by the State's personnel and for use of the State's equipment and material. The authority granted by this subsection shall be limited to projects and activities that are designed to protect the public interest or public property, and shall be compatible with the National Contingency Plan established pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. section 1251 et seq.

(c), (d) Repealed by Session Laws 1989, c. 656, s. 2.

(e) Notification of Completed Removal of Prohibited Discharges. — The definitions set out in G.S. 130A-310.31(b) apply to this subsection. Any person may submit a written request to the Department for a determination that a discharge of oil or a hazardous substance in violation of this Article has been remediated to unrestricted use standards. A request for a determination that a discharge has been remediated to unrestricted use standards shall be accompanied by the fee required by G.S. 130A-310.39(a)(2). If the Department determines that the discharge has been remediated to unrestricted use standards, the Department shall issue a written notification that no further remediation of the discharge will be required. The notification shall state that no further remediation of the discharge will be required unless the Department later determines, based on new information or information not previously provided to the Department, that the discharge has not been remediated to unrestricted use standards or that the Department was provided with false or incomplete information. Under any of those circumstances, the Department may withdraw the notification and require responsible parties to remediate the discharge to unrestricted use standards.

(f) In order to reduce or eliminate the danger to public health or the environment posed by a discharge or release of oil or a hazardous substance, an owner, operator, or other responsible party may impose restrictions on the current or future use of the real property comprising any part of the site if the restrictions meet the requirements of this subsection. The restrictions must be agreed to by the owner of the real property, included in a remedial action plan for the site that has been approved by the Secretary, and implemented as a part of the remedial action program for the site. The Secretary may approve restrictions included in a remedial action plan in accordance with standards determined: (i) pursuant to rules for remediation of soil or groundwater contamination adopted by the Commission; (ii) with respect to the cleanup of a discharge or release from a petroleum underground storage tank, pursuant to rules adopted by the Commission pursuant to G.S. 143-215.94V; or (iii) as provided in G.S. 130A-310.3(d). Restrictions may apply to activities on, over, or under the land, including, but not limited to, use of groundwater, building, filling, grading, excavating, and mining. Any approved restriction shall be enforced by any owner, operator, or other party responsible for the oil or hazardous substance discharge site. Any land-use restriction may also be enforced by the Department through the remedies provided in this Article, Part 2 of Article 1 of Chapter 130A of the General Statutes, or by means of a civil action. The Department may enforce any land-use restriction without first having exhausted any available administrative remedies. A land-use restriction may also be enforced by any unit of local government having jurisdiction over any part of the site. A land-use restriction shall not be declared unenforceable due to lack of privity of estate or contract, due to lack of benefit to particular land, or due to lack of any property interest in particular land. Any person who owns or leases a property subject to a land-use restriction under this Part shall abide by the land-use restriction. (1973, c. 534, s. 1; c. 1262, s. 23; 1975, c. 885; 1977, c. 771, s. 4; 1979, c. 535, s. 15; 1987, c. 827, ss. 154, 193; 1989, c. 656, s. 2; 1991, c. 538, s. 14; 1995, c. 377, s. 13; 1997-357, s. 7; 1997-394, s. 4; 1997-456, s. 50; 2001-384, s. 11.)

**Editor's Note.** — Session Laws 1997-357, s. 8, provides: "This act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act. The Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] shall implement the provisions of this act from funds otherwise available or appropriated to the Department."

Regarding modification of the rights and obligations of an owner, operator, or a landowner to whom G.S. 143-215.94E(b1) applies and who is eligible to have costs paid or reimbursed under G.S. 143-215.94B, as governed by G.S. 143-215.94E, see the Editor's Note to Session Laws 2003-352, s. 10, at G.S. 143-215.94E.

Session Laws 2008-195, s. 7, effective August 8, 2008, and expiring September 1, 2014, established a pilot program to evaluate the use of site-specific standards for cleanup of discharges or releases of petroleum from underground storage tanks. See note at G.S. 143-215.94A, 143-215.94T and 143-215.94V.

**Legal Periodicals.** — For note on the Brownfields Property Reuse Act of 1997, see 78 N.C.L. Rev. 1015 (1998).

### CASE NOTES

**Action Against Sellers Where Land Found to Be Contaminated.** — This article, which imposes a cleanup obligation for unlawful discharges of oil or hazardous substances only on persons who have control over such substances immediately prior to a discharge, and thus would not threaten subsequent purchasers with liability, could not be used to create a claim for breach of provision, in contract for the sale of land subsequently found by purchasers to be contaminated with chemicals, that there be no government regulations preventing their enjoyment of the property. Cameron v. Martin Marietta Corp., 729 F. Supp. 1529 (E.D.N.C. 1990).

## § 143-215.85. Required notice.

(a) Except as provided in G.S. 143-215.94E(a1) and subsection (b) of this section, every person owning or having control over oil or other substances discharged in any circumstances other than pursuant to a rule adopted by the Commission, a regulation of the U. S. Environmental Protection Agency, or a permit required by G.S. 143-215.1 or the Federal Water Pollution Control Act, upon notice that such discharge has occurred, shall immediately notify the Department, or any of its agents or employees, of the nature, location and time of the discharge and of the measures which are being taken or are proposed to be taken to contain and remove the discharge. The agent or employee of the Department receiving the notification shall immediately notify the Secretary or such member or members of the permanent staff of the Department as the Secretary may designate. If the discharged substance of which the Department is notified is a pesticide regulated by the North Carolina Pesticide Board, the Department shall immediately inform the Chairman of the Pesticide Board. Removal operations under this Article of substances identified as pesticides defined in G.S. 143-460 shall be coordinated in accordance with the Pesticide Emergency Plan adopted by the North Carolina Pesticide Board; provided that, in instances where entry of such hazardous substances into waters of the State is imminent, the Department may take such actions as are necessary to physically contain or divert such substance so as to prevent entry into the surface waters.

(b) As used in this subsection, "petroleum" has the same meaning as in G.S. 143-215.94A. A person who owns or has control over petroleum that is discharged into the environment shall immediately take measures to collect and remove the discharge, report the discharge to the Department within 24 hours of the discharge, and begin to restore the area affected by the discharge in accordance with the requirements of this Article if the volume of the petroleum that is discharged is 25 gallons or more or if the petroleum causes a sheen on nearby surface water or if the petroleum is discharged at a distance of 100 feet or less from any surface water body. If the volume of petroleum that is discharged is less than 25 gallons, the petroleum does not cause a sheen on nearby surface water, and the petroleum is discharged at a distance of more than 100 feet from all surface water bodies, the person who owns or has control over the petroleum shall immediately take measures to collect and remove the discharge. If a discharge of less than 25 gallons of petroleum cannot be cleaned up within 24 hours of the discharge or if the discharge causes a sheen on nearby surface water, the person who owns or has control over the petroleum shall immediately notify the Department. (1973, c. 534, s. 1; c. 1262, s. 23; 1977, c. 771, s. 4; c. 858, s. 1; 1979, c. 535, ss. 16, 17; 1987, c. 827, ss. 154, 194; 2000-54, s. 1.)

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

### CASE NOTES

**Cited** in Jordan v. Foust Oil Co., 116 N.C. App. 155, 447 S.E.2d 491 (1994).

## § 143-215.85A. Recordation of oil or hazardous substance discharge sites.

(a) The owner of the real property on which a site is located that is subject to current or future use restrictions approved as provided in G.S. 143-215.84(f) shall submit to the Department a survey plat as required by this section within 180 days after the owner is notified to do so. The survey plat shall identify areas designated by the Department, shall be prepared and certified by a professional land surveyor, and shall be entitled "NOTICE OF OIL OR HAZARDOUS SUBSTANCE DISCHARGE SITE". Where an oil or hazardous substance discharge site is located on more than one parcel or tract of land, a composite map or plat showing all parcels or tracts may be recorded. The Notice shall include a legal description of the site that would be sufficient as a description in an instrument of conveyance, shall meet the requirements of G.S. 47-30 for maps and plats, and shall identify:

(1) The location and dimensions of the disposal areas and areas of potential environmental concern with respect to permanently surveyed benchmarks.

(2) The type, location, and quantity of oil or hazardous substances known to the owner of the site to exist on the site.

(3) Any restrictions approved by the Department on the current or future use of the site.

(b) After the Department approves and certifies the Notice, the owner of the site shall file the certified copy of the Notice in the register of deeds office in the county or counties in which the land is located within 15 days of the date on which the owner receives approval of the Notice from the Department.

(c) The register of deeds shall record the certified copy of the Notice and index it in the grantor index under the names of the owners of the lands.

(d) In the event that the owner of the site fails to submit and file the Notice required by this section within the time specified, the Secretary may prepare and file the Notice. The costs thereof may be recovered by the Secretary from any responsible party. In the event that an owner of a site who is not a responsible party submits and files the Notice required by this section, he may recover the reasonable costs thereof from any responsible party.

(e) When an oil or hazardous substance discharge site that is subject to current or future land-use restrictions under this section is sold, leased, conveyed, or transferred, the deed or other instrument of transfer shall contain in the description section, in no smaller type than that used in the body of the deed or instrument, a statement that the property has been used as an oil or hazardous substance discharge site and a reference by book and page to the recordation of the Notice.

(f) A Notice of Oil or Hazardous Substance Discharge Site filed pursuant to this section may, at the request of the owner of the land, be cancelled by the Secretary after the hazards have been eliminated. If requested in writing by the owner of the land and if the Secretary concurs with the request, the Secretary shall send to the register of deeds of each county where the Notice is recorded a statement that the hazards have been eliminated and request that the Notice be cancelled of record. The Secretary's statement shall contain the names of the owners of the land as shown in the Notice and reference the plat book and page where the Notice is recorded. The register of deeds shall record the Secretary's statement in the deed books and index it on the grantor index in the names of the owners of the land as shown in the Notice and on the grantee index in the name "Secretary of Environment and Natural Resources". The register of deeds shall make a marginal entry on the Notice showing the date of cancellation and the book and page where the Secretary's statement is recorded, and the register of deeds shall sign the entry. If a marginal entry is impracticable because of the method used to record maps and plats, the register of deeds shall not be required to make a marginal entry. (1997-394, s. 5; 1997-443, s. 11A.119(b); 1997-456, s. 55.6(a), (b).)

## § 143-215.86. Other State agencies and State-designated local agencies.

(a) Planning. — The State Emergency Response Commission shall be responsible for developing a program, including training, for the waters of the State, including offshore marine waters, to enable the State to respond to an emergency oil or other hazardous substances spillage. In carrying out its duties under this section, designated representatives of the State Emergency Response Commission, the Board of Transportation, the Wildlife Resources Commission, the Environmental Management Commission, the Division of Marine Fisheries, the Outer Continental Shelf Lands Office of the Department of Administration, and any other agency or agencies of the State which the State Emergency Response Commission shall deem necessary and appropriate, shall confer and establish plans and procedures for the assignment and utilization of personnel, equipment and material to be used in carrying out the purposes of this Part. Every State agency involved is authorized to adopt such rules as shall be necessary to effectuate the purposes of this section.

(b) Cooperative Effort. — The Board of Transportation, the North Carolina Wildlife Resources Commission, the Division of Marine Fisheries, and any other agency of this State and any local agency designated by the State shall cooperate with and lend assistance to the Commission by assigning to the Commission upon its request personnel, equipment, and material to be utilized in any project or activity related to the containment, collection, dispersal, or removal of oil or other hazardous substances discharged upon the land or discharged into waters affecting this State.

(c) Trucks. — The Secretary of Transportation may, after consultation with the Secretary of Environment and Natural Resources, purchase and equip a sufficient number of trucks designed to carry out the provisions of subsection (b) of this section. These trucks shall be maintained by the Department of Transportation and shall be strategically located at various locations throughout the State so as to furnish a ready response when word of an oil or other hazardous substances discharge has been received. The Secretary of Environment and Natural Resources or his designee will, after consultation, decide where the trucks are to be located.

(d) Rules. — The Secretary of Transportation and the Secretary of Environment and Natural Resources or their designees shall adopt rules for the placement of these trucks and shall determine the manner and way in which they are to be used. The Secretary of Environment and Natural Resources shall reimburse the Department of Transportation for expenses incurred by the Department of Transportation during cleanups as provided in G.S. 143-215.88.

(e) Accounts. — Every State agency or other State-designated local agency participating in the containment, collection, dispersal, or removal of an oil or other hazardous substances discharge or in restoration necessitated by such discharge, shall keep a record of all expenses incurred in carrying out any such project or activity including the actual services performed by the agency's personnel and the use of the agency's personnel and the use of the agency's equipment and material. A copy of all records shall be delivered to the Commission upon completion of the project or activity. (1973, c. 507, s. 5; c. 534, s. 1; c. 1262, s. 23; 1979, c. 535, ss. 18, 19; 1987, c. 827, ss. 154, 195; 1989, c. 656, s. 3; c. 727, ss. 164, 165; 1997-443, s. 11A.119(a).)

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

## § 143-215.87. Oil or Other Hazardous Substances Pollution Protection Fund.

There is hereby established under the control and direction of the Department an Oil or Other Hazardous Substances Pollution Protection Fund which shall be a nonlapsing, revolving fund consisting of any moneys appropriated for such purpose by the General Assembly or that shall be available to it from any other source. The moneys shall be used to defray the expenses of any project or program for the containment, collection, dispersal or removal of oil or other hazardous substances discharged to the land or waters of this State, or discharged into waters outside the territorial limits of the State which affect land and waters or related uses within the State; to assess damages for injury to, destruction of, or loss of use of natural resources; and to develop and implement plans for restoration, rehabilitation, replacement, or acquisition of the equivalent of the natural resources injured by the discharge. In addition to any moneys that shall be appropriated or otherwise made available to it, the fund shall be maintained by fees, charges, or other moneys except for the clear proceeds of civil penalties paid to or recovered by or on behalf of the Department under the provisions of this Part. Any moneys paid to or recovered by or on behalf of the Department as fees, charges, or other payments as damages authorized by this Part except for the clear proceeds of civil penalties shall be paid to the Oil or Other Hazardous Substances Pollution Protection

Fund in an amount equal to the sums expended from the fund for the project or activity.

The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1973, c. 534, s. 1; c. 1262, s. 23; 1979, c. 535, s. 20; 1989, c. 656, s. 4; 1993, c. 402, s. 10; 1998-215, s. 67(b).)

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note, "Spillover from the Exxon Valdez: North Carolina's New Offshore Oil Spill Statute," see 68 N.C.L. Rev. 1214 (1990).

## § 143-215.88. Payment to State agencies or State-designated local agencies.

Upon completion of any oil or other hazardous substances removal or restoration project or activity conducted pursuant to the provisions of this Part, each agency of the State or any State-designated local agency that has participated by furnishing personnel, equipment or material shall deliver to the Department a record of the expenses incurred by the agency. The amount of incurred expenses shall be disbursed by the Secretary to each such agency from the Oil or Other Hazardous Substances Pollution Protection Fund. Upon completion of any oil or other hazardous substances removal or restoration project or activity, the Secretary shall prepare a statement of all expenses and costs of the project or activity expended by the State and shall make demand for payment upon the person having control over the oil or other hazardous substances discharged to the land or waters of the State, unless the Commission shall determine that the discharge occurred due to any of the reasons stated in G.S. 143-215.83(b). Any person having control of oil or other hazardous substances discharged to the land or waters of the State in violation of the provisions of this Part and any other person causing or contributing to the discharge of oil or other hazardous substances shall be directly liable to the State for the necessary expenses of oil or other hazardous substances cleanup projects and activities arising from such discharge and the State shall have a cause of action to recover from any or all such persons. If the person having control over the oil or other hazardous substances discharged shall fail or refuse to pay the sum expended by the State, the Secretary shall refer the matter to the Attorney General of North Carolina, who shall institute an action in the name of the State in the Superior Court of Wake County, or in his discretion, in the superior court of the county in which the discharge occurred, to recover such cost and expenses. (1973, c. 534, s. 1; c. 1262, s. 23; 1977, c. 858, s. 2; 1979, c. 535, ss. 21, 22; 1987, c. 827, s. 154.)

## § 143-215.88A. Enforcement procedures: civil penalties.

(a) Any person who intentionally or negligently discharges oil or other hazardous substances, or knowingly causes or permits the discharge of oil in violation of this Part or fails to report a discharge as required by G.S. 143-215.85 or who fails to comply with the requirements of G.S. 143-215.84(a) or orders issued by the Commission as a result of violations thereof, shall incur, in addition to any other penalty provided by law, a penalty in an amount not to exceed five thousand dollars ($5,000) for every such violation, the amount to be determined by the Secretary after taking into consideration the factors set out in G.S. 143B-282.1(b), the amount expended by the violator in complying with the provisions of G.S. 143-215.84, and the estimated damages attributed to the violator under G.S. 143-215.90. Every act or omission which causes, aids or abets a violation of this subsection shall be considered a violation under the provisions of this subsection and subject to the penalty herein provided. The procedures set out in G.S. 143-215.6 and G.S. 143B-282.1 shall apply to civil penalties assessed under this section. The penalty herein provided for shall become due and payable when the person incurring the penalty receives a notice in writing from the Commission describing the violation with reasonable particularity and advising such person that the penalty is due. A person may contest a penalty by filing a petition for a contested case under G.S. 150B-23 within 30 days after receiving notice of the penalty. If any civil penalty has not been paid within 30 days after notice of assessment has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment, unless the violator contests the assessment as provided in this subsection, or requests remission of the assessment in whole or in part. If any civil penalty has not been paid within 30 days after the final agency decision or court order has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment. Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any person in any criminal case, except as prosecution for perjury or for giving a false statement.

(b) The civil penalties provided by this section, except the civil penalty for failure to report, shall not apply to the discharge of a pesticide regulated by the North Carolina Pesticide Board, if such discharge would constitute a violation of the North Carolina Pesticide Law and if such discharge has not entered the surface waters of the State.

(c) The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1973, c. 534, s. 1; 1973, c. 1262, s. 23; 1979, c. 535, ss. 25, 26; 1987, c. 270; c. 827, ss. 154, 197; 1989 (Reg. Sess., 1990), c. 1036, s. 6; c. 1045, s. 7; c. 1075, s. 8; 1998-215, s. 67(a).)

## § 143-215.88B. Enforcement procedures: criminal penalties.

(a) No proceeding shall be brought or continued under this section for or on account of a violation by any person who has previously been convicted of a federal violation based upon the same set of facts.

(b) In proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information. Consistent with the principles of common law, the subjective mental state of defendants may be inferred from their conduct.

(c) For the purposes of the felony provisions of this section, a person's state of mind shall not be found "knowingly and willfully" or "knowingly" if the conduct that is the subject of the prosecution is the result of any of the following occurrences or circumstances:

(1) A natural disaster or other act of God which could not have been prevented or avoided by the exercise of due care or foresight.

(2) An act of third parties other than agents, employees, contractors, or subcontractors of the defendant.

(3) An act done in reliance on the written advice or emergency on-site direction of an employee of the Department. In emergencies, oral advice may be relied upon if written confirmation is delivered to the employee as soon as practicable after receiving and relying on the advice.

(4) An act causing no significant harm to the environment or risk to the public health, safety, or welfare and done in compliance with other conflicting environmental requirements or other constraints imposed in writing by environmental agencies or officials after written notice is delivered to all relevant agencies that the conflict exists and will cause a violation of the identified standard.

(5) Violations of permit limitations causing no significant harm to the environment or risk to the public health, safety, or welfare for which no enforcement action or civil penalty could have been imposed under any written civil enforcement guidelines in use by the Department at the time, including but not limited to, guidelines for the pretreatment permit civil penalties. This subdivision shall not be construed to require the Department to develop or use written civil enforcement guidelines.

(d) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other criminal offenses under State criminal offenses may apply to prosecutions brought under this section or other criminal statutes that refer to this section and shall be determined by the courts of this State according to the principles of common law as they may be applied in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(e) Any person who knowingly and willfully discharges or causes or permits the discharge of oil or other hazardous substances in violation of this Part shall be guilty of a Class H felony which may include a fine to be not more than one hundred thousand dollars ($100,000) per day of violation, provided that this fine shall not exceed a cumulative total of five hundred thousand dollars ($500,000) for each period of 30 days during which a violation continues. For the purposes of this subsection, the phrase "knowingly and willfully" shall mean intentionally and consciously as the courts of this State, according to the principles of common law interpret the phrase in the light of reason and experience.

(f)(1) Any person who knowingly discharges or causes or permits the discharge of oil or other hazardous substances in violation of this Part, and who knows at that time that he places another person in imminent danger of death or serious bodily injury shall be guilty of a Class C felony which may include a fine not to exceed two hundred fifty thousand dollars ($250,000) per day of violation, provided that this fine shall not exceed a cumulative total of one million dollars ($1,000,000) for each period of 30 days during which a violation continues.

(2) For the purposes of this subsection, a person's state of mind is knowing with respect to:

a. His conduct, if he is aware of the nature of his conduct;

b. An existing circumstance, if he is aware or believes that the circumstance exists; or

c. A result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(3) Under this subsection, in determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury:

a. The person is responsible only for actual awareness or actual belief that he possessed; and

b. Knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant.

(4) It is an affirmative defense to a prosecution under this subsection that the conduct charged was conduct consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of an occupation, a business, or a profession; or of medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent. The defendant may establish an affirmative defense under this subdivision by a preponderance of the evidence.

(g) The criminal penalties provided by this section shall not apply to the discharge of a pesticide regulated by the North Carolina Pesticide Board, if such discharge would constitute a violation of the North Carolina Pesticide Law and if such discharge has not entered the surface waters of the State.

(h) Any person who knowingly and willfully makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Article or rules adopted under this Article; or who knowingly and willfully makes a false statement of a material fact in a rule-making proceeding or contested case under this Article; or who falsifies, tampers with, or knowingly and willfully renders inaccurate any recording or monitoring device or method required to be operated or maintained under this Article or rules adopted under this Article is guilty of a Class I felony, which may include a fine not to exceed one hundred thousand dollars ($100,000) per day of violation, provided that the fine shall not exceed a cumulative total of five hundred thousand dollars ($500,000) for each period of 30 days during which a violation continues. (1973, c. 534, s. 1; 1973, c. 1262, s. 23; 1979, c. 535, ss. 25, 26; 1987, c. 270; c. 827, ss. 154, 197; 1989 (Reg. Sess., 1990), c. 1045, s. 8; 1993, c. 539, ss. 1316, 1317; 1994, Ex. Sess., c. 24, s. 14(c); 1997-394, s. 6.)

## § 143-215.89. Multiple liability for necessary expenses.

Any person liable for costs of cleanup of oil or other hazardous substances under this Part shall have a cause of action to recover such costs in part or in whole from any other person causing or contributing to the discharge of oil or other hazardous substances into the waters of the State, including any amount recoverable by the State as necessary expenses. The total recovery by the State for damage to the public resources pursuant to G.S. 143-215.90 and for the cost of oil or other hazardous substances cleanup, arising from any discharge, shall not exceed the applicable limits prescribed by federal law with respect to the United States government on account of such discharge. (1973, c. 534, s. 1; 1979, c. 535, s. 23; 1989 (Reg. Sess., 1990), c. 1045, s. 12.)

## § 143-215.90. Liability for damage to public resources.

(a) Any person who discharges oil or other hazardous substances in violation of this Article or violates any order, or rule of the Commission adopted pursuant to this Article, or fails to perform any duty imposed by this Article, or violates an order or other determination of the Commission made pursuant to the provisions of this Article, including the provisions of a discharge permit issued pursuant to G.S. 143-215.1, and in the course thereof causes the death of, or injury to fish, animals, vegetation or other resources of the State or otherwise causes a reduction in the quality of the waters of the State below the standards set by the Commission, shall be liable to pay the State damages. Such damages shall be an amount equal to the cost of all reasonable and necessary investigations made or caused to be made by the Commission in connection with such violation and the sum of money necessary to restock such waters, replenish such resources, or otherwise restore the rivers, streams, bays, tidal flats, beaches, estuaries or coastal waters and public lands adjoining the seacoast to their condition prior to the injury as such condition is determined by the Commission in conference with the Wildlife Resources Commission, and any other State agencies having an interest affected by such violation (or by the designees of any such boards, commissions, and agencies).

(b) Upon receipt of the estimate of damages caused, the Department shall give written notice by registered or certified mail to the person responsible for the death, killing, or injury to fish, animals, vegetation, or other resources of the State, or any reduction in quality of the waters of the State, describing the damages and their causes with reasonable specificity, and shall request payment from such person. Damages shall become due and payable upon receipt of such notice. A person may contest an assessment of damages by filing a petition for a contested case under G.S. 150B-23 within 30 days after receiving notice of the damages. In a contested case hearing, the estimate of the replacement cost of fish or animals or vegetation destroyed, and the estimate of costs of replacing or restoring other resources of the State, and the estimate of the cost of restoring the quality of waters of the State shall be prima facie evidence of the actual replacement of cost of fish, animals, vegetation or other resources of the State, and of the actual cost of restoring the quality of the waters of the State; provided, that such evidence is rebuttable. In arriving at such estimate, any reasonably accurate method may be used and it shall not be necessary for any agent of the Department or Wildlife Resources Commission to collect, handle, or weigh numerous specimens of dead or injured fish, animals, vegetation or other resources of the State, or to calculate the costs of restoring the quality of the waters using any technology other than that which is existing and practicable, as found to be such by the Secretary. Provided, that the Department may effect such mitigation of the amount of damages as the Commission may deem proper and reasonable. If a person fails to pay damages assessed against him, the Commission shall refer the matter to the Attorney General for collection. Any money recovered by the Attorney General or by payment of damages by the person charged therewith by the Department shall be transferred by the Commission to appropriate funds administered by the State agencies affected by the violation for use in such activities as food fish or shellfish management programs, wildlife and waterfowl management programs, water quality improvement programs and such other uses as may best mitigate the damage incurred as a result of the violation. No action shall be authorized under the provisions of this section against any person operating in compliance with the conditions of a waste discharge permit issued pursuant to G.S. 143-215.1 and the provisions of this Part.

(c) For the purpose of carrying out its duties under this Article, the Commission shall have the power to direct the investigation of any death, killing, or injury to fish, animals, vegetation or other resources of the State, or any reduction in quality of the waters of the State, which in the opinion of the Commission is of sufficient magnitude to justify investigation. (1973, c. 534, s. 1; c. 1262, s. 23; 1979, c. 535, s. 24; 1987, c. 827, ss. 154, 196.)

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ **143-215.91:** Recodified as G.S. 143-215.88A, 143-215.88B.

## § 143-215.91A. Limited liability for volunteers in oil and hazardous substance abatement.

Part 5 of this Article shall apply to the determination of civil liability or penalty pursuant to this Article. (1987, c. 269, s. 3.)

## § 143-215.92. Lien on vessel.

Any vessel (other than one owned or operated by the State of North Carolina or its political subdivisions or the United States government) from which oil or other hazardous substances is discharged in violation of this Part or any rule prescribed pursuant thereto, shall be liable for the pecuniary penalty and costs of oil or other hazardous substances removal specified in this Part and such penalty and costs shall constitute a lien on such vessel; provided, however, that said lien shall not attach if a surety bond is posted with the Commission in an amount and with sureties acceptable to the Commission, or a cash deposit is made with the Commission in an amount acceptable to the Commission. Provided further, that such lien shall not have priority over any existing perfected lien or security interest. The Commission may adopt rules providing for such conditions, limitations, and requirements concerning the bond or deposit prescribed by this section as the Commission deems necessary. (1973, c. 534, s. 1; c. 1262, s. 23; 1979, c. 535, s. 27; 1987, c. 827, ss. 154, 198.)

## § 143-215.93. Liability for damage caused.

Any person having control over oil or other hazardous substances which enters the waters of the State in violation of this Part shall be strictly liable, without regard to fault, for damages to persons or property, public or private, caused by such entry, subject to the exceptions enumerated in G.S. 143-215.83(b). (1973, c. 534, s. 1; 1979, c. 535, s. 28.)

### CASE NOTES

**Statutory "control over" oil is not necessarily coextensive with physical control or possession of oil** or ownership of oil at the time of its discharge, and since carriers and bailees are expressly included in the definition of "having control over," one need not have an ownership interest in oil to "have control over" it. Jordan v. Foust Oil Co., 116 N.C. App. 155, 447 S.E.2d 491 (1994), cert. denied, 339 N.C. 613, 454 S.E.2d 252 (1995).

**Liability Shown.** — Because defendant delivered gasoline several times into tanks it knew or should have known were leaking, these acts tended to show some legal responsibility on defendant's part for the unauthorized seepage and supported the claim of trespass, even though defendants did not own the land or the underground, storage tanks. Jordan v. Foust Oil Co., 116 N.C. App. 155, 447 S.E.2d 491 (1994), cert. denied, 339 N.C. 613, 454 S.E.2d 252 (1995).

**Liability Not Shown.** — Appellants failed to show that the potential sources of contamination from defendant's property caused them damage such that strict liability under the Oil Pollution and Hazardous Substances Control Act did not obtain. Ammons v. Wysong & Miles Co., 110 N.C. App. 739, 431 S.E.2d 524, cert. denied, 334 N.C. 619, 435 S.E.2d 332 (1993).

To establish a claim for damages caused by the contamination of well water, a plaintiff must offer more than evidence of the contamination of their water and a release of contaminants in the area. Ellington v. Hester, 127 N.C. App. 172, 487 S.E.2d 843, cert. denied, 347 N.C. 397, 494 S.E.2d 409 (1997).

Where plaintiffs alleged that defendants were liable for contamination of wells, defendants were entitled to summary judgment as to the personal injury claims because (1) causes of action for increased risk of serious disease, invasion of personal autonomy, and instilling of fear of cancer or other deadly disease were not recognized, and (2) plaintiffs produced no evidence that any plaintiff suffered from or was diagnosed with or treated for a severe and disabling emotional or mental condition. Curl v. Am. Multimedia, Inc., 187 N.C. App. 649, 654 S.E.2d 76, 2007 N.C. App. LEXIS 2558 (2007).

**Summary Judgment Upheld.** — In case involving gasoline contamination of plaintiffs' wells, where the major oil loss was in 1978, trial court properly entered summary judgment in favor of defendant and her husband, who owned the property between Jan. 1962 and Jan. 1976 and had discontinued the sale of gasoline nearly four years before the major spill occurred, and in favor of defendant oil company, which last delivered gasoline to the property in 1974. Wilson v. McLeod Oil Co., 95 N.C. App. 479, 383 S.E.2d 392, appeal of right allowed pursuant to Rule 16(b) and petition allowed as to additional issues, 325 N.C. 714, 388 S.E.2d 473 (1989), rev'd on other grounds,, rehearing denied,.

Trial court properly granted a city's motion for summary judgment regarding administrators' claim that it violated G.S. ch. 143 because the city obtained an easement across certain property to construct and maintain a waterline that connected its water system to another city's water system, and at no time was the city using, transferring, storing, or transporting oil or other hazardous substances through its easement. Michael v. Huffman Oil Co., 190 N.C. App. 256, 661 S.E.2d 1, 2008 N.C. App. LEXIS 823 (2008).

**Evidence Sufficient to Withstand Summary Judgment.** — In case involving gasoline contamination of plaintiffs' wells, plaintiff produced sufficient evidence to withstand defendants' summary judgment, where plaintiff introduced evidence which tended to show that defendants' property was a potential source of contamination of plaintiffs' wells and that defendants either owned the property during the period of contamination or provided gasoline to the site. Wilson v. McLeod Oil Co., 95 N.C. App. 479, 383 S.E.2d 392, appeal of right allowed pursuant to Rule 16(b) and petition allowed as to additional issues, 325 N.C. 714, 388 S.E.2d 473 (1989).

**Cause of Action Barred by Statute of Limitations.** — The three-year statute of limitations found in G.S. 1-52(2) barred an action brought under this Article, where plaintiff waited longer than three years after discovering the contamination to file the action. Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), cert. denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

**Failure to Instruct on Third Party Exception Was Error.** — Refusal to charge the jury on the G.S. 143-215.83(b)(2)(d) third party exception to the strict liability provisions of the North Carolina Oil Pollution and Hazardous Substances Control Act was error because there was sufficient evidence to allow a reasonable inference that the actions of a third party installer and repairer caused the gasoline discharge at issue; the exception applied to an act or omission of a third party, whether or not such was negligent, and thus an instruction to the third party's negligence did not correctly convey the exception. There was no precedent showing a duty to affirmatively plead the third-party exception. Ellison v. Gambill Oil Co., 186 N.C. App. 167, 650 S.E.2d 819, 2007 N.C. App. LEXIS 2123 (2007).

**Applied** in Biddix v. Henredon Furn. Indus., Inc., 76 N.C. App. 30, 331 S.E.2d 717 (1985).

**Cited** in Ashley Park Charlotte Assocs. v. City of Charlotte, 827 F. Supp. 1223 (W.D.N.C. 1993).

## § 143-215.93A. Limitation on liability of persons engaged in removal of oil discharges.

(a) Except as provided in subsection (b) of this section, a person is not liable under this Part, Part 2C of this Article, Articles 21 and 21B of this Chapter, other provisions of the General Statutes relating to protection of the environment or public health, Chapter 1B of the General Statutes, or common law causes of action in tort for removal costs or damages which result from, arise out of, or are related to the discharge or threatened discharge of oil, when such removal costs or damages result from acts or omissions in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the President of the United States, the Federal On-Scene Coordinator, the Governor, the Secretary, the Secretary of Crime Control and Public Safety, or any person designated to direct oil discharge removal activities by the President of the United States, the Governor, the Secretary, or the Secretary of Crime Control and Public Safety.

(b) The limitation on liability under subsection (a) of this section does not apply:

(1) To a responsible party;

(2) To a response under CERCLA/SARA or under Part 4 of Article 9 of Chapter 130A of the General Statutes;

(3) To a response under Part 3 of Article 9 of Chapter 130A of the General Statutes;

(4) To a cleanup under Part 2A of this Article;
(5) With respect to personal injury or wrongful death; or
(6) If the person is grossly negligent or engages in willful misconduct.

(c) A responsible party is liable for any removal costs and damages that another person is relieved of under this section.

(d) Nothing in this section affects the obligation of an owner or operator to respond immediately to a discharge, or the threat of a discharge, of oil.

(e) As used in this section:

(1) "CERCLA/SARA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, 42 U.S.C. § 9601 et seq., as amended, and the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, as amended.
(2) "Damages" has the same meaning as in the Oil Pollution Act of 1990, 33 U.S.C. § 2701, and G.S. 143-215.94BB.
(3) "Federal On-Scene Coordinator" means a person designated as such in the National Contingency Plan.
(4) "National Contingency Plan" has the same meaning as in 33 U.S.C. § 1321, as amended.
(5) "Oil Pollution Act of 1990" means the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484, which appears generally as 33 U.S.C. § 2701 et seq., as amended.
(6) "Remove" or "removal" has the same meaning as in the Oil Pollution Act of 1990, 33 U.S.C. § 2701.
(7) "Removal costs" has the same meaning as in the Oil Pollution Act of 1990, 33 U.S.C. § 2701.
(8) "Responsible party" means a person who is a "responsible party" as defined in the Oil Pollution Act of 1990, 33 U.S.C. § 2701, and who is liable for removal costs or damages which result from, arise out of, or are related to the discharge or threatened discharge of oil. (1991, c. 432, s. 1.)

## § 143-215.94. Joint and several liability.

In order to provide maximum protection for the public interest, any actions brought pursuant to G.S. 143-215.88 through 143-215.91(a), 143-215.93 or any other section of this Article, for recovery of cleanup costs or for civil penalties or for damages, may be brought against any one or more of the persons having control over the oil or other hazardous substances or causing or contributing to the discharge of oil or other hazardous substances. All said persons shall be jointly and severally liable, but ultimate liability as between the parties may be determined by common-law principles. (1973, c. 534, s. 1; 1977, c. 858, s. 3; 1979, c. 535, s. 29.)

**Legal Periodicals.** — For note, "Underground Storage Tanks: A Lawyer's Guide to Recent Federal and North Carolina Legislation," see 12 Campbell L. Rev. 447 (1990).

### CASE NOTES

**Applied** in Wilson v. McLeod Oil Co., 95 N.C. App. 479, 383 S.E.2d 392 (1989), rev'd on other grounds, Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990); Carpenter v. Brewer Hendley Oil Co., 145 N.C. App. 493, 549 S.E.2d 886, 2001 N.C. App. LEXIS 653 (2001).

## Part 2A. Leaking Petroleum Underground Storage Tank Cleanup.

### § 143-215.94A. Definitions.

Unless a different meaning is required by the context, the following definitions shall apply throughout this Part and Part 2B of this Article:

(1a) "Affiliate" has the same meaning as in 17 Code of Federal Regulations § 240.12(b)-2 (1 April 1994 Edition), which defines "affiliate" as a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control of another person.

(1b) "Commercial Fund" means the Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund established pursuant to this Part.

(2) "Commercial underground storage tank" means any one or combination of tanks (including underground pipes connected thereto) used to contain an accumulation of petroleum products, the volume of which (including the volume of the underground pipes connected thereto) is ten percent (10%) or more beneath the surface of the ground. The term "commercial underground storage tank" does not include any:

a. Farm or residential underground storage tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes;

b. Underground storage tank of 1,100 gallons or less capacity used for storing heating oil for consumptive use on the premises where stored;

c. Underground storage tank of more than 1,100 gallon capacity used for storing heating oil for consumptive use on the premises where stored by four or fewer households;

d. Septic tank;

e. Pipeline facility (including gathering lines) regulated under:

1. The Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. § 1671 et seq.);
2. The Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. § 2001 et seq.); or
3. Any intrastate pipeline facility regulated under State laws comparable to the provisions of the Natural Gas Pipeline Safety Act of 1968 or the Hazardous Liquid Pipeline Safety Act of 1979;

f. Surface impoundment, pit, pond, or lagoon;

g. Storm water or waste water collection system;

h. Flow-through process tank;

i. Liquid trap or associated gathering lines directly related to oil or gas production and gathering operations; or

j. Storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.

(2a) "Cost-effective cleanup" means the cleanup method that meets all of the following criteria:

a. Addresses imminent threats to human health or the environment.

b. Provides for the cleanup or removal of all contaminated soil except in circumstances where it is impractical to remove contaminated soil.

c. Is approved by the Commission for remediation of the site.

d. Is the least expensive cleanup based on total cost, including costs not eligible for reimbursement from the Commercial Fund or the Noncommercial Fund.

(3) "Council" means the North Carolina Petroleum Underground Storage Tank Funds Council.

(3a) "Facility" means an underground storage tank, or two or more underground storage tanks located in close proximity to each other and having the same owner or operator, that are located on a single tract of land or on contiguous tracts of land that are owned or controlled by the same person. As used in this subdivision, the terms "owner", "operator", and "person" include any affiliate, parent, and subsidiary of the owner, operator, or person, respectively. The owner or person having control of the land on which an underground storage tank is located, or on which two or more underground storage tanks are located, need not be the owner or operator of the underground storage tank or underground storage tanks. The term "facility", as defined in this subdivision, does not apply to a "pipeline facility", as that phrase is used in subdivisions (2) and (7) of this section.

(4) "Heating oil" means petroleum that is No. 1, No. 2, No. 4-light, No. 4-heavy, No. 5-light, No. 5-heavy, or No. 6 technical grades of fuel oil; other residual fuel oils, including Navy Special Fuel Oil and Bunker C; and other fuels when used as substitutes for one of these fuel oils for the purpose of heating.

(5) "Loan Fund" means the Groundwater Protection Loan Fund.

(6) "Noncommercial Fund" means the Noncommercial Leaking Petroleum Underground Storage Tank Cleanup Fund established pursuant to this Part.

(7) "Noncommercial underground storage tank" means any one or combination of tanks (including underground pipes connected thereto) used to contain an accumulation of petroleum products, the volume of which (including the volume of the underground pipes connected thereto) is ten percent (10%) or more beneath the surface of the ground. The term "noncommercial storage tank" does not include any:

a. Commercial underground storage tanks;
b. Septic tank;
c. Pipeline facility (including gathering lines) regulated under:
  1. The Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. § 1671 et seq.);
  2. The Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. § 2001 et seq.); or
  3. Any intrastate pipeline facility regulated under State laws comparable to the provisions of the Natural Gas Pipeline Safety Act of 1968 or the Hazardous Liquid Pipeline Safety Act of 1979;
d. Surface impoundment, pit, pond, or lagoon;
e. Storm water or waste water collection system;
f. Flow-through process tank;
g. Liquid trap or associated gathering lines directly related to oil or gas production and gathering operations; or
h. Storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.

(8) "Operator" means any person in control of, or having responsibility for, the operation of an underground storage tank.

(9) "Owner" means:

a. In the case of an underground storage tank in use on 8 November 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or dispensing of petroleum products; and

b. In the case of an underground storage tank in use before 8 November 1984, but no longer in use on or after that date, any person who owned such tank immediately before the discontinuation of its use.

(9a) "Parent" has the same meaning as in 17 Code of Federal Regulations § 240.12(b)-2 (1 April 1994 Edition), which defines "parent" as an affiliate that directly, or indirectly through one or more intermediaries, controls another person.

(10) "Petroleum" or "petroleum product" means crude oil or any fraction thereof which is a liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute), including any such liquid which consists of a blend of petroleum and alcohol and which is intended for use as a motor fuel. The terms "petroleum" and "petroleum product" do not include any hazardous substance as defined in Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, 42 U.S.C. § 9601(14) as amended; any substance regulated as a hazardous waste under Subtitle C of Title II of the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 90 Stat. 2806, 42 U.S.C. § 6921 et seq., as amended; or any mixture of petroleum or a petroleum product containing any such hazardous substance or hazardous waste in greater than de minimis quantities.

(11) "Subsidiary" has the same meaning as in 17 Code of Federal Regulations § 240.12(b)-2 (1 April 1994 Edition), which defines "subsidiary" as an affiliate that is directly, or indirectly through one or more intermediaries, controlled by another person. (1987 (Reg. Sess., 1988), c. 1035, s. 1; 1989, c. 652, s. 3; 1991, c. 538, s. 1; 1995, c. 377, s. 4; 1997-456, s. 27; 2003-352, s. 1.)

**Cross References.** — As to imposition of land-use restrictions to reduce danger to public health at contaminated sites, see G.S. 143B-279.9.

**Pilot Program to Evaluate the Use of Site-Specific Cleanup Standards.** — Session Laws 2008-195, s. 7, effective August 8, 2008, and expiring September 1, 2014, provides: "(a) The definitions set out in G.S. 143-215.94A apply to this section. As used in this section, 'Department' means the Department of Environment and Natural Resources and, with respect to any power or duty assigned to the Environmental Management Commission under Article 21A of Chapter 143 of the General Statutes, includes the Environmental Management Commission. As used in this section, 'site-specific cleanup standards' means standards developed using the methodology described in the Standard Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites adopted by the American Society for Testing and Materials (ASTM) as E1739-95(2002).

"(b) The Department shall establish a pilot program to evaluate the use of site-specific cleanup standards for the cleanup of discharges or releases of petroleum from underground storage tanks as an alternative to the use of the risk-based assessment and corrective action standards set out in 15A NCAC 2L.0400. The purpose of the pilot program is to determine the extent to which the use of site-specific standards would provide effective protection of public health, safety, and the environment in a cost-effective manner and at a lower overall cost as compared with the use of the risk-based standards set out in 15A NCAC 2L.0400. The pilot program shall apply only to discharges or releases that are classified as intermediate risk under 15A NCAC 2L.0400(d). The pilot program shall evaluate the use of site-specific standards in the cleanup of contamination that results from a discharge or release of petroleum from: (i) an underground storage tank; and (ii) an underground storage tank that is commingled with petroleum contamination from a source of contamination other than an underground storage tank, as provided in G.S. 143-215.94V(h).

"(c) Participation in the pilot program shall be at the election of the owner, operator, or landowner. To participate in the pilot program, an owner, operator, or landowner shall perform a site-specific risk assessment and submit the assessment to the Department. If the Department determines that the use of site-specific cleanup standards will provide effective protection of public health, safety, and the environment, the Department shall set site-specific soil and groundwater cleanup standards for the discharge or release. These site-specific standards shall apply in lieu of the risk-based assessment and corrective action standards set out in 15A NCAC 2L.0400.

"(d) If soil and groundwater contamination from a discharge or release is no greater than the site-specific soil and groundwater cleanup standards set by the Department, the Department shall notify an owner, operator, or landowner that no cleanup, further cleanup, or further action will be required. If soil and groundwater contamination from a discharge or release is greater than the site-specific soil and groundwater cleanup standards set by the Department, the owner, operator, or landowner shall submit a corrective action plan to achieve the standards. The Department may require the owner, operator, or landowner to evaluate the impact of the site-specific cleanup standards on public health, safety, and the environment through use of an appropriate model. The Department shall not set site-specific soil and groundwater cleanup standards for the discharge or release that allow for contamination in excess of unrestricted use standards, as defined in G.S. 143B-279.9, on any real property that is not subject to land-use restrictions under G.S. 143B-279.9 and recordation under G.S. 143B-279.11.

"(e) Except as provided in this section, the provisions of Part 2A and Part 2B of Article 21A of Chapter 143 of the General Statutes apply to this section.

"(f) The Department shall annually report to the Environmental Review Commission on the number of site-specific risk assessments submitted to the Department under the pilot program, the disposition of those submissions, and, for any submissions for which site-specific soil and groundwater cleanup standards are not set, the basis for the decision not to set site-specific cleanup standards. The report shall include a comparison of assessment and corrective action of discharges or releases under the pilot program to assessment and corrective action of intermediate risk discharges or releases pursuant to the risk-based assessment and corrective action standards set out in 15A NCAC 2L.0400. The comparison shall include all of the following:

"(1) The costs associated with investigation, assessment, initial response, abatement, analysis of risk, and development and implementation of a corrective action plan.

"(2) The immediate and long-term impacts on public health, safety, and the environment.

"(3) The need for and use of land-use restrictions as part of the corrective action plan.

"(4) The extent to which corrective action addresses vapor intrusion.

"(g) The Department shall submit the first report required by subsection (f) of this section on or before 1 September 2009. The Department shall include in the report due on or before 1 September 2013 any recommendations, including legislative proposals, based on the findings of the pilot program."

**Reclassification of Site to Lower Risk Classification.** — Session Laws 2008-195, s. 8, effective August 8, 2008, and expiring September 1, 2014, provides: "(a) The definitions set out in subsection (a) of Section 7 of this act apply to this section. It is the policy of the State that a discharge or release be reclassified as low risk if, based on site-specific cleanup standards, investigation, assessment, initial response, abatement, risk-based corrective action, or other corrective action, the Department determines that the discharge or release poses no significant risk to human health or the environment. An owner, operator, or landowner may request that a discharge or release be reclassified to a lower risk classification. If the Department denies a request to reclassify a discharge or release to a lower risk classification, the owner, operator, or landowner may file a petition for a contested case hearing as provided in Article 3 of Chapter 150B of the General Statutes.

"(b) The Department shall report on or before 1 September of each year to the Environmental Review Commission on the number of sites for which reclassification was requested based on site-specific information and the disposition of each request. The Department shall submit the first report required by this section on or before 1 September 2009."

**Editor's Note.** — Subsections (0) and (1) were redesignated as subsections (1a) and (1b) pursuant to Session Laws 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

**Legal Periodicals.** — For note, "Spillover from the Exxon Valdez: North Carolina's New Offshore Oil Spill Statute," see 68 N.C.L. Rev. 1214 (1990).

CASE NOTES

**Company as "Operator" of Two Storage Tanks.** — Substantial evidence, including evidence that only petitioner company's employees used two underground storage tanks and that the company's employees maintained the tanks, supported the finding of respondent, the North Carolina Department of Environment and Natural Resources, that the company was the "operator" of the tanks within the meaning of G.S. 143-215.94A(8). Dixie Lumber Co. of Cherryville, Inc. v. N.C. Dep't of Env't, Health & Natural Res., 150 N.C. App. 144, 563 S.E.2d 212, 2002 N.C. App. LEXIS 407 (2002), cert. denied, 356 N.C. 161, 568 S.E.2d 192 (2002).

**Cited** in Carpenter v. Brewer Hendley Oil Co., 145 N.C. App. 493, 549 S.E.2d 886, 2001 N.C. App. LEXIS 653 (2001).

## § 143-215.94B. Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund.

(a) There is established under the control and direction of the Department the Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund. This Commercial Fund shall be a nonreverting revolving fund consisting of any monies appropriated for such purpose by the General Assembly or available to it from grants, other monies paid to it or recovered on behalf of the Commercial Fund, and fees paid pursuant to this Part.

(b) The Commercial Fund shall be used for the payment of the following costs up to an aggregate maximum of one million dollars ($1,000,000) per occurrence resulting from a discharge or release of a petroleum product from a commercial underground storage tank:

(1) For discharges or releases discovered or reported between 30 June 1988 and 31 December 1991 inclusive, the cleanup of environmental damage as required by G.S. 143-215.94E(a) in excess of fifty thousand dollars ($50,000) per occurrence.

(2) For discharges or releases discovered on or after 1 January 1992 and reported between 1 January 1992 and 31 December 1993 inclusive, the cleanup of environmental damage as required by G.S. 143-215.94E(a) in excess of twenty thousand dollars ($20,000) per occurrence.

(2a) For discharges or releases discovered and reported on or after 1 January 1994 and prior to 1 January 1995, the cleanup of environmental damage as required by G.S. 143-215.94E(a) in excess of twenty thousand dollars ($20,000) if the owner or operator (i) notifies the Department prior to 1 January 1994 of its intent to permanently close the tank in accordance with applicable regulations or to upgrade the tank to meet the requirements that existing underground storage tanks must meet by 22 December 1998, (ii) commences closure or upgrade of the tank prior to 1 July 1994, and (iii) completes closure or upgrade of the tank prior to 1 January 1995.

(3) For discharges or releases reported on or after 1 January 1994, the cleanup of environmental damage as required by G.S. 143-215.94E(a) in excess of twenty thousand dollars ($20,000) if, prior to the discharge or release, the commercial underground storage tank from which the discharge or release occurred met the performance standards applicable to tanks installed after 22 December 1988 or met the requirements that existing underground storage tanks must meet by 22 December 1998.

(4) For discharges or releases reported on or after 1 January 1994 from a commercial underground storage tank that does not qualify under subdivision (2a) of this subsection or does not meet the standards in subdivision (3) of this subsection, sixty percent (60%) of the costs per occurrence of the cleanup of environmental damage as required by

G.S. 143-215.94E(a) that exceeds twenty thousand dollars ($20,000) but is not more than one hundred fifty-seven thousand five hundred dollars ($157,500) and one hundred percent (100%) of the costs above this amount, up to the limits established in this section.

(5) Compensation to third parties for bodily injury and property damage in excess of one hundred thousand dollars ($100,000) per occurrence.

(6) Reimbursing the State for damages or other costs incurred as a result of a loan from the Loan Fund. The per occurrence limit does not apply to reimbursements to the State under this subdivision.

(7) Recordation of residual petroleum as required by G.S. 143B-279.11 if the Commercial Fund is responsible for the payment of costs under subdivisions (1) through (4) of this subsection.

(b1) In the event that two or more discharges or releases at any one facility, the first of which was discovered or reported on or after 30 June 1988, result in more than one plume of soil, surface water, or groundwater contamination, the Commercial Fund shall be used for the payment of the costs of the cleanup of environmental damage as required by G.S. 143-215.94E(a) in excess of the multiple discharge amount up to the applicable aggregate maximum specified in subsections (b) and (b2) of this section. The multiple discharge amount shall be calculated as follows:

(1) Each discharge or release shall be considered separately as if it were the only discharge or release, and the cost for which the owner or operator is responsible under subdivisions (1), (2), (2a), or (3) of subsection (b) of this section, whichever are applicable, shall be determined for each discharge or release. For each discharge or release for which subdivision (4) of subsection (b) of this section is applicable, the cost for which the owner or operator is responsible, for the purpose of this subsection, shall be seventy-five thousand dollars ($75,000). For purposes of this subsection, two or more discharges or releases that result in a single plume of soil, surface water, or groundwater contamination shall be considered as a single discharge or release.

(2) The multiple discharge amount shall be the lesser of:
   a. The sum of all the costs determined as set out in subdivision (1) of this subsection; or
   b. The product of the highest of the costs determined as set out in subdivision (1) of this subsection multiplied by one and one-half (1½).

(b2) In the event that the aggregate costs per occurrence described in subsection (b) or (b1) of this section exceed one million dollars ($1,000,000), the Commercial Fund shall be used for the payment of eighty percent (80%) of the costs in excess of one million dollars ($1,000,000) up to a maximum of one million five hundred thousand dollars ($1,500,000). The Department shall not pay or reimburse costs under this subsection unless the owner, operator, or landowner eligible for reimbursement under G.S. 143-215.94E(b1) submits proof that the owner, operator, or landowner eligible for reimbursement under G.S. 143-215.94E(b1) has paid at least twenty percent (20%) of the costs for which reimbursement is sought.

(b3) For purposes of subsections (b) and (b1) of this section, the cleanup of environmental damage includes connection of a third party to a public water system if the Department determines that connection of the third party to a public water system is a cost-effective measure, when compared to other available measures, to reduce risk to human health or the environment. A payment or reimbursement under this subsection is subject to the requirements and limitations of this section. This subsection shall not be construed to limit any right or remedy available to a third party under any other provision of law. This subsection shall not be construed to require a third party to connect to a public water system. Except as provided by this subsection, connection to a public water system does not constitute cleanup under Part 2 of this Article, G.S. 143-215.94E, G.S. 143-215.94V, any other applicable statute, or at common law.

(b4) The Commercial Fund shall pay any claim made after 1 September 2001 for compensation to third parties pursuant to subdivision (5) of subsection (b) of this section only if the owner, operator, or other party responsible for the discharge or release has complied with the requirements of G.S. 143B-279.9 and G.S. 143B-279.11, unless compliance is prohibited by another provision of law.

(c) The Commercial Fund is to be available on an occurrence basis, without regard to number of occurrences associated with tanks owned or operated by the same owner or operator.

(d) The Commercial Fund shall not be used for:

(1) Costs incurred as a result of a discharge or release from an aboveground tank, aboveground pipe or fitting not connected to an underground storage tank, or vehicle.

(2) The removal or replacement of any tank, pipe, fitting or related equipment.

(3) Costs incurred as a result of a discharge or release of petroleum from a transmission pipeline.

(4) Costs intended to be paid by the Noncommercial Fund.

(5) Costs associated with the administration of any underground storage tank program other than the program administered pursuant to this Part.

(6) Costs paid or reimbursed by or from any source other than the Commercial Fund, including but not limited to, any payment or reimbursement made under a contract of insurance.

(7) Costs incurred as a result of the cleanup of environmental damage to groundwater to a more protective standard than the risk-based standard required by the Department unless the cleanup of environmental damage to groundwater to a more protective standard is necessary to resolve a claim for compensation by a third party for property damage.

(8) Costs in excess of those required to achieve the most cost-effective cleanup.

(e) The Commercial Fund shall be treated as a special trust fund and shall be credited with interest by the State Treasurer pursuant to G.S. 147-69.2 and G.S. 147-69.3.

(f) **(Expires October 1, 2011)** During each fiscal year, the Department may use up to two million five hundred thousand dollars ($2,500,000) of the funds in the Commercial Fund for performance-based cleanups as provided in this subsection. The Department may also use any funds that are available from any other source and that are specifically intended to be used for performance-based cleanups as provided in this section. Each performance-based cleanup shall comply with the requirements of this Part and any other provisions of law that govern the cleanup of environmental damage resulting from the discharge or release of a petroleum product from a commercial underground storage tank. The Department or any owner, operator, or landowner may contract for performance-based cleanups with environmental services firms that the Department has determined to be qualified to satisfactorily complete the work associated with a cleanup. Before the award of the contract, the environmental services firms shall secure a surety or performance bond equal to the price of the firm's services under the contract and shall demonstrate having secured the surety or performance bond to the satisfaction of the Department. The surety shall be liable on the bond obligation when the environmental services firms fail to perform as specified in the contract. A performance-based contract shall provide that cleanup will be completed within the time and for the cost stated in the contract. The Department or any owner, operator, or landowner shall select environmental services firms for performance-based cleanup through a competitive bidding process. The Commission shall adopt rules governing the competitive bidding process and any other rules necessary to implement this subsection. The rules shall establish qualifications for environmental services firms and for individuals and firms that provide engineering services as part of a contract to satisfactorily complete work associated with cleanup.

(g) The Commercial Fund may be used to support the administrative functions of the program for underground storage tanks under this Part and Part 2B of this Article up to the amounts allowed by law, which amounts may be changed from time to time. In the case of a legislated increase or decrease in salaries and benefits, the administrative allowance existing at the time of the increase or decrease shall be correspondingly increased or decreased an amount equal to the legislated increase or decrease in salaries and benefits.

(h) The Commercial Fund may be used to reimburse the owner or operator of a commercial petroleum underground storage tank for annual operating fees that were paid under protest pursuant to G.S. 143-215.94C(f) to the extent the Department has recovered the fees from the previous owner or operator from whom the annual operating fees were due. The Commercial Fund may be used only to reimburse those fees that the owner or operator paid to eliminate an unpaid annual operating fees balance that had been accrued by and was the obligation of a previous owner or operator. (1987 (Reg. Sess., 1988), c. 1035, s. 1; 1989, c. 652, ss. 4, 16; 1991, c. 538, ss. 2, 3; 1991 (Reg. Sess., 1992), c. 817, s. 1; 1993, c. 400, s. 15; c. 402, s. 1; 1995, c. 377, s. 5; 1998-161, s. 2; 2001-384, ss. 4, 5, 8; 2001-442, s. 1; 2003-352, ss. 2, 3; 2007-323, s. 12.1(a); 2008-195, s. 11; 2008-198, s. 7(a).)

**Editor's Note.** — Session Laws 2001-442, ss. 6(a) to (c), provide: "(a) This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1.

"(b) Notwithstanding G.S. 150B-21.1(a)(2) and 26 NCAC 2C.0102(11), the Environmental Management Commission may adopt temporary rules to implement this act [Session Laws 2001-442] until 1 July 2002. Prior to the adoption of a temporary rule under this section [s. 6 of Session Laws 2001-442], the Commission shall publish a notice of intent to adopt a temporary rule in the North Carolina Register. The notice shall set out the text of the proposed temporary rule and include the name of the person to whom questions and written comment on the proposed temporary rule may be submitted. The Commission shall accept written comment on the proposed temporary rule for at least 30 days after the notice of intent to adopt a temporary rule is published in the North Carolina Register.

"(c) Notwithstanding G.S. 150B-21.1(a)(2) and 26 NCAC 2C.0102(11), the State Building Commission may adopt temporary rules to authorize open-end design agreements for design and construction of wetland, stream, and buffer creation, mitigation, and restoration projects. Prior to the adoption of a temporary rule under this section [s. 6 of Session Laws 2001-442], the Commission shall publish a notice of intent to adopt a temporary rule in the North Carolina Register. The notice shall set out the text of the proposed temporary rule and include the name of the person to whom questions and written comment on the proposed temporary rule may be submitted. The Commission shall accept written comment on the proposed temporary rule for at least 30 days after the notice of intent to adopt a temporary rule is published in the North Carolina Register. The State Building Commission is authorized to adopt temporary rules under this section until 1 July 2002."

Session Laws 2001-442, s. 7, as amended by Session Laws 2003-340, s. 2, provides: "Beginning 1 September 2003, the Secretary of Environment and Natural Resources shall submit an annual report to the Environmental Review Commission on the implementation of Sections 1 through 6 of this act [Session Laws 2001-442, ss. 1-6] as a part of the report required by G.S. 143-215.94M." Session Laws 2001-442, s. 8, provided that Session Laws 2001-442, s. 7, would expire October 1, 2006. Session Laws 2008-195, s. 11, effective retroactively to October 1, 2006, amended Session Laws 2001-442,

s. 8, by extending the expiration date to October 1, 2011.

Session Laws 2001-442, s. 8, provided that s. 1 of the act, which added subsection (f) of this section, would expire October 1, 2006. Session Laws 2008-195, s. 11, effective retroactively to October 1, 2006, amended Session Laws 2001-442, s. 8, by extending the expiration date to October 1, 2011.

Regarding modification of the rights and obligations of an owner, operator, or a landowner to whom G.S. 143-215.94E(b1) applies and who is eligible to have costs paid or reimbursed under G.S. 143-215.94B, as governed by G.S. 143-215.94E, see the Editor's Note to Session Laws 2003-352, s. 10, at G.S. 143-215.94E.

Session Laws 2008-107, s. 12.6, provides: "(a) There is appropriated from the Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund to the Department of Environment and Natural Resources the sum of seven hundred ninety-one thousand six hundred fourteen dollars ($791,614) for the 2008-2009 fiscal year. Notwithstanding G.S. 143-215.94B, these funds shall be used to establish and support 11 positions within the underground storage tank program as follows:

"(1) $92,643 shall be used to establish and support one Environmental Program Supervisor II position.

"(2) $615,953 shall be used to establish and support nine Environmental Specialist positions.

"(3) $83,018 shall be used to establish and support one Environmental Engineer I position.

"(b) The positions under subsection (a) of this section shall be used to increase compliance inspection frequency for the underground storage tank program within the Department and to conduct operator training for those underground storage tank systems that are subject to regulation under Part 2A or Part 2B of Article 21A of Chapter 143 of the General Statutes. It is the intent of the General Assembly that funds for these positions under this section are recurring funds and that these funds are in addition to funds previously appropriated to the Department of Environment and Natural Resources for the 2008-2009 fiscal year."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2008-198, s. 7(a), effective August 8, 2008, added subsection (h).

**Legal Periodicals.** — For legislative survey, see 21 Campbell L. Rev. 323 (1999).

## CASE NOTES

**Claim for Reimbursement of Clean-up Costs.** — Trial court erred by granting the North Carolina Department of Environment, Health, and Natural Resources' motion for summary judgment on an oil company's claim that the Department erred when it denied the company's claim for reimbursement from the North Carolina Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund because, even though there was some evidence the oil company knew, prior to June 30, 1988, that underground storage tanks it was using at a gas station were leaking, other evidence showed that the oil company did not know about the problem until the Department issued a notice of violation in February 1989, and the conflicting evidence created a genuine issue of material fact. York Oil Co. v. N.C. Dep't of Env't, 164 N.C. App. 550, 596 S.E.2d 270, 2004 N.C. App. LEXIS 966 (2004).

**Cited** in Dixie Lumber Co. of Cherryville, Inc. v. N.C. Dep't of Env't, Health & Natural Res., 150 N.C. App. 144, 563 S.E.2d 212, 2002 N.C. App. LEXIS 407 (2002); Lancaster v. N.C. Dep't of Env't & Natural Res., 187 N.C. App. 105, 652 S.E.2d 359, 2007 N.C. App. LEXIS 2304 (2007).

## § 143-215.94C. Commercial leaking petroleum underground storage tank cleanup fees.

(a) For purposes of this subsection, each compartment of a commercial underground storage tank that is designed to independently contain a petroleum product is a separate petroleum commercial underground storage tank. The owner or operator of a commercial petroleum underground storage tank shall pay to the Secretary for deposit into the Commercial Fund an annual operating fee of four-hundred twenty dollars ($420.00) for each petroleum commercial underground storage tank.

(b) The annual operating fee shall be determined on a calendar year basis. For petroleum commercial underground storage tanks in use on 1 January and remaining in use on or after 1 December of that year, the annual operating fee due for that year shall be as specified in subsection (a) of this section. For a petroleum commercial underground storage tank that is first placed in service in any year, the annual operating fee due for that year shall be determined by multiplying one-twelfth (1/12) of the amount specified in subsection (a) of this section by the number of months remaining in the calendar year. For a petroleum commercial underground storage tank that is permanently removed from service in any year, the annual operating fee due for that year shall be determined by multiplying one-twelfth (1/12) of the amount specified in subsection (a) of this section by the number of months in the calendar year preceding the permanent removal from use. In calculating the pro rata annual operating fee for a tank that is first placed in use or permanently removed during a calendar year under the preceding two sentences, a partial month shall count as a month, except that where a tank is permanently removed and replaced by another tank, the total of the annual operating fee for the tank that is removed and the replacement tank shall not exceed the annual operating fee for the replacement tank. The annual operating fee shall be due and payable on the first day of the month in accordance with a staggered schedule established by the Department. The Department shall implement a staggered schedule to the end that the total amount of fees to be collected by the Department is approximately the same each quarter. A person who owns or operates more than one petroleum commercial underground storage tank may request that the fee for all tanks be due at the same time. The fee for all commercial underground storage tanks located at the same facility shall be due at the same time. A person who owns or operates 12 or more commercial petroleum storage tanks may request that the total of all fees be paid in four equal payments to be due on the first day of each calendar quarter, provided that the fee for all commercial underground storage tanks located at the same facility shall be due at the same time.

(c) Beginning no later than sixty days before the first due date of the annual operating fee imposed by this section, any person who deposits a petroleum product in a commercial underground storage tank that would be subject to the annual operating fee shall, at least once in each calendar year during which such deposit of a petroleum product is made, notify the owner or operator of the duty to pay the annual operating fee. The requirement to notify pursuant to this subsection does not constitute a duty owed by the person depositing a petroleum product in a commercial underground storage tank to the owner or operator and the person depositing a petroleum product in an underground storage tank shall not incur any liability to the owner or operator for failure to give notice of the duty to pay the operating fee.

(d) Repealed by Session Laws 1991, c. 538, s. 3.1.

(e) An owner or operator of a commercial underground storage tank who fails to pay an annual operating fee due under this section within 30 days of the date that the fee is due shall pay, in addition to the fee, a late penalty of five dollars ($5.00) per day per commercial underground storage tank, up to a maximum equal to the annual operating fee due. The Department may waive a late penalty in whole or in part if:

(1) The late penalty was incurred because of the late payment or nonpayment of an annual operating fee by a previous owner or operator.

(2) The late penalty was incurred because of a billing error for which the Department is responsible.

(3) Where the late penalty was incurred because the annual operating fee was not paid by the owner or operator due to inadvertence or accident.

(4) Where payment of the late penalty will prevent the owner or operator from complying with any substantive law, rule, or regulation applicable to underground storage tanks and intended to prevent or mitigate discharges or releases or to facilitate the early detection of discharges or releases.

(f) A person who becomes the owner or operator of a commercial petroleum underground storage tank may pay, under protest, unpaid annual operating fees that were the obligation of a previous owner or operator for the purpose of obtaining an operating permit for the underground storage tanks. An owner or operator who pays unpaid operating fees that were due from a previous owner or operator may request reimbursement of those fees as provided in G.S. 143-215.94B(h). In collecting unpaid annual operating fees, the Department shall diligently seek to collect unpaid annual operating fees from the person who was the owner or operator of the commercial petroleum underground storage tank at the time the fee first became due notwithstanding the fact that those fees were paid under protest as provided in this subsection. (1987 (Reg. Sess., 1988), c. 1035, s. 1; 1989, c. 652, ss. 5, 16; 1991, c. 538, ss. 3.1, 4, 5; 1993, c. 400, s. 15; c. 402, s. 2; 1995, c. 377, s. 6; 1995 (Reg. Sess., 1996), c. 648, s. 2; 2008-195, s. 1; 2008-198, s. 7(b).)

**Editor's Note.** — Session Laws 2008-195, s. 12, provides: "Notwithstanding any provision of Part 2A of Article 21A of Chapter 143 of the General Statutes, the Department of Environment and Natural Resources shall annually use up to three million dollars ($3,000,000) of the increase in receipts credited to the Commercial Fund as a result of the increase in the annual operating fee set out in G.S. 143-215.94C(a), as amended by Section 1 of this act, solely for the removal of free petroleum from groundwater as a first priority and shall use the balance of these receipts to address the other concerns raised in the letter from the United States Environmental Protection Agency Region 4 Administrator to the Secretary of Environment and Natural Resources dated 19 September 2006."

**Effect of Amendments.** — Session Laws 2008-195, s. 1, effective January 1, 2009, in subsection (a), substituted "of four-hundred twenty dollars ($420.00) for each petroleum commercial underground storage tank" for "according to the following schedule:" and former subdivisions (a)(1) and (2), which distinguished between tanks of more than 3,500 gallon capacity and smaller tanks; and substituted "use" for "service" twice in subsection (b).

Session Laws 2008-198, s. 7(b), effective August 8, 2008, added subsection (f).

## CASE NOTES

**Reimbursement Properly Denied for Failure to Pay Operator Fee.** — Where substantial evidence supported the finding by respondent, the North Carolina Department of Environment and Natural Resources, that petitioner company was the "operator" of two underground petroleum storage tanks and it was undisputed that the company had not paid the operator fees required by G.S. 143-215.94C(a), the department properly determined that, pursuant to G.S. 143-215.94E(g)(3) and N.C. Admin. Code Tit. 15A, R. 2P.0401(b), the company was not entitled to reimbursement for the its costs of cleaning up certain petroleum releases from the tanks. Dixie Lumber Co. of Cherryville, Inc. v. N.C. Dep't of Env't, Health & Natural Res., 150 N.C. App. 144, 563 S.E.2d 212, 2002 N.C. App. LEXIS 407 (2002), cert. denied, 356 N.C. 161, 568 S.E.2d 192 (2002).

## § 143-215.94D. Noncommercial Leaking Petroleum Underground Storage Tank Cleanup Fund.

(a) There is established under the control and direction of the Department the Noncommercial Leaking Petroleum Underground Storage Tank Cleanup Fund. This Noncommercial Fund shall be a nonreverting revolving fund consisting of any monies appropriated for such purpose by the General Assembly or available to it from grants, or other monies paid to it or recovered on behalf of the Noncommercial Fund.

(b) The Noncommercial Fund shall be used for the payment of the costs set out in subsection (b1) of this section, up to an aggregate maximum of one million dollars ($1,000,000) per occurrence resulting from a discharge or release of a petroleum product from:

(1) Noncommercial underground storage tanks if the discharge or release meets the minimum priority criteria for corrective action established by the Department.

(2) Commercial underground storage tanks if the owner or operator cannot be identified or fails to proceed with the cleanup.

(3) Commercial underground storage tanks that were taken out of operation prior to 1 January 1974 if, at the time the discharge or release is discovered, neither the owner or operator owns or leases the lands on which the tank is located.

(4) Commercial underground storage tanks if the owner of the commercial underground storage tank is the owner only as a result of owning the land on which the commercial underground storage tank is located, the owner did not know or have reason to know that the underground storage tank was located on the property, and the land was not transferred to the owner to avoid liability for the commercial underground storage tank.

(b1) The Noncommercial Fund shall be used for the payment of the costs of:

(1) The cleanup of environmental damage as required by G.S. 143-215.94E(a).

(2) Compensation to third parties for bodily injury and property damage in excess of one hundred thousand dollars ($100,000) per occurrence.

(3) Reimbursing the State for damages or other costs incurred as a result of a loan from the Loan Fund. The per occurrence limit does not apply to reimbursements to the State under this subdivision.

(4) Recordation of residual petroleum as required by G.S. 143B-279.11 if the Noncommercial Fund is responsible for the payment of costs under subdivisions (1) through (3) of this subsection and subsection (b) of this section.

(b2) The Noncommercial Fund may be used by the Department for the payment of costs necessary to render harmless any commercial or noncommercial underground storage tank from which a discharge or release has not occurred but which poses an imminent hazard to the environment if the owner or operator cannot be identified or located, or if the owner or operator fails to take action to render harmless the underground storage tank within 90 days after having been notified of the imminent hazard posed by the underground storage tank. The Secretary may seek to recover the costs of the action from the owner or operator as provided in G.S. 143-215.94G.

(b3) For purposes of subsection (b1) of this section, the cleanup of environmental damage includes connection of a third party to a public water system if the Department determines that connection of the third party to a public water system is a cost-effective measure, when compared to other available measures, to reduce risk to human health or the environment. A payment or reimbursement under this subsection is subject to the requirements and limitations of this section. This subsection shall not be construed to limit any right or remedy available to a third party under any other provision of law. This subsection shall not be construed to require a third party to connect to a public water system. Except as provided by this subsection, connection to a public water system does not constitute cleanup under Part 2 of this Article, G.S. 143-215.94E, G.S. 143-215.94V, any other applicable statute, or at common law.

(b4) The Noncommercial Fund shall pay any claim made after 1 September 2001 for compensation to third parties pursuant to subdivision (2) of subsection (b1) of this section only if the owner, operator, or other party responsible for the discharge or release has complied with the requirements of G.S. 143B-279.9 and G.S. 143B-279.11, unless compliance is prohibited by another provision of law.

(c) The Noncommercial Fund is to be available on an occurrence basis, without regard to number of occurrences associated with tanks owned or operated by the same owner or operator.

(d) The Noncommercial Fund shall not be used for:

(1) Costs incurred as a result of a discharge or release from an aboveground tank, aboveground pipe or fitting not connected to an underground storage tank, or vehicle.

(2) The removal or replacement of any tank, pipe, fitting or related equipment.

(3) Costs incurred as a result of a discharge or release of petroleum from a transmission pipeline.

(4) Costs intended to be paid for by the Commercial Fund.

(5) Costs associated with the administration of any underground storage tank program other than the program administered pursuant to this Part.

(6) Costs paid or reimbursed by or from any source other than the Noncommercial Fund, including, but not limited to, any payment or reimbursement made under a contract of insurance.

(7) Costs incurred as a result of the cleanup of environmental damage to groundwater to a more protective standard than the risk-based standard required by the Department unless the cleanup of environmental damage to groundwater to a more protective standard is necessary to resolve a claim for compensation by a third party for property damage.

(8) Costs in excess of those required to achieve the most cost-effective cleanup.

(e) The Noncommercial Fund shall be treated as a special trust fund and shall be credited with interest by the State Treasurer pursuant to G.S. 147-69.2 and G.S. 147-69.3.

(f) **(Expires October 1, 2011)** During each fiscal year the Department may use up to two hundred fifty thousand dollars ($250,000) of the funds in the Noncommercial Fund for performance-based cleanups as provided in this subsection. The Department may also use any funds that are available from any other source and that are specifically intended to be used for performance-based cleanups as provided in this section. Each performance-based cleanup shall comply with the requirements of this Part and any other provisions of law that govern the cleanup of environmental damage resulting from the discharge or release of a petroleum product from a noncommercial underground storage tank. The Department or any owner, operator, or landowner may contract for performance-based cleanups with environmental services firms that the Department has determined to be qualified to satisfactorily complete the work associated with a cleanup. Before the award of the contract, the environmental services firms shall secure a surety or performance bond equal to the price of the firm's services under the contract and shall demonstrate having secured the surety or performance bond to the satisfaction of the Department. The surety shall be liable on the bond obligation when the environmental services firms fail to perform as specified in the contract. A performance-based contract shall provide that cleanup will be completed within the time and for the cost stated in the contract. The Department or any owner, operator, or landowner shall select environmental services firms for performance-based cleanup through a competitive bidding process and any other rules necessary to implement this subsection.

(g) The Noncommercial Fund may be used to support the administrative functions of the program for underground storage tanks under this Part and Part 2B of this Article up to the amounts allowed by law, which amounts may be changed from time to time. In the case of a legislated increase or decrease in salaries and benefits, the administrative allowance existing at the time of the increase or decrease shall be correspondingly increased or decreased an amount equal to the legislated increase or decrease in salaries and benefits. (1987 (Reg. Sess., 1988), c. 1035, s. 1; 1989, c. 652, ss. 6, 16; 1991, c. 538, s. 6; 1991 (Reg. Sess., 1992), c. 890, s. 17; 1993, c. 400, s. 15; 1995, c. 377, s. 7; 1998-161, ss. 3, 11(a); 2001-384, ss. 6, 7, 9; 2001-442, s. 2; 2003-352, ss. 4, 5; 2007-323, s. 12.1(b); 2008-195, s. 11.)

**Editor's Note.** — Session Laws 2001-442, ss. 6(a) to (c), provide: "(a) This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1.

"(b) Notwithstanding G.S. 150B-21.1(a)(2) and 26 NCAC 2C.0102(11), the Environmental Management Commission may adopt temporary rules to implement this act [Session Laws 2001-442] until 1 July 2002. Prior to the adoption of a temporary rule under this section [s. 6 of Session Laws 2001-442], the Commission shall publish a notice of intent to adopt a temporary rule in the North Carolina Register. The notice shall set out the text of the proposed temporary rule and include the name of the person to whom questions and written comment on the proposed temporary rule may be submitted. The Commission shall accept written comment on the proposed temporary rule for at least 30 days after the notice of intent to adopt a temporary rule is published in the North Carolina Register.

"(c) Notwithstanding G.S. 150B-21.1(a)(2) and 26 NCAC 2C.0102(11), the State Building Commission may adopt temporary rules to authorize open-end design agreements for design and construction of wetland, stream, and buffer creation, mitigation, and restoration projects. Prior to the adoption of a temporary rule under this section [s. 6 of Session Laws 2001-442], the Commission shall publish a notice of intent to adopt a temporary rule in the North Carolina Register. The notice shall set out the text of the proposed temporary rule and include the name of the person to whom questions and written comment on the proposed temporary rule may be submitted. The Commission shall accept written comment on the proposed temporary rule for at least 30 days after the notice of intent to adopt a temporary rule is published in the North Carolina Register. The State Building Commission is authorized to adopt temporary rules under this section until 1 July 2002."

Session Laws 2001-442, s. 7, as amended by Session Laws 2003-340, s. 2, provides: "Beginning 1 September 2003, the Secretary of Environment and Natural Resources shall submit an annual report to the Environmental Review Commission on the implementation of Sections 1 through 6 of this act [Session Laws 2001-442, ss. 1-6] as a part of the report required by G.S. 143-215.94M." Session Laws 2001-442, s. 8, provided that Session Laws 2001-442, s. 7, would expire October 1, 2006. Session Laws 2008-195, s. 11, effective retroactively to October 1, 2006, amended Session Laws 2001-442, s. 8, by extending the expiration date to October 1, 2011.

Session Laws 2001-442, s. 8, provided that s. 2 of the act, which added subsection (f) of this section, would expire October 1, 2006. Session Laws 2008-195, s. 11, effective retroactively to October 1, 2006, amended Session Laws 2001-442, s. 8, by extending the expiration date to October 1, 2011.

**Legal Periodicals.** — For legislative survey, see 21 Campbell L. Rev. 323 (1999).

## § 143-215.94E. Rights and obligations of the owner or operator.

(a) Upon a determination that a discharge or release of petroleum from an underground storage tank has occurred, the owner or operator of the underground storage tank shall notify the Department pursuant to G.S. 143-215.85. The owner or operator of the underground storage tank shall immediately undertake to collect and remove the discharge or release and to restore the area affected in accordance with the requirements of this Article.

(a1) If a spill or overfill associated with a petroleum underground storage tank results in a release of petroleum to the environment of 25 gallons or more or causes a sheen on nearby surface water, the owner or operator of the petroleum underground storage tank shall immediately clean up the spill or overfill, report the spill or overfill to the Department within 24 hours of the spill or overfill, and begin to restore the area affected in accordance with the requirements of this Article. The owner or operator of a petroleum underground storage tank shall immediately clean up a spill or overfill of less than 25 gallons of petroleum that does not cause a sheen on nearby surface water. If a spill or overfill of less than 25 gallons of petroleum cannot be cleaned up within 24 hours of the spill or overfill or causes a sheen on nearby surface water, the owner or operator of the petroleum underground storage tank shall immediately notify the Department.

(b) In the case of a discharge or release from a commercial underground storage tank where the owner or operator has been identified and has proceeded with cleanup, the owner or operator may elect to have the Commercial Fund pay or reimburse the owner or operator for any costs described in subsection (b) or (b1) of G.S. 143-215.94B that exceed the amounts for which the owner or operator is responsible under that subsection. The sum of payments by the owner or operator and the payments from the Commercial Fund shall not exceed one million dollars ($1,000,000) per discharge or release except as provided in G.S. 143-215.94B(b2).

(b1) In the case of a discharge or release from a commercial underground storage tank where the owner and operator cannot be identified or located, or where the owner and operator fail to proceed as required by subsection (a) of this section, if the current landowner of the land in which the commercial underground storage tank is located notifies the Department in accordance with G.S. 143-215.85 and undertakes to collect and remove the discharge or release and to restore the area affected in accordance with the requirements of this Article and applicable federal and State laws, regulations, and rules, the current landowner may elect to have the Commercial Fund pay or reimburse the current landowner for any costs described in subdivisions (1), (2), (2a), (3), and (4) of G.S. 143-215.94B(b) or G.S. 143-215.94B(b1) that exceed the amounts for which the owner or operator is responsible under that subsection. The current landowner is not eligible for payment or reimbursement until the current landowner has paid the costs described in subdivisions (1), (2), (2a), (3), and (4) of G.S. 143-215.94B(b) or G.S. 143-215.94B(b1) for which the owner or operator is responsible. Eligibility for reimbursement under this subsection may be transferred from a current landowner who has paid the costs described in subdivisions (1), (2), (2a), (3), and (4) of G.S. 143-215.94B(b) or G.S. 143-215.94B(b1) to a subsequent landowner. The sum of payments from the Commercial Fund and from all other sources shall not exceed one million dollars ($1,000,000) per discharge or release except as provided in G.S. 143-215.94B(b2). This subsection shall not be construed to require a current landowner to cleanup a discharge or release of petroleum from an underground storage tank for which the current landowner is not otherwise responsible. This subsection does not alter any right, duty, obligation, or liability of a current landowner, former landowner, subsequent landowner, owner, or operator under other provisions of law. This subsection shall not be construed to limit the authority of the Department to engage in a cleanup under this Article or any other provision of law. In the event that an owner or operator is subsequently identified or located, the Secretary shall seek reimbursement as provided in G.S. 143-215.94G(d). The current landowner shall submit documentation of all expenditures as required by G.S. 143-215.94G(b).

(c) In the case of a discharge or release from a noncommercial underground storage tank or a commercial underground storage tank eligible for the Noncommercial Fund in accordance with G.S. 143-215.94D(b), the owner or operator may elect to have the Noncommercial Fund pay or reimburse the owner or operator for the costs described in G.S. 143-215.94D(b1) up to a maximum of one million dollars ($1,000,000) per discharge or release.

(c1) In the case of a discharge or release from a noncommercial underground storage tank where the owner and operator cannot be identified or located, or where the owner and operator fail to proceed as required by subsection (a) of this section, if the current landowner of the land in which the noncommercial underground storage tank is located notifies the Department in accordance with G.S. 143-215.85 and undertakes to collect and remove the discharge or release and to restore the area affected in accordance with the requirements of this Article and applicable federal and State laws, regulations, and rules, the current landowner may elect to have the Noncommercial Fund pay or reimburse the current landowner for ninety percent (90%) of any costs described in subdivisions (1) and (2) of G.S. 143-215.94D(b1) that exceed five thousand dollars ($5,000). Eligibility for reimbursement under this subsection may be transferred to a subsequent landowner from a current landowner who has paid the costs for which the landowner is responsible under this subsection. The sum of payments from the Noncommercial Fund and from all other sources shall not exceed one million dollars ($1,000,000) per discharge or release. This subsection shall not be construed to require a current landowner to clean up a discharge or release of petroleum from an underground storage tank for which the current landowner is not otherwise responsible. This subsection does not alter any right, duty, obligation, or liability of a current landowner, former landowner, subsequent landowner, owner, or operator under other provisions of law. This subsection shall not be construed to limit the authority of the Department to engage in a cleanup under this Article or any other provision of law. The current landowner shall submit documentation of all expenditures as required by G.S. 143-215.94G(b).

(d) In any case where the costs described in G.S. 143-215.94B(b), 143-215.94B(b1), or 143-215.94D(b1) exceed one million dollars ($1,000,000), or one million five hundred thousand dollars ($1,500,000) if G.S. 143-215.94B(b2) applies, the provisions of Article 21A of this Chapter or any other applicable statute or common law principle regarding liability shall apply for the amount in excess of one million dollars ($1,000,000) or, if G.S. 143-215.94B(b2) applies, one million five hundred thousand dollars ($1,500,000). Nothing contained in this Part shall limit or modify any liability that any party may have pursuant to Article 21A of this Chapter, any other applicable statute, or at common law.

(e) When an owner, operator, or landowner pays the costs described in G.S. 143-215.94B(b), 143-215.94B(b1), or 143-215.94D(b1) resulting from a discharge or release of petroleum from an underground storage tank, the owner, operator, or landowner may seek reimbursement from the appropriate fund for any costs that the owner, operator, or landowner may elect to have either the Commercial Fund or the Noncommercial Fund pay in accordance with the applicable subsections of this section.

(e1) The Department may contract for any services necessary to evaluate any claim for reimbursement or compensation from either the Commercial Fund or the Noncommercial Fund, may contract for any expert witness or consultant services necessary to defend any decision to pay or deny any claim for reimbursement, and may pay the cost of these services from the fund against which the claim is made; provided that in any fiscal year the Department shall not expend from either fund more than one percent (1%) of the unobligated balance of the fund on 30 June of the previous fiscal year. The cost of contractual services to evaluate a claim or for expert witness or consultant services to defend a decision with respect to a claim shall be included as costs under G.S. 143-215.94B(b), 143-215.94B(b1), and 143-215.94D(b1).

(e2) An owner or operator whose claim for reimbursement is denied may appeal a decision of the Department as provided in Article 3 of Chapter 150B of the General Statutes. If the owner or operator is eligible for reimbursement under this section and the cleanup extends beyond a period of three months, the owner or operator may apply to the Department for interim reimbursements to which he is entitled under this section on a quarterly basis. If the Department fails to notify an owner or operator of its decision on a claim for reimbursement under this section within 90 days after the date the claim is received by the Department, the owner or operator may elect to consider the claim to have been denied, and may appeal the denial as provided in Article 3 of Chapter 150B of the General Statutes.

(e3) The Department shall not pay any third party or reimburse any owner or operator who has paid any third party pursuant to any settlement agreement or consent judgment relating to a claim by or on behalf of a third party for compensation for bodily injury or property damage unless the Department has approved the settlement agreement or consent judgment prior to entry into the settlement agreement or consent judgment by the parties or entry of a consent judgment by the court. The approval or disapproval by the Department of a proposed settlement agreement or consent judgment shall be subject to challenge only in a contested case filed under Chapter 150B of the General Statutes. The Secretary shall make the final agency decision in a contested case proceeding under this subsection.

(e4)(1) If the owner or operator takes initial steps to collect and remove the discharge or release as required by the Department and completes the initial assessment required to determine degree of risk, the owner or operator shall not be subject to any violation or penalty for any failure to proceed with further assessment or cleanup under G.S. 143-215.84 or this section before the owner or operator is authorized to proceed with further assessment or cleanup as provided in subsection (e5) of this section. The lack of availability of funds in the Commercial Fund or the Noncommercial Fund shall not relieve an owner or operator of responsibility to immediately undertake to collect and remove the discharge or release or to conduct any assessment or cleanup ordered by the Department or be a defense against any violations and penalties issued to the owner or operator for failure to conduct required assessment or cleanup.

(2) The Department shall establish the degree of risk to human health and the environment posed by a discharge or release of petroleum from a commercial underground storage tank and shall determine a schedule for further assessment and cleanup that is based on the degree of risk to human health and the environment posed by the discharge or release and that gives priority to the assessment and cleanup of discharges and releases that pose the greatest risk. If any of the costs of assessment and cleanup of the discharge or release from a commercial underground storage tank are eligible to be paid or reimbursed from the Commercial Fund, the Department shall also consider the availability of funds in the Commercial Fund and the order in which the discharge or release was reported in determining the schedule.

(3) The Department shall establish the degree of risk to human health and the environment posed by a discharge or release of petroleum from a noncommercial underground storage tank and shall determine a schedule for further assessment and cleanup that is based on the degree of risk to human health and the environment posed by the discharge or release and that gives priority to the assessment and cleanup of discharges and releases that pose the greatest risk. If any of the costs of assessment or cleanup of the discharge or release from a noncommercial underground storage tank are eligible to be paid or reimbursed from the Noncommercial Fund, the Department shall also

consider the availability of funds in the Noncommercial Fund and the order in which the discharge or release was reported in determining the schedule.

(4) The Department may revise the schedules that apply to the assessment and cleanup of any discharge or release at any time based on its reassessment of any of the foregoing factors.

(e5)(1) As used in this subsection:

a. "Authorization" means a determination by the Department that a person may proceed with one or more tasks associated with the assessment or cleanup of a discharge or release from a petroleum underground storage tank. To 'authorize' means to make such a determination.

b. "Preapproval" means a determination by the Department that:

1. The nature and scope of a task is reasonable and necessary to be performed under G.S. 143-215.94B(b), 143-215.94B(b1), or 143-215.94D(b1) in order to achieve the purposes of this Part.

2. The amount estimated for the cost of a task does not exceed the amount or rate that is reasonable for that task.

(2) The Department may require an owner, operator, or landowner to obtain preapproval before proceeding with any task. The Department shall specify those tasks for which preapproval is required. The Department shall deny any request for payment or reimbursement of the cost of any task for which preapproval is required if the owner, operator, or landowner failed to obtain preapproval of the task. Preapproval of a task by the Department does not guarantee payment or reimbursement in the amount estimated for the cost of the task at the time preapproval is requested. The Department shall pay or reimburse the cost of a task only if all of the following apply:

a. The cost is eligible to be paid under G.S. 143-215.94B(b), 143-215.94B(b1), or 143-215.94D(b1).

b. Payment is in accordance with G.S. 143-215.94B(d) or G.S. 143-215.94D(d).

c. The Department determines that the cost is reasonable and necessary.

(3) The Commission may adopt rules governing payment or reimbursement of reasonable and necessary costs and, consistent with any rules adopted by the Commission, the Department shall develop, implement, and periodically revise a schedule of costs that the Department determines to be reasonable and necessary costs for specific tasks. Statements that specify tasks for which preapproval is required and schedules of reasonable and necessary costs for specific tasks are statements within the meaning of G.S. 150B-2(8a)g. This subsection shall not be construed to invalidate any rule of the Commission related to preapproval of tasks that will result in a cost that is eligible to be paid or reimbursed under G.S. 143-215.94B(b), 143-215.94B(b1), or 143-215.94D(b1), provided, however, that the Department may specify additional tasks for which preapproval is required.

(4) In all cases, the Department shall require an owner, operator, or landowner to submit documentation sufficient to establish that a claim is eligible to be paid or reimbursed under this Part before the Department pays or reimburses the claim.

(5) The Department shall authorize a task the cost of which is to be paid or reimbursed from the Commercial Fund or the Noncommercial Fund only when the task is scheduled to be performed on the basis of a priority determination pursuant to subsection (e4) of this section. The Department shall not pay or reimburse the cost of any task for

which authorization is required under this subsection until the Department has preapproved and authorized the task.

(6) Except as provided in subdivisions (8) and (9) of this subsection, the Department shall not authorize any task the cost of which is to be paid or reimbursed from the Commercial Fund or the Noncommercial Fund unless the Department determines, based on the scope of the work to be performed and the schedule of reasonable and necessary costs, that sufficient funds will be available in the Commercial Fund or the Noncommercial Fund, whichever applies, to pay or reimburse the cost of that task within 90 days after the Department determines that the owner, operator, or landowner has submitted a claim with documentation sufficient to establish that the claim is eligible to be paid under this Part.

(7) This subsection shall not be construed to establish a cause of action against the Commission or the Department for any failure to pay or reimburse any cost within any specific period of time. This subsection shall not be construed to establish a defense to any action to enforce the requirements of either G.S. 143-215.84 or subsection (a) of this section.

(8) The Department may preapprove and authorize a task the cost of which is to be paid or reimbursed from the Commercial Fund or the Noncommercial Fund that has not been authorized pursuant to subdivisions (5) and (6) of this subsection if the owner, operator, or landowner specifically requests that the task be authorized and agrees that the claim for payment or reimbursement of the cost will not be paid until after the Department has paid all claims for payment or reimbursement of costs for tasks that the Department has authorized pursuant to subdivisions (5) and (6) of this subsection.

(9) The Department may preapprove and authorize a task the cost of which is to be paid or reimbursed from the Commercial Fund or the Noncommercial Fund that has not been authorized pursuant to subdivisions (5) and (6) of this subsection if the discharge or release creates an emergency situation. An emergency situation exists when a discharge or release of petroleum results in an imminent threat to human health or the environment. A claim for payment or reimbursement of costs for tasks that are authorized under this subdivision shall be paid or reimbursed on the same basis as tasks that are authorized under subdivisions (5) and (6) of this subsection.

(f) Repealed by Session Laws 2003-352, s. 6, effective July 27, 2003.

(f1) Any person seeking payment or reimbursement from either the Commercial Fund or the Noncommercial Fund shall certify to the Department that the costs to be paid or reimbursed by the Commercial Fund or the Noncommercial Fund are not eligible to be paid or reimbursed by or from any other source, including any contract of insurance. If any cost paid or reimbursed by the Commercial Fund or the Noncommercial Fund is eligible to be paid or reimbursed by or from another source, that cost shall not be paid from, or if paid shall be repaid to, the Commercial Fund or the Noncommercial Fund. As used in this Part, the phrase "any other source including any contract of insurance" does not include self-insurance.

(g) No owner or operator shall be reimbursed pursuant to this section, and the Department shall seek reimbursement of the appropriate fund or of the Department for any monies disbursed from the appropriate fund or expended by the Department if any of the following apply:

(1) The owner or operator has willfully violated any substantive law, rule, or regulation applicable to underground storage tanks and intended to prevent or mitigate discharges or releases or to facilitate the early detection of discharges or releases.

(2) The discharge or release is the result of the owner's or operator's willful or wanton misconduct.

(3) The owner or operator has failed to pay any annual tank operating fee due pursuant to G.S. 143-215.94C.

(h) Subdivision (1) of subsection (g) of this section shall not be construed to limit the right of an owner or operator to contest notices of violation or orders issued by the Department. Subdivision (1) of subsection (g) of this section shall not apply to a payment or reimbursement pursuant to this section if, at the time of the discharge or release, the owner or operator holds a valid operating permit as required by G.S. 143-215.94U.

(i) Repealed by Session Laws 2005-365, s. 1, effective September 8, 2005.

(j) An owner, operator, or landowner shall request that the Department determine whether any of the costs of assessment and cleanup of a discharge or release from a petroleum underground storage tank are eligible to be paid or reimbursed from either the Commercial Fund or the Noncommercial Fund within one year after completion of any task that is eligible to be paid or reimbursed under G.S. 143-215.94B(b), 143-215.94B(b1), or 143-215.94D(b1).

(k) An owner, operator, or landowner shall request payment or reimbursement from the Commercial Fund or the Noncommercial Fund for the cost of a task within one year after the completion of the task. The Department shall deny any request for payment or reimbursement of the cost of any task that would otherwise be eligible to be paid or reimbursed if the request is not received within 12 months after the later of the date on which the:

(1) Department determines that the cost is eligible to be paid or reimbursed.

(2) Task is completed. (1987 (Reg. Sess., 1988), c. 1035, s. 1; 1989, c. 652, ss. 7, 16; 1991, c. 538, ss. 7, 22; 1991 (Reg. Sess., 1992), c. 817, s. 2; 1993, c. 400, s. 15; c. 402, s. 3; 1995, c. 377, s. 8; 1995 (Reg. Sess., 1996), c. 648, ss. 3, 4; 1998-161, ss. 4, 5, 8(a), (b), 11(b); 1998-215, s. 68; 2000-172, s. 7.1; 2003-352, ss. 6, 7; 2004-124, s. 30.10(d); 2005-365, ss. 1, 2; 2008-195, s. 2(a).)

**Editor's Note.** — Session Laws 2003-352, s. 10, as amended by Session Laws 2004-124, s. 30.10(e), provides: "The definitions set out in G.S. 143-212 and G.S. 143-215.94A apply to this section. The rights and obligations of an owner, an operator, or a landowner to whom either G.S. 143-215.94E(b1) or G.S. 143-215.94E(c1) apply who is eligible to have costs paid or reimbursed under G.S. 143-215.94B or G.S. 143-215.94D shall be governed by G.S. 143-215.94E as modified by this section. The Department shall establish the degree of risk to human health and the environment posed by a discharge or release of petroleum from a commercial underground storage tank and shall determine a schedule for further assessment and cleanup that is based on the degree of risk to human health and the environment posed by the discharge or release and that gives priority to the assessment and cleanup of discharges and releases that pose the greatest risk. If any of the costs of assessment and cleanup of the discharge or release from a commercial underground storage tank are eligible to be paid from the Commercial Fund, the Department shall also consider the availability of funds in the Commercial Fund and the order in which the discharge or release was reported in determining the schedule. The Department shall establish the degree of risk to human health and the environment posed by a discharge or release of petroleum from a noncommercial underground storage tank and shall determine a schedule for further assessment and cleanup that is based on the degree of risk to human health and the environment posed by the discharge or release and that gives priority to the assessment and cleanup of discharges and releases that pose the greatest risk. If any of the costs of assessment or cleanup of the discharge or release from a noncommercial underground storage tank are eligible to be paid from the Noncommercial Fund, the Department shall also consider the availability of funds in the Noncommercial Fund and the order in which the discharge or release was reported in determining the schedule. The Department may revise the schedules that apply to the assessment and cleanup of any discharge or release at any time based on its reassessment of any of the foregoing factors. The lack of availability of funds in the Commercial Fund or the Noncommercial Fund shall not relieve an owner or operator of responsibility to immediately undertake to collect and remove the discharge or release or to conduct any assessment or cleanup ordered by the Department or be a defense against any violations and penalties issued to the owner or operator for failure to conduct required assessment or cleanup. If the owner or operator takes initial steps to collect and remove the discharge or release as required by the Department and completes initial assessment required to determine degree of risk, the owner or operator shall not be subject to any violation or penalty for any failure to proceed with further assessment or cleanup under G.S. 143-215.84 or G.S. 143-215.94E before the owner or operator is authorized to proceed with further assessment or cleanup pursuant to the schedule set by the Department. Once the Department has determined a schedule for the assessment and cleanup of a discharge or release from a commercial underground storage tank or a noncommercial underground storage tank, an owner, operator, or other person responsible for the assessment and cleanup is not eligible to have the costs of the assessment or cleanup paid or reimbursed from the Commercial Fund or the Noncommercial Fund until such time as further assessment or cleanup is authorized by the Department pursuant to the schedule. An owner, operator, or other person may undertake further assessment or cleanup before receiving authorization from the Department. An owner, operator, or other person who undertakes further assessment or cleanup before receiving authorization from the Department shall be reimbursed only after the Department has paid or reimbursed the costs for all assessments and cleanups that the Department has authorized."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2005-365, s. 2, provides: "Notwithstanding Section 13 of S.L. 2003-352, Section 10 of S.L. 2003-352, as amended by subsection (e) of Section 30.10 of S.L. 2004-124, and as codified and amended by Section 1 of this act, shall continue in effect."

Session Laws 2008-195, s. 2(b), provides: "Notwithstanding G.S. 143-215.94E(k), as enacted by subsection (a) of this section, an owner, operator, or landowner shall request payment or reimbursement of the cost of any task completed prior to 1 January 2009 that is eligible to be paid or reimbursed from the Commercial Fund or the Noncommercial Fund no later than 1 January 2010. The Department shall deny any request for payment or reimbursement of the cost of any task to which this subsection applies that is made after 1 January 2010."

Session Laws 2008-195, s. 7, effective August 8, 2008, and expiring September 1, 2014, established a pilot program to evaluate the use of site-specific standards for cleanup of discharges or releases of petroleum from underground storage tanks. See note at G.S. 143-215.94A, 143-215.94T and 143-215.94V.

**Effect of Amendments.** — Session Laws 2008-195, s. 2(a), effective January 1, 2009, and applicable to determinations of eligibility and requests for payments made on or after that date, added subsections (j) and (k).

**Legal Periodicals.** — For legislative survey, see 21 Campbell L. Rev. 323 (1999).

## CASE NOTES

**Reimbursement Properly Denied for Failure to Pay Operator Fee.** — Where substantial evidence supported the finding by respondent, the North Carolina Department of Environment and Natural Resources, that petitioner company was the "operator" of two underground petroleum storage tanks and it was undisputed that the company had not paid the operator fees required by G.S. 143-215.94C(a), the department properly determined that, pursuant to G.S. 143-215.94E(g)(3) and N.C. Admin. Code Tit. 15A, R. 2P.0401(b), the company was not entitled to reimbursement for the its costs of cleaning up certain petroleum releases from the tanks. Dixie Lumber Co. of Cherryville, Inc. v. N.C. Dep't of Env't, Health & Natural Res., 150 N.C. App. 144, 563 S.E.2d 212, 2002 N.C. App. LEXIS 407 (2002), cert. denied, 356 N.C. 161, 568 S.E.2d 192 (2002).

**Relationship to Regulation Regarding Timing of Fee Payment.** — The requirement of N.C. Admin. Code Tit. 15A, R. 2P.0401(b) that the fees assessed to operators of underground petroleum storage tanks must be paid prior to the discovery of the release of petroleum does not conflict with G.S. 143-215.94E(g)(3). Dixie Lumber Co. of Cherryville, Inc. v. N.C. Dep't of Env't, Health & Natural Res., 150 N.C. App. 144, 563 S.E.2d 212, 2002 N.C. App. LEXIS 407 (2002), cert. denied, 356 N.C. 161, 568 S.E.2d 192 (2002).

**Dismissal of Petition for Review Signed by Non-Attorney Agent of Corporation Erroneous.** — Dismissal of petition for review of a department's decision to retract a corporate owner's eligibility for reimbursement of environmental clean-up costs was in error because, although the petition was signed by a non-attorney agent for owner, 26 N.C. Admin. Code 3.0120(e) stated that a party did not need to be represented by an attorney at administrative hearings; the term "representative" as used in G.S. 150B-23, was not coterminous with the term "attorney." Allied Envtl. Servs., PLLC v. N.C. Dep't of Envtl. & Natural Res., Div. of Waste Mgmt., 187 N.C. App. 227, 653 S.E.2d 11, 2007 N.C. App. LEXIS 2369 (2007).

## § 143-215.94F. Limited amnesty.

Any owner or operator who reports a suspected discharge or release from an underground storage tank prior to 1 October 1989 shall not be liable for any civil penalty that might otherwise be imposed pursuant to G.S. 143-215.88A(a) for violations of G.S. 143-215.83(a) and G.S. 143-215.85. The limited amnesty provided by this section shall not apply upon a finding by the Commission that the discharge or release was the result of gross negligence or an intentional act. (1987 (Reg. Sess., 1988), c. 1035, s. 1; 1989, c. 652, s. 8.)

## § 143-215.94G. Authority of the Department to engage in cleanups; actions for fund reimbursement.

(a) The Department may use staff, equipment, or materials under its control or provided by other cooperating federal, State, or local agencies and may contract with any agent or contractor it deems appropriate to investigate a release, to develop and implement a cleanup plan, to provide interim alternative sources of drinking water to third parties, and to pay the initial costs for providing permanent alternative sources of drinking water to third parties, and shall pay the costs resulting from commercial underground storage tanks from the Commercial Fund and shall pay the costs resulting from noncommercial underground storage tanks from the Noncommercial Fund, whenever there is a discharge or release of petroleum from any of the following:

(1) A noncommercial underground storage tank.
(2) An underground storage tank whose owner or operator cannot be identified or located.
(3) An underground storage tank whose owner or operator fails to proceed as required by G.S. 143-215.94E(a).
(4) A commercial underground storage tank taken out of operation prior to 1 January 1974 if, when the discharge or release is discovered, neither the owner nor operator owns or leases the land on which the underground storage tank is located.

(a1) Every State agency shall provide to the Department to the maximum extent feasible such staff, equipment, and materials as may be available and useful to the development and implementation of a cleanup program.

(a2) The cost of any action authorized under subsection (a) of this section shall be paid, to the extent funds are available, from the following sources in the order listed:

(1) Any funds to which the State is entitled under any federal program providing for the cleanup of petroleum discharges or releases from underground storage tanks, including, but not limited to, the Leaking Underground Storage Tank Trust Fund established pursuant to 26 U.S.C. § 4081 and 42 U.S.C. § 6991b(h).
(2) The Commercial Fund or the Noncommercial Fund.

(a3) **(Expires October 1, 2011)** The Department may implement the provisions of subsection (a) of this section as provided in G.S. 143-215.94B(f) and G.S. 143-215.94D(f).

(b) Whenever the discharge or release of a petroleum product is from a commercial underground storage tank, the Department may supervise the cleanup of environmental damage required by G.S. 143-215.94E(a). If the owner or operator elects to have the Commercial Fund reimburse or pay for any costs allowed under subsection (b) or (b1) of G.S. 143-215.94B, the Department shall require the owner or operator to submit documentation of all expenditures claimed for the purposes of establishing that the owner or operator has spent the amounts required to be paid by the owner or operator pursuant to and in accordance with G.S. 143-215.94E(b). The Department shall allow credit for all expenditures that the Department determines to be reasonable and necessary. The Department may not pay for any costs for which the Commercial Fund was established until the owner or operator has paid the amounts specified in G.S. 143-215.94E(b).

(c) The Secretary shall keep a record of all expenses incurred for the services of State personnel and for the use of the State's equipment and material.

(d) The Secretary shall seek reimbursement through any legal means available, for:

(1) Any costs not authorized to be paid from either the Commercial or the Noncommercial Fund;

(2) The amounts provided for in G.S. 143-215.94B(b) or G.S. 143-215.94B(b1) required to be paid for by the owner or operator pursuant to G.S. 143-215.94E(b) where the owner or operator of a commercial underground storage tank is later identified or located;

(3) The amounts provided for in G.S. 143-215.94B(b) or G.S. 143-215.94B(b1) required to be paid for by the owner or operator pursuant to G.S. 143-215.94E(b) where the owner or operator of a commercial underground storage tank failed to proceed as required by G.S. 143-215.94E(a);

(3a) The amounts provided for by G.S. 143-215.94B(b)(5) required to be paid by the owner or operator to third parties for the cost of providing interim alternative sources of drinking water to third parties and the initial cost of providing permanent alternative sources of drinking water to third parties;

(4) Any funds due under G.S. 143-215.94E(g); and

(5) Any funds to which the State is entitled under any federal program providing for the cleanup of petroleum discharges or releases from underground storage tanks.

(e) In the event that a civil action is commenced to secure reimbursement pursuant to subdivisions (1) through (4) of subsection (d) of this section, the Secretary may recover, in addition to any amount due, the costs of the action, including but not limited to reasonable attorney's fees and investigation expenses. Any monies received or recovered as reimbursement shall be paid into the appropriate fund or other source from which the expenditures were made.

(f) In the event that a recovery equal to or in excess of the amounts required to be paid for by the owner or operator pursuant to G.S. 143-215.94E(b) is recovered pursuant to subdivisions (2) and (3) of subsection (d) of this section for the costs described in G.S. 143-215.94B(b) or G.S. 143-215.94B(b1), the Department shall transfer funds from the Commercial Fund that would have been paid from the Commercial Fund pursuant to subsection (b) or (b2) of G.S. 143-215.94B if the owner or operator had proceeded with the cleanup, but which were paid from the Noncommercial Fund, into the Noncommercial Fund.

(g) If the Department paid or reimbursed costs that are not authorized to be paid or reimbursed under G.S. 143-215.94B or G.S. 143-215.94D as a result of a misrepresentation by an agent who acted on behalf of an owner, operator, or landowner, the Department shall first seek reimbursement, pursuant to subdivision (1) of subsection (d) of this section, from the agent of monies paid to or retained by the agent.

(h) The Department shall take administrative action to recover costs or bring a civil action pursuant to subdivision (1) of subsection (d) of this section to seek reimbursement of costs in accordance with the time limits set out in this subsection.

(1) The Department shall take administrative action to recover costs or bring a civil action to seek reimbursement of costs that are not authorized to be paid from the Commercial Fund under subdivision (1), (2), or (3) of G.S. 143-215.94B(d) or from the Noncommercial Fund under subdivision (1), (2), or (3) of G.S. 143-215.94D(d) within five years after payment.

(2) The Department shall take administrative action to recover costs or bring a civil action to seek reimbursement of costs other than those described in subdivision (1) of this subsection within three years after payment.

(3) Notwithstanding the time limits set out in subdivisions (1) and (2) of this subsection, the Department may take administrative action to recover costs or bring a civil action to seek reimbursement of costs paid as a result of fraud or misrepresentation at any time.

(i) An administrative action or civil action that is not commenced within the time allowed by subsection (h) of this section is barred.

(j) Except with the consent of the claimant, the Department may not withhold payment or reimbursement of costs that are authorized to be paid from the Commercial Fund or the Noncommercial Fund in order to recover any other costs that are in dispute unless the Department is authorized to withhold payment by a final decision of the Commission pursuant to G.S. 150B-36 or an order or final decision of a court. (1987 (Reg. Sess., 1988), c. 1035, s. 1; 1989, c. 652. ss. 9, 16; 1991, c. 538, ss. 8, 23; 1993, c. 400, s. 15; c. 402, s. 4; 1995, c. 377, s. 9; 2001-442, s. 3; 2008-195, ss. 3, 11.)

**Editor's Note.** — Session Laws 2001-442, ss. 6(a) to (c), provide: "(a) This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1.

"(b) Notwithstanding G.S. 150B-21.1(a)(2) and 26 NCAC 2C.0102(11), the Environmental Management Commission may adopt temporary rules to implement this act [Session Laws 2001-442] until 1 July 2002. Prior to the adoption of a temporary rule under this section [s. 6 of Session Laws 2001-442], the Commission shall publish a notice of intent to adopt a temporary rule in the North Carolina Register. The notice shall set out the text of the proposed temporary rule and include the name of the person to whom questions and written comment on the proposed temporary rule may be submitted. The Commission shall accept written comment on the proposed temporary rule for at least 30 days after the notice of intent to adopt a temporary rule is published in the North Carolina Register.

"(c) Notwithstanding G.S. 150B-21.1(a)(2) and 26 NCAC 2C.0102(11), the State Building Commission may adopt temporary rules to authorize open-end design agreements for design and construction of wetland, stream, and buffer creation, mitigation, and restoration projects. Prior to the adoption of a temporary rule under this section [s. 6 of Session Laws 2001-442], the Commission shall publish a notice of intent to adopt a temporary rule in the North Carolina Register. The notice shall set out the text of the proposed temporary rule and include the name of the person to whom questions and written comment on the proposed temporary rule may be submitted. The Commission shall accept written comment on the proposed temporary rule for at least 30 days after the notice of intent to adopt a temporary rule is published in the North Carolina Register. The State Building Commission is authorized to adopt temporary rules under this section until 1 July 2002."

Session Laws 2001-442, s. 7, as amended by Session Laws 2003-340, s. 2, provides: "Beginning 1 September 2003, the Secretary of Environment and Natural Resources shall submit an annual report to the Environmental Review Commission on the implementation of Sections 1 through 6 of this act [Session Laws 2001-442, ss. 1-6] as a part of the report required by G.S. 143-215.94M." Session Laws 2001-442, s. 8, provided that Session Laws 2001-442, s. 7, would expire October 1, 2006. Session Laws 2008-195, s. 11, effective retroactively to October 1, 2006, amended Session Laws 2001-442, s. 8, by extending the expiration date to October 1, 2011.

Session Laws 2001-442, s. 8, provided that s. 3 of the act, which added subsection (a3) of this section, would expire October 1, 2006. Session Laws 2008-195, s. 11, effective retroactively to October 1, 2006, amended Session Laws 2001-442, s. 8, by extending the expiration date to October 1, 2011.

**Effect of Amendments.** — Session Laws 2008-195, s. 3, effective January 1, 2009, added subsections (g) through (j).

## § 143-215.94H. Financial responsibility.

(a) The Department shall require each owner and operator of a petroleum underground storage tank who is required to demonstrate financial responsibility under rules promulgated by the United States Environmental Protection Agency pursuant to 42 U.S.C. § 6991b(d) to maintain evidence of financial responsibility that is the lesser of:

(1) The full amount of the financial responsibility that an owner or operator is required to demonstrate under rules promulgated by the United States Environmental Protection Agency pursuant to 42 U.S.C. § 6991b(d).

(2) The amounts required to be paid for by the owner or operator pursuant to G.S. 143-215.94E(b) per occurrence for costs described in G.S. 143-215.94B(b) and G.S. 143-215.94B(b1) if costs are eligible to be paid under those subsections.

(b) Financial responsibility may be established in accordance with rules adopted by the Commission which shall provide that financial responsibility may be established by either insurance, guarantee, surety bond, letter of credit, qualification as a self-insurer, or any combination thereof. The compliance date schedule for demonstrating financial responsibility shall conform to the schedule adopted by the Environmental Protection Agency. (1987 (Reg. Sess., 1988), c. 1035, s. 1; 1989, c. 652, s. 10; 1993, c. 402, s. 5; 2008-195, s. 4; 2009-570, s. 19.)

**Editor's Note.** — This section was amended by Session Laws 2008-195, s. 4, in the coded bill drafting format provided by G.S. 120-20.1. At the beginning of what is now subdivision (2), the word "the" that now appears following "The" was not struck through. Session Laws 2009-570, s. 19 corrected the oversight.

**Effect of Amendments.** — Session Laws 2008-195, s. 4, effective August 8, 2008, divided the former first sentence of the section into the present introductory language of subsection (a) and subdivision (a)(2); in subsection (a), substituted "that is the lesser of" for "of not less than" in the introductory language, added subdivision (a)(1), and in subdivision (a)(2), inserted "The" at the beginning and substituted "G.S. 143-215.94B(b1) if costs are eligible to be paid under those subsections" for "G.S. 143-215.94D(b1)"; and designated the former last two sentences of the section as subsection (b).

Session Laws 2009-570, s. 19, effective August 28, 2009, deleted the duplicate instance of "the" at the beginning of subdivision (a)(2).

## § 143-215.94I. Insurance pools authorized; requirements.

(a) As used in this section, "Commissioner" means the Commissioner of Insurance of the State of North Carolina.

(b) Owners and operators of underground storage tanks may demonstrate financial responsibility by establishing insurance pools which provide insurance coverage to pool members in at least the minimum amounts specified in G.S. 143-215.94H. Each such pool shall be operated by a board of trustees consisting of at least five persons who are elected or appointed officials of pool members. The board of trustees of each pool shall:

(1) Establish terms and conditions of coverage within the pool, including underwriting criteria, applicable deductible levels, the maximum level of claims that the pool will self-insure, and exclusions of coverage;

(2) Ensure that all valid claims are paid promptly;

(3) Take all necessary precautions to safeguard the assets of the pool;
(4) Maintain minutes of its meetings and make those minutes available to the Commissioner;
(5) Designate an administrator to carry out the policies established by the board of trustees and to provide continual management of the pool, and delineate in written minutes of its meetings the areas of authority it delegates to the pool's administrator;
(6) Establish the amount of insurance to be purchased by the pool to provide coverage over and above the claims that are not to be satisfied directly from the pool's resources;
(7) Establish the amount, if any, of aggregate excess insurance coverage to be purchased and maintained in the event that the pool's resources are exhausted in a given fiscal period; and
(8) Establish guidelines for membership in the pool, including the amount of money to be collected from each pool member to form and fund the pool.

(c) The board of trustees may not:
(1) Extend credit to individual members for payment of a premium, except pursuant to payment plans approved by the Commissioner; or
(2) Borrow any monies from the pool or in the name of the pool, except in the ordinary course of business, without first advising the Commissioner of the nature and purpose of the loan and obtaining prior approval from the Commissioner.

(d) A contract or agreement made pursuant to this section must contain provisions:
(1) For a system or program of loss control;
(2) For termination of membership including both:
  a. Cancellation of individual membership in the pool by the pool; and
  b. Election by an individual member of the pool to terminate its participation;
(3) That a pool or a terminating member must provide at least 90 days' written notice of cancellation or termination;
(4) Requiring the pool to pay all claims for which each member incurs liability during each member's period of membership, except:
  a. Where a member has individually retained the risk;
  b. Where the risk is not covered; or
  c. For amounts of claims above the coverage provided by the pool;
(5) For the maintenance of claim reserves equal to known incurred losses and loss adjustment expenses and to an estimate of incurred but not reported losses;
(6) For compliance with any applicable federal requirements regarding financial responsibility for underground storage tanks;
(7) For a final accounting and settlement of the obligations of or refunds to a terminating member to occur when all incurred claims are concluded, settled, or paid;
(8) That the pool may establish offices where necessary in this State and employ necessary staff to carry out the purposes of the pool;
(9) That the pool may retain legal counsel, actuaries, claims adjusters, auditors, engineers, private consultants, and advisors, and other persons as the board of trustees or the administrator deems to be necessary;
(10) That the pool may make and alter bylaws and rules pertaining to the exercise of its purpose and powers;
(11) That the pool may purchase, lease, or rent real and personal property it deems to be necessary; and
(12) That the pool may enter into financial services agreements with financial institutions and that it may issue checks in its own name.

(e) In the event that either the pool or an individual pool member gives notice of an intent to cancel or terminate participation in the pool as provided by subdivision (4) of subsection (d) of this section, the pool shall so notify both the Commissioner and the Secretary within five business days of the issuance or receipt of such notice by the pool. In addition, the pool shall notify both the Commissioner and the Secretary within five business days of the date such cancellation or termination becomes effective, unless notice of cancellation or termination is rescinded.

(f) The formation and operation of an insurance pool under this section shall be subject to approval by the Commissioner who shall, after notice and hearing, establish reasonable requirements and rules for the approval and monitoring of such pools, including prior approval of pool administrators and provisions for periodic examinations of financial condition. The Commissioner may disapprove an application for the formation of an insurance pool, and may suspend or withdraw such approval whenever he finds that such applicant or pool:

(1) Has refused to submit its books, papers, accounts, or affairs to the reasonable inspection of the Commissioner or his representative;
(2) Has refused, or its officers, agents, or administrators have refused, to furnish satisfactory evidence of its financial and business standing or solvency;
(3) Is insolvent, or is in such condition that its further transaction of business in this State is hazardous to its members and creditors in this State and to the public;
(4) Has refused or neglected to pay a valid final judgment against it within 60 days after its rendition;
(5) Has violated any law of this State or has violated or exceeded the powers granted by its members;
(6) Has failed to pay any taxes, fees, or charges imposed in this State within 60 days after they are due and payable, or within 60 days after final disposition or any legal contest with respect to liability therefor; or
(7) Has been found insolvent by a court of any other state, by the insurance regulator or other proper officer or agency of any other state, and has been prohibited from doing business in such state.

(g) Each pool shall be audited annually at the expense of the pool by a certified public accounting firm, with a copy of the report available to the governing body or chief executive officer of each member of the pool and to the Commissioner. The board of trustees of the pool shall obtain an appropriate actuarial evaluation of the loss and loss adjustment expense reserves of the pool, including an estimate of losses and loss adjustment expenses incurred but not reported. The provisions of G.S. 58-2-131, 58-2-132, 58-2-133, 58-2-134, 58-2-150, 58-2-155, 58-2-165, 58-2-180, 58-2-185, 58-2-190, 58-2-200, and 58-6-5 apply to each pool and to persons that administer the pools. Annual financial statements required by G.S. 58-2-165 shall be filed by each pool within 60 days after the end of the pool's fiscal year. All financial statements required by this section shall be prepared in accordance with generally accepted statutory accounting principles.

(h) If, as a result of the annual audit or an examination by the Commissioner, it appears that the assets of a pool are insufficient to enable the pool to discharge its legal liabilities and other obligations, the Commissioner shall notify the administrator and the board of trustees of the pool of the deficiency and his list of recommendations to abate the deficiency, including a recommendation not to add any new members until the deficiency is abated. If the pool fails to comply with the recommendations within 30 days after the date of the notice, the Commissioner may apply to the Superior Court of Wake County for an order requiring the pool to abate the deficiency and authorizing the Commissioner to appoint one or more special deputy commissioners, counsel, clerks, or assistants to oversee the implementation of the Court's order. The Commissioner has all of the powers granted to him under Article 17A of General Statute Chapter 58 relating to rehabilitation and liquidation of insurers; and the provisions of that Article apply to this section to the extent they are not in conflict with this section. The compensation and expenses of such persons shall be fixed by the Commissioner, subject to the approval of the Court, and shall be paid out of the funds or assets of the pool.

(i) Each pool contract shall provide that the members of the pool shall be assessed on a pro rata basis as calculated by the amount of each member's average annual contribution in order to satisfy the amount of any deficiency where a pool is determined to be insolvent, financially impaired, or is otherwise found to be unable to discharge its legal liabilities and other obligations.

(j) In the event that the Commissioner finds that a pool is insolvent, financially impaired, or otherwise, unable to discharge its legal liabilities or obligations, or if the Commissioner at any time has reason to believe that any owner or operator is unable to demonstrate financial responsibility as required by G.S. 143-215.94H and rules adopted by the Commission as a result of the financial condition of the pool or for any other reason, the Commissioner shall so notify the Secretary.

(k) The provisions of Article 48 of Chapter 58 do not apply to any risks retained by any pool.

(*l*) The Department of Insurance, in consultation with the Petroleum Underground Storage Tank Funds Council and the Department of Environment and Natural Resources, shall provide guidance and technical assistance for the formation of an insurance pool pursuant to G.S. 143-215.94I to any responsible entity that requests assistance. (1987 (Reg. Sess., 1988), c. 1035, s. 1; 1989, c. 652, s. 11; 1995, c. 193, s. 66; 1999-132, s. 11.11; 2008-195, s. 10.)

**Editor's Note.** — Much of Article 17A of Chapter 58, referred to in subsection (h) of this section, was repealed by Session Laws 1989, c. 452, which also enacted an Article 46 of Chapter 58, containing similar provisions of those contained in the repealed sections of Article 17A. Article 46 of Chapter 58 has been recodified as Article 30 of Chapter 58.

Session Laws 2008-195, s. 10, effective August 8, 2008, was codified as subsection (*l*) of this section at the direction of the Revisor of Statutes.

## § 143-215.94J. Limitation of liability of the State of North Carolina.

(a) No claim filed against either the Commercial Fund or the Noncommercial Fund shall be paid except from assets of the respective fund as provided for in this Part or as may otherwise be authorized by law.

(b) This Part shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this Part; nor shall it be construed to obligate the Secretary to take any action pursuant to this Part for which funds are not available from appropriations or otherwise.

(c) The Secretary may budget anticipated receipts as needed to implement this Part.

(d) Should the Secretary find that the Noncommercial Fund balance is insufficient to satisfy all claims and other obligations of the Noncommercial Fund incurred pursuant to this Part, the Secretary may transfer funds which would otherwise revert to the General Fund to the Noncommercial Fund in order to meet such claims and obligations.

(e) If at any time either fund balance is insufficient to pay all valid claims against it, the claims shall be paid in full in the order in which they are finally determined. The Secretary may retain not more than five hundred thousand dollars ($500,000) in the Noncommercial Fund as a contingency reserve and not apply the reserve to the claims. The Department may use the contingency reserve to conduct cleanups in accordance with G.S. 143-215.94G when an imminent hazard poses a threat to human health or to significant natural resources. (1987 (Reg. Sess., 1988), c. 1035, s. 1; 1989, c. 652, s. 16; 1991, c. 538, s. 9; 1993, c. 400, s. 15.)

## § 143-215.94K. Enforcement.

The provisions of G.S. 143-215.94W through G.S. 143-215.94Y shall apply to this Part. (1987 (Reg. Sess., 1988), c. 1035, s. 1; 1989, c. 652, s. 16; 1993, c. 400, s. 15; 1995, c. 377, s. 10.)

## § 143-215.94L. Definitions.

(a) The Commission may adopt rules necessary to implement the provisions of this Part. Except as may be otherwise specifically provided, the provisions of Chapter 150B of the General Statutes apply to this Part.

(b) This Part shall be administered by the Department consistent with the provisions of Title VI, § 601 of the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 42 U.S.C. § 6991 et seq., as amended. The provisions of 40 Code of Federal Regulations Part 280, Subpart I — Lender Liability (1 July 1997 Edition) apply to this Part and Part 2B of this Article.

(c) The provisions of this Part and of Part 2 of this Article are intended to be complementary. This Part shall not be construed to limit the liability under G.S. 143-215.84(a) of any person or to limit the authority of the Department to take any action pursuant to G.S. 143-215.84(b).

(d) This Part shall be known and may be cited as the Leaking Petroleum Underground Storage Tank Cleanup Act of 1988.

(e) The Department of Environment and Natural Resources shall establish a process to provide informal notice of any proposed policy change or rule interpretation that is not a rule, as defined in G.S. 150B-2, to interested parties. Except in a situation that requires immediate action, the Department shall receive and consider oral and written comment from interested parties before the Department implements the proposed policy change or rule interpretation. Except in a situation that requires immediate action, the Department shall provide written notice of a policy change or rule interpretation to interested parties at least 30 days prior to its implementation. (1987 (Reg. Sess., 1988), c. 1035, s. 1; 1991, c. 538, ss. 10, 16; 1993, c. 400, s. 15; 1998-161, s. 9; 2008-195, s. 9.)

**Editor's Note.** — Session Laws 2008-195, s. 9, effective August 8, 2008, was codified as subsection (e) of this section at the direction of the Revisor of Statutes.

Session Laws 2008-195, s. 7, effective August 8, 2008, and expiring September 1, 2014, established a pilot program to evaluate the use of site-specific standards for cleanup of discharges or releases of petroleum from underground storage tanks. See note at G.S. 143-215.94A, 143-215.94T and 143-215.94V.

## § 143-215.94M. Reports.

(a) The Secretary shall present an annual report to the Environmental Review Commission which shall include at least the following:

(1) A list of all discharges or releases of petroleum from underground storage tanks;

(2) A list of all cleanups requiring State funding through the Noncommercial Fund and a comprehensive budget to complete such cleanups;

(3) A list of all cleanups undertaken by tank owners or operators and the status of these cleanups;

(4) A statement of receipts and disbursements for both the Commercial Fund and the Noncommercial Fund;

(5) A statement of all claims against both the Commercial Fund and the Noncommercial Fund, including claims paid, claims denied, pending claims, anticipated claims, and any other obligations;

(6) The adequacy of both the Commercial Fund and the Noncommercial Fund to carry out the purposes of this Part together with any recommendations as to measures that may be necessary to assure the continued solvency of the Commercial Fund and the Noncommercial Fund; and

(7) A statement of the condition of the Loan Fund and a summary of all activity under the Loan Fund.

(b) The report required by this section shall be made by the Secretary on or before 1 September of each year. (1987 (Reg. Sess., 1988), c. 1035, s. 1; 1989, c. 652, ss. 12, 16; 1991, c. 538, s. 11; 1993, c. 400, s. 15; c. 402, s. 6; 2002-148, s. 7.)

**Editor's Note.** — Session Laws 2008-195, ss. 7 and 8, effective August 8, 2008, and expiring September 1, 2014, established a pilot program to evaluate the use of site-specific cleanup standards, provided for the reclassification of a site as low risk, and required annual reports to the Environmental Review Commission. See notes at G.S. 143-215.94A, 143-215.94T and 143-215.94V.

Session Laws 2001-442, s. 7, as amended by Session Laws 2003-340, s. 2, provides: "Beginning 1 September 2003, the Secretary of Environment and Natural Resources shall submit an annual report to the Environmental Review Commission on the implementation of Sections 1 through 6 of this act [Session Laws 2001-442, ss. 1-6] as a part of the report required by G.S. 143-215.94M." Session Laws 2001-442, s. 8, provided that Session Laws 2001-442, s. 7, would expire October 1, 2006. Session Laws 2008-195, s. 11, effective retroactively to October 1, 2006, amended Session Laws 2001-442, s. 8, by extending the expiration date to October 1, 2011.

## § 143-215.94N. Applicability.

(a) The provisions of this Part as they relate to costs paid from the Commercial Fund apply only to discharges or releases that are discovered or reported on or after 30 June 1988 from a commercial underground storage tank.

(b) The provisions of this Part as they relate to costs paid from the Noncommercial Fund apply to discharges or releases without regard to the date discovered or reported; however, reimbursement of costs under G.S. 143-215.94G(d)(1), (2), (3), (3a), and (4) shall be for the full amount of the costs paid for from the Noncommercial Fund and shall not be limited pursuant to G.S. 143-215.94E(b) for discharges or releases from commercial underground storage tanks discovered or reported on or before 30 June 1988. (1989, c. 652, ss. 13, 16; 1993, c. 400, s. 15; 1995, c. 377, s. 11.)

### CASE NOTES

**Claim for Reimbursement of Clean-up Costs.** — Trial court erred by granting the North Carolina Department of Environment, Health, and Natural Resources' motion for summary judgment on an oil company's claim that the Department erred when it denied the company's claim for reimbursement from the Fund because, even though there was some evidence the oil company knew, prior to June 30, 1988, that underground storage tanks it was using at a gas station were leaking, other evidence showed that the oil company did not know about the problem until the Department issued a notice of violation in February 1989, and the conflicting evidence created a genuine issue of material fact. York Oil Co. v. N.C. Dep't of Env't, 164 N.C. App. 550, 596 S.E.2d 270, 2004 N.C. App. LEXIS 966 (2004).

## § 143-215.94O. Petroleum Underground Storage Tank Funds Council.

(a) The North Carolina Petroleum Underground Storage Tank Funds Council is created. The Council shall be composed of 11 members as follows:

(1) An employee of the Department who is not employed by the section responsible for the administration of the underground storage tank cleanup program who shall be appointed by the Secretary and who shall serve at the pleasure of the Secretary.

(2) Five members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate as follows:

a. One who shall, at the time of appointment, be actively connected with a petroleum refining company or an organization representing petroleum refining companies.

b. One who shall, at the time of appointment, be actively connected with a petroleum marketer or an organization representing petroleum marketers.

c. One who shall, at the time of appointment, be actively connected with an environmental insurance carrier or an organization representing environmental insurance carriers.

d. One who shall, at the time of appointment, be actively connected with a commercial lending institution or an organization representing commercial lending institutions.

e. One who shall, at the time of appointment, be actively engaged in farming and the owner of a noncommercial petroleum underground storage tank or actively connected with an organization representing farmers.

(3) Five members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives as follows:

a. One who shall, at the time of appointment, be an owner or operator of a convenience store that markets petroleum products or is actively connected with an organization representing convenience store owners or operators.

b. One who shall, at the time of appointment, be a motor fuel service station dealer or actively connected with an organization representing motor fuel service station dealers.

c. One who shall, at the time of appointment, be actively connected with an environmental advocacy organization.

d. One who shall, at the time of appointment, have special training and experience in the remediation of groundwater contamination resulting from leaking petroleum underground storage tanks.

e. One who shall, at the time of appointment, be the owner of a noncommercial petroleum underground storage tank and not eligible for appointment under subdivisions (1), (2)a. through (2)d., or (3)a. through (3)d. of this subsection.

(b) The members of the Council shall elect a chairman and a vice-chairman.

(c) All appointments made by the General Assembly shall be for a term of two years. Terms shall expire on 30 June except that members shall serve until their successors are appointed and duly qualified as provided in G.S. 128-7. The General Assembly shall have the power to remove, in accordance with G.S. 143B-13, any member appointed by the General Assembly.

(d) The Secretary shall provide staff assistance to the Council from the agency responsible for administration of the underground storage tank cleanup program.

(e) Members of the Council who are not State employees shall be reimbursed for their expenses in accordance with G.S. 138-5. Members of the

Council who are State employees shall be reimbursed for their expenses in accordance with G.S. 138-6.

(f) The Council shall meet upon the call of the Chairman or a majority of its members. A majority of its members shall constitute a quorum for the transaction of business.

(g) The Council shall:

(1) Review the administration of the Commercial Fund, the Noncommercial Fund, and the Loan Fund.

(2) Advise the Secretary and the Commission on any matter relating to the effective and efficient implementation of this Part.

(3) Advise the Secretary on the adequacy of the funds to carry out the purposes of this Part.

(4) Recommend rules, in accordance with generally accepted standards prevailing among commercial lending institutions, for use by the Department in determining eligibility for loans, interest rates, terms, and conditions applicable to loans, and in managing the Loan Fund.

(5) Recommend rules and comment on proposed rules governing reimbursement of necessary and reasonable costs under G.S. 143-215.94E(e). (1989, c. 652, s. 16; 1991, c. 538, ss. 12, 21; 1991 (Reg. Sess., 1992), c. 817, s. 3; 1993, c. 400, s. 15; 1995 (Reg. Sess., 1996), c. 743, s. 16.)

## § 143-215.94P. Groundwater Protection Loan Fund.

(a) There is established under the control and direction of the Department the Groundwater Protection Loan Fund. This Loan Fund shall be a nonreverting revolving fund consisting of any monies appropriated to it by the General Assembly or available to it from grants, and other monies paid to it or recovered on behalf of the Loan Fund. The Loan Fund shall be credited with interest on the Loan Fund by the State Treasurer pursuant to G.S. 147-69.2 and G.S. 147-69.3.

(b) The Loan Fund shall be used to provide loans to the owners of commercial petroleum underground storage tanks who are creditworthy but may be unable to secure conventional loans to upgrade or replace commercial underground storage tanks in use on 1 July 1991 so as to meet the performance standards applicable to tanks installed after 22 December 1988 or the requirements that existing underground storage tanks must meet by 22 December 1998. All applications for loans under this section must be received by the Department prior to 1 January 1995.

(c) The Department shall adopt rules for use in managing the Loan Fund. Rules for managing the Loan Fund shall be based on generally accepted standards prevailing among commercial lending institutions with such modifications as may be necessary to achieve the purpose of this section to make loans available to creditworthy applicants. The Department shall administer the loan program through existing commercial lending institutions. In the event that the Department is unable to arrange for the administration of the loan program through existing commercial institutions in all or any part of the State, the Department may administer the loan program through the Office of State Budget and Management. Each commercial institution or agency that administers any part of the loan program shall collect all charges for securing and administering each loan, including but not limited to application fees, recording costs, collection costs, and attorneys' fees from the borrower. Receipt of a loan from the Loan Fund is not a right, duty, or privilege; therefore, Article 3 of Chapter 150B of the General Statutes does not apply to the grant or denial of a loan from the Loan Fund.

(d) Funds received in repayment of loans made from the Loan Fund shall be deposited into the Loan Fund until the proceeds of all approved loans are disbursed to the borrowers. Thereafter, funds received in repayment of loans made from the Loan Fund and any other funds remaining in the Loan Fund shall be deposited in the Commercial Fund.

(e) In the event of a default on a loan from the Loan Fund or a violation of a loan agreement, the Secretary may request the Attorney General to bring a civil action for collection of the amount owed or other appropriate relief. An action shall be filed in the superior court of the county where the loan recipient resides, where the loan recipient does business, or where the tanks replaced or upgraded by the loan are located. In an action, the Attorney General may recover all costs of litigation, including attorneys' fees.

(f) If the State incurs liability in extending credit from the Loan Fund and, as a result of the liability, the State is ordered to pay or, as part of a settlement agreement, agrees to pay damages or other costs, the State shall seek reimbursement for the amount of the damages or other costs from the following sources in the order listed:

(1) Any funds to which the State is entitled under any federal program providing for the cleanup of petroleum discharges or releases from underground storage tanks, including but not limited to the Leaking Underground Storage Tank Trust Fund established pursuant to 26 U.S.C. § 4081 and 42 U.S.C. § 6991b(h).
(2) The Noncommercial Fund.
(3) The Commercial Fund. (1989, c. 652, s. 16; 1991, c. 538, ss. 13, 21; 1993, c. 400, s. 15; c. 402, s. 7; 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

**§§ 143-215.94Q through 143-215.94S:** Reserved for future codification purposes.

## Part 2B. Underground Storage Tank Regulation.

### § 143-215.94T. Adoption and implementation of regulatory program.

(a) The Commission shall adopt, and the Department shall implement and enforce, rules relating to underground storage tanks as provided by G.S. 143-215.3(a)(15) and G.S. 143B-282(a)(2)h. These rules shall include standards and requirements applicable to both existing and new underground storage tanks and tank systems, may include different standards and requirements based on tank capacity, tank location, tank age, and other relevant factors, and shall include, at a minimum, standards and requirements for:

(1) Design, construction, and installation, including monitoring systems.
(2) Notification to the Department, inspection, and registration.
(3) Recordation of tank location.
(4) Modification, retrofitting, and upgrading.
(5) General operating requirements.
(6) Release detection.
(7) Release reporting, investigation, and confirmation.
(8) Corrective action.
(9) Repair.
(10) Closure.
(11) Financial responsibility.
(12) Tank tightness testing procedures and certification of persons who conduct tank tightness tests.
(13) Secondary containment for all components of petroleum underground storage tank systems.

(b) Rules adopted pursuant to subsection (a) of this section that apply only to commercial underground storage tanks shall not apply to any:

(1) Farm or residential underground storage tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes.

(2) Underground storage tank of 1,100 gallons or less capacity used for storing heating oil for consumptive use on the premises where stored.

(3) Underground storage tank of more than 1,100 gallon capacity used for storing heating oil for consumptive use on the premises where stored by four or fewer households.

(c) Rules adopted pursuant to subdivision (13) of subsection (a) of this section shall require secondary containment for all components of underground storage tank systems, including, but not limited to, tanks, piping, fittings, pump heads, and dispensers. Secondary containment requirements shall include standards for double wall tanks, piping, and fittings and for sump containment for pump heads and dispensers. The rules shall provide for monitoring of double wall interstices and sump containments. The rules shall apply to any underground storage tank system that is installed on or after the date on which the rules become effective and to the replacement of any component of an underground storage tank system on or after that date. (1989, c. 652, s. 14; 1998-161, s. 10; 1999-328, s. 4.12; 2003-352, s. 8; 2008-195, s. 5; 2009-570, s. 20.)

**Pilot Program to Evaluate the Use of Site-specific Cleanup Standards.** — Session Laws 2008-195, s. 7, effective August 8, 2008, and expiring September 1, 2014, provides: "(a) The definitions set out in G.S. 143-215.94A apply to this section. As used in this section, 'Department' means the Department of Environment and Natural Resources and, with respect to any power or duty assigned to the Environmental Management Commission under Article 21A of Chapter 143 of the General Statutes, includes the Environmental Management Commission. As used in this section, 'site-specific cleanup standards' means standards developed using the methodology described in the Standard Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites adopted by the American Society for Testing and Materials (ASTM) as E1739-95(2002).

"(b) The Department shall establish a pilot program to evaluate the use of site-specific cleanup standards for the cleanup of discharges or releases of petroleum from underground storage tanks as an alternative to the use of the risk-based assessment and corrective action standards set out in 15A NCAC 2L.0400. The purpose of the pilot program is to determine the extent to which the use of site-specific standards would provide effective protection of public health, safety, and the environment in a cost-effective manner and at a lower overall cost as compared with the use of the risk-based standards set out in 15A NCAC 2L.0400. The pilot program shall apply only to discharges or releases that are classified as intermediate risk under 15A NCAC 2L.0400(d). The pilot program shall evaluate the use of site-specific standards in the cleanup of contamination that results from a discharge or release of petroleum from: (i) an underground storage tank; and (ii) an underground storage tank that is commingled with petroleum contamination from a source of contamination other than an underground storage tank, as provided in G.S. 143-215.94V(h).

"(c) Participation in the pilot program shall be at the election of the owner, operator, or landowner. To participate in the pilot program, an owner, operator, or landowner shall perform a site-specific risk assessment and submit the assessment to the Department. If the Department determines that the use of site-specific cleanup standards will provide effective protection of public health, safety, and the environment, the Department shall set site-specific soil and groundwater cleanup standards for the discharge or release. These site-specific standards shall apply in lieu of the risk-based assessment and corrective action standards set out in 15A NCAC 2L.0400.

"(d) If soil and groundwater contamination from a discharge or release is no greater than the site-specific soil and groundwater cleanup standards set by the Department, the Department shall notify an owner, operator, or landowner that no cleanup, further cleanup, or further action will be required. If soil and groundwater contamination from a discharge or release is greater than the site-specific soil and groundwater cleanup standards set by the Department, the owner, operator, or landowner shall submit a corrective action plan to achieve the standards. The Department may require the owner, operator, or landowner to evaluate the impact of the site-specific cleanup standards on public health, safety, and the environment through use of an appropriate model. The Department shall not set site-specific soil and groundwater cleanup standards for the discharge or release that allow for contamination in excess of unrestricted use standards, as defined in G.S. 143B-279.9, on any real property that is not subject to land-use restrictions under G.S. 143B-279.9 and recordation under G.S. 143B-279.11.

"(e) Except as provided in this section, the provisions of Part 2A and Part 2B of Article 21A of Chapter 143 of the General Statutes apply to this section.

"(f) The Department shall annually report to the Environmental Review Commission on the number of site-specific risk assessments submitted to the Department under the pilot program, the disposition of those submissions, and, for any submissions for which site-specific soil and groundwater cleanup standards are not set, the basis for the decision not to set site-specific cleanup standards. The report shall include a comparison of assessment and corrective action of discharges or releases under the pilot program to assessment and corrective action of intermediate risk discharges or releases pursuant to the risk-based assessment and corrective action standards set out in 15A NCAC 2L.0400. The comparison shall include all of the following:

"(1) The costs associated with investigation, assessment, initial response, abatement, analysis of risk, and development and implementation of a corrective action plan.

"(2) The immediate and long-term impacts on public health, safety, and the environment.

"(3) The need for and use of land-use restrictions as part of the corrective action plan.

"(4) The extent to which corrective action addresses vapor intrusion.

"(g) The Department shall submit the first report required by subsection (f) of this section on or before 1 September 2009. The Department shall include in the report due on or before 1 September 2013 any recommendations, including legislative proposals, based on the findings of the pilot program."

**Reclassification of Site to Lower Risk Classification.** — Session Laws 2008-195, s. 8, effective August 8, 2008, and expiring September 1, 2014, provides: "(a) The definitions set out in subsection (a) of Section 7 of this act apply to this section. It is the policy of the State that a discharge or release be reclassified as low risk if, based on site-specific cleanup standards, investigation, assessment, initial response, abatement, risk-based corrective action, or other corrective action, the Department determines that the discharge or release poses no significant risk to human health or the environment. An owner, operator, or landowner may request that a discharge or release be reclassified to a lower risk classification. If the Department denies a request to reclassify a discharge or release to a lower risk classification, the owner, operator, or landowner may file a petition for a contested case hearing as provided in Article 3 of Chapter 150B of the General Statutes.

"(b) The Department shall report on or before 1 September of each year to the Environmental Review Commission on the number of sites for which reclassification was requested based on site-specific information and the disposition of each request. The Department shall submit the first report required by this section on or before 1 September 2009."

**Editor's Note.** — Session Laws 1999-328, s. 5.1, provides that this act shall not be construed to obligate the General Assembly to appropriate any funds to implement the provisions of this act. Every State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency.

Session Laws 2008-195, s. 5, amended this section in the coded bill drafting format provided by G.S. 120-20.1. In subsection (c), the word "for" was added by Session Laws 2008-195, but was not underlined per code drafting guidelines. Session Laws 2009-570, s. 20 corrected the oversight.

**Effect of Amendments.** — Session Laws 2008-195, s. 5, effective August 8, 2008, substituted "G.S. 143B-282(a)(2)h" for "G.S. 143B-282(2)h" in the introductory language of subsection (a); substituted "all" for "nontank" in subdivision (a)(13); and in subsection (c), deleted "nontank" preceding "components" in the first sentence, and "component" in the last sentence, substituted "including, but not limited to, tanks, piping" for "including all piping and," inserted "tanks" following "standards for double wall," and deleted "monthly" preceding "monitoring of double wall."

Session Laws 2009-570, s. 20, effective August 28, 2009, inserted "for" preceding "sump containment" in the second sentence of subsection (c).

**Legal Periodicals.** — For legislative survey, see 21 Campbell L. Rev. 323 (1999).

### § 143-215.94U. Registration of petroleum commercial underground storage tanks; operation of petroleum underground storage tanks; operating permit required.

(a) The owner or operator of each petroleum commercial underground storage tank shall annually obtain an operating permit from the Department for the facility at which the tank is located. The Department shall issue an operating permit only if the owner or operator has done all of the following:

(1) Notified the Department of the existence of all tanks as required by 40 Code of Federal Regulations § 280.22 (1 July 1994 Edition) or 42 U.S.C. § 6991a, if applicable, at the facility.

(2) Paid all fees required under G.S. 143-215.94C for all commercial petroleum underground storage tanks located at the facility.

(3) Complies with applicable release detection, spill and overfill protection, and corrosion protection requirements set out in rules adopted pursuant to this Chapter, notifies the Department of the method or combination of methods of leak detection, spill and overfill protection, and corrosion protection in use, and certifies to the Department that all applicable release detection, spill and overfill protection, and corrosion protection requirements are being met for all petroleum underground storage tanks located at the facility.

(4) If applicable, complies with the Stage I vapor control requirements set out in 15A North Carolina Administrative Code 2D.0928, effective 1 March 1991, notifies the Department of the method or combination of methods of vapor control in use, and certifies to the Department that all Stage I vapor control requirements are being met for all petroleum underground storage tanks located at the facility.

(5) Substantially complied with the air quality, groundwater quality, and underground storage tank standards applicable to any activity in which the applicant has previously engaged and has been in substantial compliance with federal and State laws, regulations, and rules for the protection of the environment. In determining substantial compliance, the compliance history of the owner or operator and any parent, subsidiary, or other affiliate of the owner, operator, or parent may be considered.

(6) Demonstrated financial responsibility as required by G.S. 143-215.94H.

(b) The operating permit shall be issued at the time the commercial underground storage annual tank operating fee required under G.S. 143-215.94C(a) is paid and shall be valid from the first day of the month in which the fee is due through the last day of the last month for which the fee is paid in accordance with the schedule established by the Department under G.S. 143-215.94C(b).

(c) No person shall place a petroleum product, and no owner or operator shall cause a petroleum product to be placed, into an underground storage tank at a facility for which the owner or operator does not hold a currently valid operating permit.

(d) The Department shall issue an operating permit certificate for each facility that meets the requirements of subsection (a) of this section. The operating permit certificate shall identify the number of tanks at the facility and shall conspicuously display the date on which the permit expires. Except for the owner or operator, no person shall be liable under subsection (c) of this section if an unexpired operating permit certificate is displayed at the facility, unless the person knows or has reason to know that the owner or operator does not hold a currently valid operating permit for the facility.

(e) The Department may revoke an operating permit only if the owner or operator fails to continuously meet the requirements set out in subsection (a) of this section. If the Department revokes an operating permit, the owner or operator of the facility for which the operating permit was issued shall immediately surrender the operating permit certificate to the Department, unless the revocation is stayed pursuant to G.S. 150B-33. An owner or operator may challenge a decision by the Department to deny or revoke an operating permit by filing a contested case under Article 3 of Chapter 150B of the General Statutes. The Secretary shall make the final agency decision regarding the revocation of a permit under this section. (1995, c. 377, s. 2; 1998-161, s. 6; 2008-195, s. 6.)

**Effect of Amendments.** — Session Laws 2008-195, s. 6, effective January 1, 2009, inserted "has done all of the following" in the introductory language of subsection (a); made grammatical and stylistic changes in subdivisions (a)(1) through (a)(5); added subdivision (a)(6); and deleted "subdivisions (1) through (4) of" preceding "subsection (a)" in the first sentence of subsection (e).

## § 143-215.94V. Standards for petroleum underground storage tank cleanup.

(a) Legislative findings and intent.

(1) The General Assembly finds that:

a. The goals of the underground storage tank program are to protect human health and the environment. Maintaining the solvency of the Commercial Fund and the Noncommercial Fund is essential to these goals.

b. The sites at which discharges or releases from underground storage tanks occur vary greatly in terms of complexity, soil types, hydrogeology, other physical and chemical characteristics, current and potential future uses of groundwater, and the degree of risk that each site may pose to human health and the environment.

c. Risk-based corrective action is a process that recognizes this diversity and utilizes an approach where assessment and remediation activities are specifically tailored to the conditions and risks of a specific site.

d. Risk-based corrective action gives the State flexibility in requiring different levels of cleanup based on scientific analysis of different site characteristics, and allowing no action or no further action at sites that pose little risk to human health or the environment.

e. A risk-based approach to the cleanup of environmental damage can adequately protect human health and the environment while preventing excessive or unproductive cleanup efforts, thereby assuring that limited resources are directed toward those sites that pose the greatest risk to human health and the environment.

(2) The General Assembly intends:

a. To direct the Commission to adopt rules that will provide for risk-based assessment and cleanup of discharges and releases from petroleum underground storage tanks. These rules are intended to combine groundwater standards that protect current and potential future uses of groundwater with risk-based analysis to determine the appropriate cleanup levels and actions.

b. That these rules apply to all discharges or releases that are reported on or after the date the rules become effective in order to ascertain whether cleanup is necessary, and if so, the appropriate level of cleanup.

c. That these rules may be applied to any discharge or release that has been reported at the time the rules become effective at the discretion of the Commission.

d. That these rules and decisions of the Commission and the Department in implementing these rules facilitate the completion of more cleanups in a shorter period of time.

e. That neither the Commercial Fund nor the Noncommercial Fund be used to clean up sites where the Commission has determined that a discharge or release poses a degree of risk to human health or the environment that is no greater than the acceptable level of risk established by the Commission.

f. Repealed by Session Laws 1998-161, s. 11(c), effective retroactively to January 1, 1998.

g. That the Commercial Fund and the Noncommercial Fund be used to perform the most cost-effective cleanup that addresses imminent threats to human health and the environment.

(b) The Commission shall adopt rules to establish a risk-based approach for the assessment, prioritization, and cleanup of discharges and releases from petroleum underground storage tanks. The rules shall address, at a minimum, the circumstances where site-specific information should be considered, criteria for determining acceptable cleanup levels, and the acceptable level or range of levels of risk to human health and the environment.

(c) The Commission may require an owner or operator or a landowner eligible for payment or reimbursement under subsections (b), (b1), (c), and (c1) of G.S. 143-215.94E to provide information necessary to determine the degree of risk to human health and the environment that is posed by a discharge or release from a petroleum underground storage and to identify the most cost-effective cleanup that addresses imminent threats to human health and the environment.

(d) If the Commission concludes that a discharge or release poses a degree of risk to human health or the environment that is no greater than the acceptable level of risk established by the Commission, the Commission shall notify an owner, operator, or landowner who provides the information required by subsection (c) of this section that no cleanup, further cleanup, or further action will be required unless the Commission later determines that the discharge or release poses an unacceptable level of risk or a potentially unacceptable level of risk to human health or the environment. If the Commission concludes that a discharge or release poses a degree of risk to human health or the environment that requires further cleanup, the Commission shall notify the owner, operator, or landowner who provides the information required by subsection (c) of this section of the cleanup method approved by the Commission as the most cost-effective cleanup method for the site. This section shall not be construed to prohibit an owner, operator, or landowner from selecting a cleanup method other than the cost-effective cleanup method approved by the Commission so long as the Commission determines that the alternative cleanup method will address imminent threats to human health and the environment.

(e) If the Commission concludes under subsection (d) of this section that no cleanup, no further cleanup, or no further action will be required, the Department shall not pay or reimburse any costs otherwise payable or reimbursable under this Article from either the Commercial or Noncommercial Fund, other than reasonable and necessary to conduct the risk assessment required by this section, unless:

(1) Cleanup is ordered or damages are awarded in a finally adjudicated judgment in an action against the owner or landowner.

(2) Cleanup is required or damages are agreed to in a consent judgment approved by the Department prior to its entry by the court.

(3) Cleanup is required or damages are agreed to in a settlement agreement approved by the Department prior to its execution by the parties.

(4) The payment or reimbursement is for costs that were incurred prior to or as a result of notification of a determination by the Commission that no cleanup, no further cleanup, or no action is required.

(5) The payment or reimbursement is for costs that were incurred as a result of a later determination by the Commission that the discharge or release poses a threat or potential threat to human health or the environment as provided in subsection (d) of this section.

(e1) If the Commission concludes under subsection (d) of this section that further cleanup is required and notifies the owner, operator, or landowner of the cleanup method approved by the Commission as the most cost-effective cleanup method for the site, the Department shall not pay or reimburse any costs otherwise payable or reimbursable under this Article from either the Commercial Fund or Noncommercial Fund, other than those costs that are reasonable and necessary to conduct the risk assessment and to implement the cost-effective cleanup method approved by the Commission. If the owner, operator, or landowner selects a cleanup method other than the one identified by the Commission as the most cost-effective cleanup, the Department shall not pay or reimburse for costs in excess of the cost of implementing the approved cost-effective cleanup.

(f) This section shall not be construed to limit the authority of the Commission to require investigation, initial response, and abatement of a discharge or release pending a determination by the Commission under subsection (d) of this section as to whether cleanup, further cleanup, or further action will be required.

(g) Subsections (c) through (e1) of this section apply only to assessments and cleanups in progress or begun on or after 2 January 1998.

(h) If a discharge or release of petroleum from an underground storage tank results in contamination in soil or groundwater that becomes commingled with contamination that is the result of a discharge or release of petroleum from a source of contamination other than an underground storage tank, the cleanup of petroleum may proceed under rules adopted pursuant to this section. The Department shall not pay or reimburse any costs associated with the assessment or remediation of that portion of contamination that results from a release or discharge of petroleum from a source other than an underground storage tank from either the Commercial Fund or the Noncommercial Fund. (1995, c. 377, s. 1; 1998-161, s. 11(c); 2003-352, s. 9.)

**Pilot Program to Evaluate the Use of Site-specific Cleanup Standards.** — Session Laws 2008-195, s. 7, effective August 8, 2008, and expiring September 1, 2014, provides: "(a) The definitions set out in G.S. 143-215.94A apply to this section. As used in this section, 'Department' means the Department of Environment and Natural Resources and, with respect to any power or duty assigned to the Environmental Management Commission under Article 21A of Chapter 143 of the General Statutes, includes the Environmental Management Commission. As used in this section, 'site-specific cleanup standards' means standards developed using the methodology described in the Standard Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites adopted by the American Society for Testing and Materials (ASTM) as E1739-95(2002).

"(b) The Department shall establish a pilot program to evaluate the use of site-specific cleanup standards for the cleanup of discharges or releases of petroleum from underground storage tanks as an alternative to the use of the risk-based assessment and corrective action standards set out in 15A NCAC 2L.0400. The purpose of the pilot program is to determine the extent to which the use of site-specific standards would provide effective protection of public health, safety, and the environment in a cost-effective manner and at a lower overall cost as compared with the use of the risk-based standards set out in 15A NCAC 2L.0400. The pilot program shall apply only to discharges or releases that are classified as intermediate risk under 15A NCAC 2L.0400(d). The pilot program shall evaluate the use of site-specific standards in the cleanup of contamination that results from a discharge or release of petroleum from: (i) an underground storage tank; and (ii) an underground storage tank that is commingled with petroleum contamination from a source of contamination other than an underground storage tank, as provided in G.S. 143-215.94V(h).

"(c) Participation in the pilot program shall be at the election of the owner, operator, or landowner. To participate in the pilot program, an owner, operator, or landowner shall perform a site-specific risk assessment and submit the assessment to the Department. If the Department determines that the use of site-specific cleanup standards will provide effective protection of public health, safety, and the environment, the Department shall set site-specific soil and groundwater cleanup standards for the discharge or release. These site-specific standards shall apply in lieu of the risk-based assessment and corrective action standards set out in 15A NCAC 2L.0400.

"(d) If soil and groundwater contamination from a discharge or release is no greater than the site-specific soil and groundwater cleanup standards set by the Department, the Department shall notify an owner, operator, or landowner that no cleanup, further cleanup, or further action will be required. If soil and groundwater contamination from a discharge or release is greater than the site-specific soil and groundwater cleanup standards set by the Department, the owner, operator, or landowner shall submit a corrective action plan to achieve the standards. The Department may require the owner, operator, or landowner to evaluate the impact of the site-specific cleanup standards on public health, safety, and the environment through use of an appropriate model. The Department shall not set site-specific soil and groundwater cleanup standards for the discharge or release that allow for contamination in excess of unrestricted use standards, as defined in G.S. 143B-279.9, on any real property that is not subject to land-use restrictions under G.S. 143B-279.9 and recordation under G.S. 143B-279.11.

"(e) Except as provided in this section, the provisions of Part 2A and Part 2B of Article 21A of Chapter 143 of the General Statutes apply to this section.

"(f) The Department shall annually report to the Environmental Review Commission on the number of site-specific risk assessments submitted to the Department under the pilot program, the disposition of those submissions, and, for any submissions for which site-specific soil and groundwater cleanup standards are not set, the basis for the decision not to set site-specific cleanup standards. The report shall include a comparison of assessment and corrective action of discharges or releases under the pilot program to assessment and corrective action of intermediate risk discharges or releases pursuant to the risk-based assessment and corrective action standards set out in 15A NCAC 2L.0400. The comparison shall include all of the following:

"(1) The costs associated with investigation, assessment, initial response, abatement, analysis of risk, and development and implementation of a corrective action plan.

"(2) The immediate and long-term impacts on public health, safety, and the environment.

"(3) The need for and use of land-use restrictions as part of the corrective action plan.

"(4) The extent to which corrective action addresses vapor intrusion.

"(g) The Department shall submit the first report required by subsection (f) of this section on or before 1 September 2009. The Department shall include in the report due on or before 1 September 2013 any recommendations, including legislative proposals, based on the findings of the pilot program."

**Reclassification of Site to Lower Risk Classification.** — Session Laws 2008-195, s. 8, effective August 8, 2008, and expiring September 1, 2014, provides: "(a) The definitions set out in subsection (a) of Section 7 of this act apply to this section. It is the policy of the State that a discharge or release be reclassified as low risk if, based on site-specific cleanup standards, investigation, assessment, initial response, abatement, risk-based corrective action, or other corrective action, the Department determines that the discharge or release poses no significant risk to human health or the environment. An owner, operator, or landowner may request that a discharge or release be reclassified to a lower risk classification. If the Department denies a request to reclassify a discharge or release to a lower risk classification, the owner, operator, or landowner may file a petition for a contested case hearing as provided in Article 3 of Chapter 150B of the General Statutes.

"(b) The Department shall report on or before 1 September of each year to the Environmental Review Commission on the number of sites for which reclassification was requested based on site-specific information and the disposition of each request. The Department shall submit the first report required by this section on or before 1 September 2009."

Session Laws 1995 (Reg. Sess., 1996), c. 648, s. 8, provides: "Nothing in this act shall be construed to waive the sovereign immunity of the State for any action or omission of the State or of any agent or employee of the State in implementing the provisions of this act. The provisions of Article 31 of Chapter 143 of the General Statutes, Tort Claims against State Departments and Agencies, shall not apply to any action or omission of the State or of any agent or employee of the State in implementing the provisions of this act. There shall be no liability for negligence on the part of the State or of any agent or employee for any action or omission in implementing the provisions of this act."

Regarding modification of the rights and obligations of an owner, operator, or a landowner to whom G.S. 143-215.94E(b1) applies and who is eligible to have costs paid or reimbursed under G.S. 143-215.94B, as governed by G.S. 143-215.94E, see the Editor's Note to Session Laws 2003-352, s. 10, at G.S. 143-215.94E.

## § 143-215.94W. Enforcement procedures: civil penalties.

(a) A civil penalty of not more than ten thousand dollars ($10,000) may be assessed by the Secretary against any person who:

(1) Violates any provision of this Part or rule adopted pursuant to this Part.
(2) Fails to apply for or to secure a permit required by this Part.
(3) Violates or fails to act in accordance with the terms, conditions, or requirements of any permit issued pursuant to this Part.
(4) Fails to file, submit, or make available, as the case may be, any documents, data, or reports required by this Part.
(5) Violates or fails to act in accordance with the terms, conditions, or requirements of any special order or other appropriate document issued pursuant to G.S. 143-215.2 or fails to comply with the requirements of G.S. 143B-279.9 through G.S. 143B-279.11.
(6) Falsifies or tampers with any recording or monitoring device or method required to be operated or maintained under this Part or rules implementing this Part.
(7) Knowingly renders inaccurate any recording or monitoring device or method required to be operated or maintained under this Part or rules implementing this Part.
(8) Knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Part or a rule implementing this Part.
(9) Knowingly makes a false statement of a material fact in a rule-making proceeding or contested case under this Part.
(10) Refuses access to the Commission or its duly designated representative to any premises for the purpose of conducting a lawful inspection provided for in this Part.

(b) If any action or failure to act for which a penalty may be assessed under this section is continuous, the Secretary may assess a penalty not to exceed ten thousand dollars ($10,000) per day for so long as the violation continues. A penalty for a continuous violation shall not exceed two hundred thousand dollars ($200,000) for each period of 30 days during which the violation continues.

(c) In determining the amount of the penalty, the Secretary shall consider the factors set out in G.S. 143B-282.1(b). The procedures set out in G.S. 143B-282.1 shall apply to civil penalty assessments that are presented to the Commission for final agency decision.

(d) The Secretary shall notify any person assessed a civil penalty of the assessment and the specific reasons therefor by registered or certified mail, or by any means authorized by G.S. 1A-1, Rule 4. Contested case petitions shall be filed pursuant to G.S. 150B-23 within 30 days of receipt of the notice of assessment. The Secretary shall make the final decision regarding assessment of a civil penalty under this section.

(e) Requests for remission of civil penalties shall be filed with the Secretary. Remission requests shall not be considered unless made within 30 days of receipt of the notice of assessment. Remission requests must be accompanied by a waiver of the right to a contested case hearing pursuant to Chapter 150B and a stipulation of the facts on which the assessment was based. Consistent with the limitations in G.S. 143B-282.1(c) and (d), remission requests may be resolved by the Secretary and the violator. If the Secretary and the violator are unable to resolve the request, the Secretary shall deliver remission requests and his recommended action to the Committee on Civil Penalty Remissions of the Environmental Management Commission appointed pursuant to G.S. 143B-282.1(c).

(f) If any civil penalty has not been paid within 30 days after notice of assessment has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the superior court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment, unless the violator contests the assessment as provided in subsection (d) of this section, or requests remission of the assessment in whole or in part as provided in subsection (e) of this section. If any civil penalty has not been paid within 30 days after the final agency decision or court order has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the superior court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment. Such civil actions must be filed within three years of the date the final agency decision or court order was served on the violator.

(g) Repealed by Session Laws 1995 (Regular Session, 1996), c. 743, s. 17.

(h) The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1995, c. 377, s. 3; 1995 (Reg. Sess., 1996), c. 743, s. 17; 1998-215, s. 69; 2002-90, s. 6.)

**Editor's Note.** — Session Laws 2002-90, s. 8, provides in part: "This act applies retroactively to any cleanup of a discharge or release of petroleum from an underground storage tank pursuant to Part 2A of Article 21A of Chapter 143 of the General Statutes except that land-use restrictions and recordation of residual contamination are not required with respect to a discharge or release of petroleum for which the Department of Environment and Natural Resources issued a determination that no further action is required prior to 1 September 2001."

## § 143-215.94X. Enforcement procedures: criminal penalties.

(a) Any person who negligently commits any of the offenses set out in subdivisions (1) through (9) of G.S. 143-215.94W(a) shall be guilty of a Class 2 misdemeanor which may include a fine not to exceed fifteen thousand dollars ($15,000) per day of violation, provided that such fine shall not exceed a cumulative total of two hundred thousand dollars ($200,000) for each period of 30 days during which a violation continues.

(b) Any person who knowingly and willfully commits any of the offenses set out in subdivisions (1) through (5) of G.S. 143-215.94W(a) shall be guilty of a Class I felony, which may include a fine not to exceed one hundred thousand dollars ($100,000) per day of violation, provided that this fine shall not exceed a cumulative total of five hundred thousand dollars ($500,000) for each period of 30 days during which a violation continues. For the purposes of this subsection, the phrase "knowingly and willfully" shall mean intentionally and consciously as the courts of this State, according to the principles of common law interpret the phrase in the light of reason and experience.

(c)(1) Any person who knowingly commits any of the offenses set out in subdivisions (1) through (5) of G.S. 143-215.94W(a) and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury shall be guilty of a Class C felony, which may include a fine not to exceed two hundred fifty thousand dollars ($250,000) per day of violation, provided that this fine shall not exceed a cumulative total of one million dollars ($1,000,000) for each period of 30 days during which a violation continues.

(2) For the purposes of this subsection, a person's state of mind is knowing with respect to:

a. His conduct, if he is aware of the nature of his conduct;

b. An existing circumstance, if he is aware or believes that the circumstance exists; or

c. A result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(3) Under this subsection, in determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury:

a. The person is responsible only for actual awareness or actual belief that he possessed; and

b. Knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant.

(4) It is an affirmative defense to a prosecution under this subsection that the conduct charged was conduct consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of an occupation, a business, or a profession; or of medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent. The defendant may establish an affirmative defense under this subdivision by a preponderance of the evidence.

(d) No proceeding shall be brought or continued under this section for or on account of a violation by any person who has previously been convicted of a federal violation based upon the same set of facts.

(e) In proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information. Consistent with the principles of common law, the subjective mental state of defendants may be inferred from their conduct.

(f) For the purposes of the felony provisions of this section, a person's state of mind shall not be found "knowingly and willfully" or "knowingly" if the conduct that is the subject of the prosecution is the result of any of the following occurrences or circumstances:

(1) A natural disaster or other act of God which could not have been prevented or avoided by the exercise of due care or foresight.

(2) An act of third parties other than agents, employees, contractors, or subcontractors of the defendant.

(3) An act done in reliance on the written advice or emergency on-site direction of an employee of the Department. In emergencies, oral advice may be relied upon if written confirmation is delivered to the employee as soon as practicable after receiving and relying on the advice.

(4) An act causing no significant harm to the environment or risk to the public health, safety, or welfare and done in compliance with other conflicting environmental requirements or other constraints imposed in writing by environmental agencies or officials after written notice is delivered to all relevant agencies that the conflict exists and will cause a violation of the identified standard.

(5) Violations causing no significant harm to the environment or risk to the public health, safety, or welfare for which no enforcement action or civil penalty could have been imposed under any written civil enforcement guidelines in use by the Department at the time. This subdivision shall not be construed to require the Department to develop or use written civil enforcement guidelines.

(6) Occasional, inadvertent, short-term violations causing no significant harm to the environment or risk to the public health, safety, or welfare. If the violation occurs within 30 days of a prior violation or lasts for more than 24 hours, it is not an occasional, short-term violation.

(g) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other criminal offenses under State criminal offenses may apply to prosecutions brought under this section or other criminal statutes that refer to this section and shall be determined by the courts of this State according to the principles of common law as they may be applied in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience. (1995, c. 377, s. 3.)

## § 143-215.94Y. Enforcement procedures; injunctive relief.

Whenever the Department has reasonable cause to believe that any person has violated or is threatening to violate any of the provisions of this Part, any of the terms of any permit issued pursuant to this Part, or a rule implementing this Part or has failed to comply with the requirements of G.S. 143B-279.9 through G.S. 143B-279.11, the Department may, either before or after the institution of any other action or proceeding authorized by this Part, request the Attorney General to institute a civil action in the name of the State upon the relation of the Department for injunctive relief to restrain the violation or threatened violation and for such other and further relief in the premises as the court shall deem proper. The Attorney General may institute such action in the superior court of the county in which the violation occurred or may occur or, in his discretion, in the superior court of the county in which the person responsible for the violation or threatened violation resides or has his or its principal place of business. Upon a determination by the court that the alleged violation of the provisions of this Part, the rules of the Commission, or the failure to comply with the requirements of G.S. 143B-279.9 through G.S. 143B-279.11 has occurred or is threatened, the court shall grant the relief necessary to prevent or abate the violation or threatened violation. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from any penalty prescribed for violation of this Part or for failure to comply with the requirements of G.S. 143B-279.9 through G.S. 143B-279.11. (1995, c. 377, s. 3; 2002-90, s. 7.)

**Editor's Note.** — Session Laws 2002-90, s. 8, provides in part: "This act applies retroactively to any cleanup of a discharge or release of petroleum from an underground storage tank pursuant to Part 2A of Article 21A of Chapter 143 of the General Statutes except that land-use restrictions and recordation of residual contamination are not required with respect to a discharge or release of petroleum for which the Department of Environment and Natural Resources issued a determination that no further action is required prior to 1 September 2001."

## § 143-215.94Z: Reserved for future codification purposes.

## Part 2C. Offshore Oil and Gas Activities. Adverse Environmental Impact Protection.

### § 143-215.94AA. Declaration of public policy.

The General Assembly hereby finds and declares as follows:

(1) The traditional uses of the seacoast of the State are public and private recreation, commercial and sports fishing, and habitat for natural resources;

(2) The preservation of these uses is a matter of the highest urgency and priority, and such uses can only be preserved effectively by maintaining and enhancing the existing condition of the coastal waters, estuaries, wetlands, tidal flats, beaches, and public lands adjoining the seacoast;

(3) The coastal economy, including access to the coast of the State, depends, either directly or indirectly, upon a ready and continuous reserve of petroleum products and by-products, including that portion of the supply resulting from oil and gas activities on the Outer Continental Shelf;

(4) Offshore oil and natural gas exploration, production, processing, recovery, and transportation pose increased potential for damage to the State's coastal environment, to the traditional uses of the area, and to the beauty of the North Carolina coast;

(5) Spills, discharges, and escapes of pollutants occurring as a result of procedures involving offshore oil and natural gas related activities have occurred in the past, and future threats of potentially catastrophic proportions from such activities require adoption of this Part as mitigation against such events;

(6) The economic burdens imposed by the General Assembly upon those engaged in the offshore exploration, production, processing, recovery, and transportation of oil and natural gas are reasonable and necessary in light of the traditional uses and interests herein protected, which are expressly declared to be of grave public interest and concern to the State in promoting its general interest and welfare promoting the public health, preventing diseases, and providing for the public safety. (1989, c. 656, s. 5; c. 770, s. 75.5.)

### § 143-215.94BB. Definitions.

In addition to the definitions set out in G.S. 143-215.77, as used in this Part, the following definitions shall apply:

(1) "Damages" are damages for any of the following:

a. Injury or harm to real or personal property, which includes the cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge under this section, any income lost from the time such property is damaged to the time such property is restored, repaired, or replaced, and any reduction in value of such property caused by such discharge by comparison with its value prior thereto.

b. Business loss, including loss of income or impairment of earning capacity due to damage to real or personal property or to damage or destruction of natural resources upon which such income or earning capacity is reasonably dependent.

c. Interest on loans obtained or other financial obligations incurred by an injured party for the purpose of ameliorating the adverse effects of a discharge pending the payment of a claim in full as provided by this Article.

d. Costs of cleanup, removal, or treatment of natural gas, oil, or drilling waste discharges.

e. Costs of restoration, rehabilitation, and, where possible, replacement of wildlife or other natural resources damaged as a result of a discharge.

f. When the injured party is the State or one of its political subdivisions, in addition to any injury described in subparagraphs (a) to (e), inclusive, damages include all of the following:

1. Injury to natural resources or wildlife, including recreational or commercial fisheries, and loss of use and enjoyment of public beaches and other public resources or facilities within the jurisdiction of the State or one of its political subdivisions.
2. Costs to assess damages to natural resources, wildlife, or habitat.
3. Costs incurred to monitor the cleanup of the natural gas, oil, or drilling waste spilled.
4. Loss of State or local government tax revenues resulting from damages to real or personal property proximately resulting from a discharge.

(2) For the purposes of this Part, "oil" and "drilling wastes" include, but are not limited to: petroleum, refined or processed petroleum, petroleum by-products, oil sludge, oil refuse, oil mixed with wastes and chemicals, or other materials used in the exploration, recovery, or processing of oil. "Oil" does not include oil carried in a vessel for use as fuel in that vessel.

(3) "Natural gas" includes natural gas, liquified natural gas, and natural gas by-products. "Natural gas" does not include natural gas carried in a vessel for use as fuel in that vessel.

(4) "Exploration" means undersea boring, drilling, and soil sampling.

(5) "Injured party" means any person who suffers damages from natural gas, oil, or drilling waste which is discharged or leaks into marine waters, or from offshore exploration. The State, or a county or municipality, may be an injured party.

(6) "Responsible person" means any of the following:

a. The owner or transporter of natural gas, oil, or drilling waste which causes an injury covered by this Part.

b. The owner, operator, lessee of, or person who charters by demise, any offshore well, undersea site, facility, oil rig, oil platform, vessel, or pipeline which is the source of natural gas, oil, drilling waste, or is the source or location of exploration which causes an injury covered by this Part.

"Responsible party" does not include the United States, the State, any county, municipality or public governmental agency; however, this exception to the definition of "responsible person" shall not be read to exempt utilities from the provisions of this Part.

(7) "Offshore waters" shall include both the territorial sea extending seaward from the coastline of North Carolina to the State and federal boundary, and United States jurisdictional waters of the Atlantic Ocean adjacent to the territorial sea of the State.

(8) "Natural resources" shall include "marine and estuarine resources" and "wildlife resources" as those terms are defined in G.S. 113-129(11) and G.S. 113-129(17), respectively. (1989, c. 656, s. 5; c. 770, s. 75.5.)

## § 143-215.94CC. Liability under this section; exceptions.

(a) Any responsible person shall be strictly liable, notwithstanding any language of limitation found in G.S. 143-215.89, for all cleanup and removal costs and all direct or indirect damages incurred within the territorial jurisdiction of the State by any injured party, which arise out of, or are caused by, the discharge or leaking of natural gas, oil, or drilling waste into or onto "coastal fishing waters" as defined in G.S. 113-129(4), or offshore waters, or by any exploration in or upon coastal fishing or offshore waters, from any of the following sources:

(1) Any offshore well or undersea site at which there is exploration for or extraction or recovery of natural gas or oil.

(2) Any offshore facility, oil rig, or oil platform at which there is exploration for, or extraction, recovery, processing, or storage of, natural gas or oil.

(3) Any vessel offshore in which natural gas, oil, or drilling waste is transported, processed or stored other than for purposes of fuel for the vessel carrying it.

(4) Any pipeline located offshore in which natural gas, oil, or drilling waste is transported.

(b) A responsible person is not liable to an injured party under this section for any of the following:

(1) Damages, other than costs of removal incurred by the State or a local government, caused solely by any act of war, hostilities, civil war, or insurrection or by an unanticipated grave natural disaster or other act of God of an exceptional, inevitable, and irresistible character, which could not have been prevented or avoided by the exercise of due care or foresight.

(2) Damages caused solely by the negligence or intentional malfeasance of that injured party.

(3) Damages caused solely by the criminal act of a third party other than the defendant or an agent or employee of the defendant. In any action arising under the provisions of this Article wherein this exception is raised as a defense to liability, the burden of proving that the alleged third-party intervention occurred in such a manner as to limit the liability of the person sought to be held liable shall be upon the person charged.

(4) Natural seepage not caused by a responsible person.

(5) Discharge or leaking of oil or natural gas from a private pleasure boat or commercial fishing vessel having a fuel capacity of less than 500 gallons.

(6) Damages which arise out of, or are caused by, a discharge which is authorized by a State or federal permit.

(7) Damages that could have been mitigated by the injured party in accordance with common law.

(c) A court of suitable jurisdiction in any action under this Part may award reasonable costs of the suit and attorneys' fees, and the costs of any necessary expert witnesses, to any prevailing plaintiff. The court may award reasonable costs of the suit and attorneys' fees to any prevailing defendant only if the court finds that the plaintiff commenced or prosecuted the suit under this Part in bad faith or solely for purposes of harassing the defendant. (1989, c. 656, s. 5; c. 770, ss. 75.4, 75.5.)

## § 143-215.94DD. Joint and several liability; damages; personal injury.

(a) Liability under this Part shall be joint and several. However, this section does not bar a cause of action that a responsible person has or would have, by reason of subrogation or otherwise, against any person.

(b) This section does not prohibit any person from bringing an action for damages caused by natural gas, oil or drilling waste, or by exploration, under any other provisions or principle of law, including, but not limited to, common law. However, damages shall not be awarded pursuant to this section to an injured party for any loss or injury for which the party is or has been awarded damages under any other provisions or principles of law. G.S. 143-215.94CC(b) does not create any defense not otherwise available regarding any action brought under any other provision or principle of law, including, but not limited to, common law.

(c) This section shall not apply to claims for damages for personal injury or wrongful death, and does not limit the right of any person to bring such an action under any provision or theory of law. (1989, c. 656, s. 5; c. 770, s. 75.5.)

## § 143-215.94EE. Removal of prohibited discharges.

(a) The Department shall be authorized and empowered to proceed with the cleanup of discharges covered under this Part pursuant to the authority granted to the Department in G.S. 143-215.84(b) and G.S. 143-215.94HH(b)(2).

(b) Any unexplained discharge of oil, natural gas or drilling wastes occurring in waters beyond the jurisdiction of the State that for any reason penetrates within State jurisdiction shall be removed by or under the direction of the Department. Except for any expenses incurred by the responsible person, should such person become known, all expenses incurred in the removal of such discharges shall be paid promptly by the State from the Oil or Other Hazardous Substances Pollution Protection Fund established pursuant to G.S. 143-215.87 or from any other available sources. In the case of unexplained discharges, the matter shall be referred by the Secretary to the North Carolina Attorney General for collection of damages pursuant to G.S. 143-215.94FF of this Part. At his discretion, the Attorney General may refer the matter to the State Bureau of Investigation or other appropriate State or federal authority to determine the identity of the responsible person.

(c) Nothing in this section is intended to preclude cleanup and removal by any person threatened by such discharges, who, as soon as is reasonably possible, coordinates and obtains approval for such actions with ongoing State or federal operations and appropriate State and federal authorities.

(d) No action taken by any person to contain or remove an unlawful discharge shall be construed as an admission of liability for said discharge. (1989, c. 656, s. 5; c. 770, s. 75.5; 1991, c. 342, s. 13.)

## § 143-215.94FF. Authorization of the Attorney General; citizens' suits.

(a) For any violation of this Part, the Attorney General may, on behalf of the State and on behalf of affected citizens of the State as a class, bring a civil action in the Superior Court of Wake County against the alleged responsible person. The action may seek:

(1) Injunctive relief; or
(2) Damages caused by the violation; or
(3) Both damages and injunctive relief; or
(4) Such other and further relief in the premises as the Court shall deem proper.

(b) Any injured party under this Part may bring a civil action for damages against the alleged responsible person. Civil actions under this subsection shall be brought in the superior court of the county in which the alleged injury occurred or in which the alleged damaged property is located, or in the county in which the injured party resided.

(c) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek injunctive or other relief. (1989, c. 656, s. 5; c. 770, s. 75.5.)

## § 143-215.94GG. Notification by persons responsible for discharge.

(a) Any person responsible for an offshore discharge under this Part shall immediately notify the Division of Emergency Management pursuant to rules established by the Secretary of Crime Control and Public Safety, if any, but in no case later than two hours after the discharge. Failure to so notify the Division of Emergency Management shall make the responsible person liable to the penalties set out in subsection (b) of this section. No penalty shall be imposed under this section when the owner or operator has promptly reported the discharge to federal authorities designated pursuant to 33 U.S.C. § 1321.

(b) The civil penalty for failure to immediately report a discharge under this Part shall be determined by the Commission. In determining the amount of a penalty for failure to report under this section, the Commission shall take into consideration such circumstances as the gravity of the violation, the previous record of the responsible person in complying with the terms of this Article, whether the violator reported the discharge and if so after what period of time following the spill, the size of the business of the responsible person and the effect of the penalty on the violator's ability to continue in business, and other relevant factors; provided that the penalty assessed under this section shall not exceed the following daily maximum amounts, based upon the quantity of oil spilled:

| | |
|---|---|
| (1) Up to 50,000 gallons | $ 50,000 |
| (2) More than 50,000 gallons | 250,000 |

For purposes of this section, each day or any part thereof during which a discharge goes unreported by the responsible person shall constitute a separate offense.

(c) The clear proceeds of penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1989, c. 656, s. 5; c. 770, s. 75.5; 1998-215, s. 70.)

## § 143-215.94HH. Oil spill contingency plan.

(a) The State Emergency Response Commission, in consultation with the Secretary of Administration or his designee in the Outer Continental Shelf Lands Office, shall develop a State oil spill contingency plan relating solely to the undersea exploration, extraction, production and transport of oil or natural gas in the marine environment off the North Carolina coast, including any such development on the Outer Continental Shelf seaward of the State's jurisdiction over its territorial waters.

(b) The Secretary of Crime Control and Public Safety or his designee shall establish, pursuant to such a plan, an emergency oil spill control network which shall be comprised of available equipment from appropriate State, county and municipal governmental agencies. Such network shall be employed to provide an immediate response to an oil discharge into the offshore marine environment which is reasonably likely to affect the State's coastal waters. Furthermore, such network shall be employed in conjunction with the cleanup operations under this Article or any applicable federal law, required of the owner or operator of the discharging operation, vessel, or facility, the Department of Environment and Natural Resources, and any federal agency.

(1) The Secretary of Crime Control and Public Safety or his designee shall make an inventory, including its location and condition, of all equipment owned by the State, its counties and municipalities, and private equipment that is available to the State for leasing in the case of an oil spill including costs of leasing, that would be capable of participating in discharge cleanup operations.

(2) The Secretary of Crime Control and Public Safety shall at his discretion have the power to deploy such equipment in participating in a discharge cleanup operation.

(3) The Secretary of Environment and Natural Resources shall be authorized to reimburse such State agencies, counties, and municipalities for use of such equipment with such funds as may be available from the "Oil or Other Hazardous Substances Pollution Protection Fund" created pursuant to G.S. 143-215.87 or any other sources.

(4) The oil spill contingency plan and oil spill response network developed pursuant to this section shall be reviewed and evaluated for adequacy and continued feasibility every three years, or more often if deemed appropriate by the Secretary of Crime Control and Public Safety. (1989, c. 656, s. 5; c. 727, s. 218(111a); c. 770, s. 75.5; 1997-443, s. 11A.119(a).)

## § 143-215.94II. Emergency proclamation; Governor's powers.

(a) Whenever any emergency exists or appears imminent, arising from the discharge of oil or other pollutants within the marine environment, the Governor shall by proclamation declare the fact and that a state of emergency exists in the appropriate sections of the State. Upon such proclamation, the Governor shall have all powers enumerated in G.S. 14-288.15, subject to the provisions of G.S. 14-288.16.

(b) If the Governor is unavailable, the Lieutenant Governor shall, by proclamation, declare the fact and that a state of emergency exists in the appropriate sections of the State.

(c) In performing his duties under this section, the Governor is authorized and directed to cooperate with all departments and agencies of the federal government, the offices and agencies of other states and foreign countries and the political subdivisions thereof, and private agencies in all matters pertaining to an emergency described herein.

(d) In addition to the powers enumerated in G.S. 14-288.15, in the case of such an emergency described in subsection (a) of this section, the Governor is further authorized and empowered to transfer any funds available to him by statute for emergency use into the Oil or Other Hazardous Substances Pollution Protection Fund created pursuant to G.S. 143-215.87, to be utilized for the purposes specified therein. (1989, c. 656, s. 5; c. 770, s. 75.5; 1991, c. 342, s. 14.)

## § 143-215.94JJ. Federal law.

Nothing in this Part shall authorize State agencies to impose any duties or obligations in conflict with limitations on State authority established by federal law at the time such agency action is taken. Likewise, no additional liability is established by this Part to the extent that, at the time of the injury, federal law establishes limits on liability which preempt State law. (1989, c. 656, s. 5; c. 770, s. 75.5.)

## Part 3. Oil Terminal Facilities.

### § 143-215.95. Duties of Secretary.

The Secretary shall administer the provisions for registration of oil terminal facilities contained in this Part. In addition, he shall engage in such study and research concerning oil terminal facilities and their regulation in this State and elsewhere as may be required to furnish the General Assembly with a thorough factual basis for his recommendations for further legislation pursuant to this Part. (1973, c. 534, s. 1; 1977, c. 771, s. 4; 1987, c. 827, s. 154(3).)

### § 143-215.96. Oil terminal facility registration.

(a) The owner or operator of every oil terminal facility in the State shall secure a registration certificate from the Secretary. The Secretary shall not issue a registration certificate until the owner or operator has furnished the following information:

(1) Complete name of the owner and operator of the oil terminal facility together with addresses and telephone numbers;

(2) Number of employees of the oil terminal facility and the principal officers;

(3) Maps or sketches, based on criteria developed by the Secretary, showing property lines of the oil terminal facility and location of nearby watercourses or bodies of water as specified by the Secretary; and

(4) Summary of present and proposed procedures, if any, for prevention of oil spills.

(b) The owner or operator of an oil terminal facility shall secure a registration certificate no later than 30 days after the oil terminal facility begins operation. (1973, c. 534, s. 1; 1995, c. 504, s. 11.)

### § 143-215.97. Rules.

The Secretary may adopt rules to implement this Part. (1973, c. 534, s. 1; 1975, 2nd Sess., c. 983, s. 82; 1977, c. 771, s. 4; 1987, c. 827, s. 199.)

### § 143-215.98. Violations.

Any person who shall be adjudged to have violated any provision of this Part or any rule of the Secretary adopted hereunder shall be guilty of a Class 3 misdemeanor. (1973, c. 534, s. 1; 1977, c. 771, s. 4; 1987, c. 827, ss. 154(3), 200; 1993, c. 539, s. 1024; 1994, Ex. Sess., c. 24, s. 14(c).)

**§ 143-215.99:** Repealed by Session Laws 1975, c. 521, s. 1.

## Part 4. Oil Refining Facility Permits.

### § 143-215.100. Oil refining facility permits.

No facility which is to be used or is capable of being used for the purpose of refining oil shall be initiated or constructed after July 1, 1975, without a permit from the Secretary. (1975, c. 521, s. 2; 1977, c. 771, s. 4; 1987, c. 827, s. 154(3).)

## § 143-215.101. Powers of the Secretary.

The Secretary has the power to:

(1) Adopt rules implementing this Part. Rules adopted under this Part may include the following matters:
  a. Requirements for submission of engineering reports, plans and specifications for the location and construction of oil terminal facilities.
  b. Establishment of procedures and methods of reporting discharges and other occurrences prohibited by this Article.
  c. Establishment of procedures, methods, means, and equipment to be used in the removal of oil pollutants.

(2) To deny the issuance of a permit upon a finding that:
  a. The installation will have substantial adverse effects on wildlife or on fresh water, estuarine or marine fisheries; or
  b. The operation of the installation will violate standards of air or water quality promulgated or administered by the Commission; or
  c. The installation will have a substantial adverse effect on a publicly owned park, forest, or recreation area.

(3) To grant permits for the operation of existing or proposed oil refining facilities and to impose such terms and conditions therein as it shall deem necessary and appropriate to effectuate the purposes of this Article.

(4) To require the installation of such facilities and the employment of such protective measures and operating procedures as are deemed necessary to prevent, insofar as possible, any oil discharges to the waters or lands of the State.

(5) Repealed by Session Laws 1987, c. 827, s. 201. (1975, c. 521, s. 2; 1987, c. 827, ss. 154, 201.)

## § 143-215.102. Penalties.

(a) Civil Penalty. — Any person who violates any provision of this Part, or any rule, regulation or order made pursuant to this Part, shall incur, in addition to any other penalty provided by law, a civil penalty in an amount not to exceed ten thousand dollars ($10,000) for every such violation, the amount to be determined by the Secretary after taking into consideration the factors set out in G.S. 143B-282.1(b). The procedures set out in G.S. 143-215.6 and G.S. 143B-282.1 shall apply to civil penalties assessed under this section. The penalty herein provided for shall become due and payable when the person incurring the penalty receives a notice in writing from the Commission describing the violation with reasonable particularity and advising such person that the penalty is due. A person may contest a penalty by filing a petition for a contested case under G.S. 150B-23 within 30 days after receiving notice of the penalty. If any civil penalty has not been paid within 30 days after notice of assessment has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment, unless the violator contests the assessment, or requests remission of the assessment in whole or in part as provided in G.S. 143-215.6. If any civil penalty has not been paid within 30 days after the final agency decision or court order has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment.

The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Criminal Penalties. — Any person who intentionally or knowingly or willfully violates any provision of this Part, or any rule, regulation or order made pursuant to this Part shall be guilty of a Class 2 misdemeanor which may include a fine to be not more than ten thousand dollars ($10,000). No proceeding shall be brought or continued under this subsection for or on account of a violation by any person who has previously been convicted of a federal violation or a local ordinance violation based upon the same set of facts. (1975, c. 521, s. 2; 1987, c. 827, s. 202; 1989 (Reg. Sess., 1990), c. 1036, s. 7; 1993, c. 539, s. 1025; 1994, Ex. Sess., c. 24, s. 14(c); 1998-215, s. 71.)

## Part 5. Limitation on Liability for Hazardous Materials Abatement.

### § 143-215.103. Definitions.

As used in this Part, unless the context otherwise requires:

(1) "Discharge" shall mean leakage, seepage, or other release.

(2) "Hazardous materials" shall mean oil, low-level radioactive waste, and all materials and substances which are now or hereafter defined as toxic or hazardous by any State or federal law or by the regulations of any State or federal government agency.

(3) "Person" shall mean any individual, partnership, corporation, association, or other entity or employee thereof. (1987, c. 269, s. 1.)

### § 143-215.104. Limited liability for volunteers in hazardous material abatement.

Any person who provides assistance or advice in mitigating or attempting to mitigate the effects of an actual or threatened discharge of hazardous materials, or in preventing, cleaning up, or disposing of or in attempting to prevent, clean up or dispose of any such discharge, when the reasonably apparent circumstances indicate the need for prompt decisions and action, shall not be subject to civil liabilities of any type, unless:

(1) Prior to providing assistance or advice in mitigating or attempting to mitigate the effects of an actual or threatened discharge or in preventing, cleaning up, or disposal of or in attempting to prevent cleanup or disposal of any such discharge, he had incurred liability for the actual or threatened discharge;

(2) He receives compensation other than reimbursement for out-of-pocket expenses for his services in rendering assistance or advice, except that an individual receiving compensation for employment from his regular employer for services performed in preventing, cleaning up, or disposing of or in attempting to prevent, clean up or dispose of a discharge shall not be deemed to have received compensation if his employer is entitled to the protection afforded by this Part; or

(3) His act or omission led to damages resulting from his gross negligence, or from his reckless, wanton, or intentional misconduct.

The limited immunity provided herein shall not be applicable to any act or omission or occurrence involving the operation of a motor vehicle. The limited immunity provided herein is waived to the extent of any indemnification by insurance for damages caused by such volunteer. (1987, c. 269, s. 1.)

## Part 6. Dry-Cleaning Solvent Cleanup.

## (Expires January 1, 2022 — see notes)

### § 143-215.104A. (See note for repeal of Part 6) Title; sunset.

This part is the "Dry-Cleaning Solvent Cleanup Act of 1997" and may be cited by that name. Except as otherwise provided in this section, this part expires 1 January 2022.

(1) G.S. 143-215.104K is not repealed to the extent that it applies to liability arising from dry-cleaning solvent contamination described in a Dry-Cleaning Solvent Assessment Agreement or Dry-Cleaning Solvent Remediation Agreement entered into by the Environmental Management Commission pursuant to G.S. 143-215.104H and G.S. 143-215.104I.

(2) Any Dry-Cleaning Solvent Assessment Agreement or Dry-Cleaning Solvent Remediation Agreement in force as of 1 January 2012 shall continue to be governed by the provisions of Part 6 of Article 21A of Chapter 143 of the General Statutes as though those provisions had not been repealed.

(3) G.S. 143-215.104D(b)(2) is not repealed; rules adopted by the Environmental Management Commission pursuant to G.S. 143-215.104D(b)(2) shall continue in effect; and those rules may be enforced pursuant to G.S. 143-215.104P, 143-215.104Q, and 143-215.104R, which shall remain in effect for that purpose. (1997-392, s. 1; 2009-483, ss. 5, 7.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

**Effect of Amendments.** — Session Laws, 2009-483, s. 7, effective August 26, 2009, inserted "; sunset" in the section heading; added the second sentence in the first paragraph; and added subdivisions (1)-(3).

**Legal Periodicals.** — For 1997 legislative survey, see 20 Campbell L. Rev. 443.

### § 143-215.104B. (Expires January 1, 2022 — see notes) Definitions.

(a) Unless a different meaning is required by the context or unless a different meaning is set out in subsection (b) of this section, the definitions in G.S. 143-215.77, 130A-2, and 130A-290 apply throughout this Part.

(b) Unless a different meaning is required by the context, the following definitions apply in this Part. The definitions set out in this subsection apply only to the implementation of this Part and do not define or limit the scope of any other remedial program:

(1) "Abandoned dry-cleaning facility site" or "abandoned site" means any real property or individual leasehold space on which a dry-cleaning facility or wholesale distribution facility formerly operated.

(2) "Affiliate" has the same meaning as in 17 Code of Federal Regulations § 240.12b-2 (1 April 1996 Edition).

(3) "Commission" means the Environmental Management Commission.

(4) "Contaminant" means a regulated substance released into the environment.

**Part 6 has a delayed expiration date. See notes.**

(5) Renumbered.
(6) "Disposal" shall have the meaning ascribed to it in G.S. 130A-290.
(7) "Dry-cleaning facility" means a place of business located in this State and engaged in on-site dry-cleaning operations, other than a commercial uniform service or commercial linen supply facility.
(8) "Dry-cleaning operations" means cleaning of apparel and household fabrics by using one or more dry-cleaning solvents instead of water.
(9) "Dry-cleaning solvent" means any hydrocarbon or halogenated hydrocarbon used as a solvent in a dry-cleaning operation or the degradation products from these solvents.
(10) "Dry-cleaning solvent assessment agreement" or "assessment agreement" means an agreement between the Commission and a potentially responsible party who desires an assessment of whether a release of dry-cleaning solvents at a dry-cleaning facility, an abandoned dry-cleaning facility site, or a wholesale distribution facility may be eligible for remediation under this Part and whether any other contaminants that are identified in the agreement may require remediation under other remedial programs operated or administered by the Department.
(11) "Dry-cleaning solvent contamination" means the presence of dry-cleaning solvent in the waters or surface or subsurface soils of the State, the bedrock or other rock formations, or buildings in a concentration above the level requiring remediation pursuant to the rules implementing Article 21A of Chapter 143.
(12) "Dry-cleaning solvent remediation agreement" or "remediation agreement" means an agreement between the Commission and a potentially responsible party who desires the cleanup of dry-cleaning solvent contamination resulting from a release at a dry-cleaning facility, an abandoned dry-cleaning facility site, or a wholesale distribution facility under this Part and any other contaminants that are identified in the agreement under other remedial programs operated or administered by the Department.
(13) "Facility" means a dry-cleaning facility or a wholesale distribution facility.
(14) "Fund" means the Dry-Cleaning Solvent Cleanup Fund.
(14a) "Halogenated hydrocarbon" means any hydrocarbon where at least one hydrogen atom is substituted by a halogen atom.
(15) "Hazardous waste" has the same meaning as in G.S. 130A-290.
(15a) "Hydrocarbon" means any linear, branched, saturated, or unsaturated compound whose molecules contain only carbon and hydrogen atoms.
(16) "Imminent hazard" means a situation that is likely to cause an immediate threat to human life, an immediate threat of serious physical injury, an immediate threat of serious adverse health effects, or a serious risk of irreparable damage to the environment if no immediate action is taken.
(17) "Local government" means a town, city, or county.
(18) "Operator" means any person operating a dry-cleaning facility or wholesale distribution facility, whether by lease, contract, or any other form of agreement.
(19) "Parent" has the same meaning as in 17 Code of Federal Regulations § 240.12b-2 (1 April 1996 Edition).
(20) Repealed by Session Laws 2000, ch. 19, s. 3, effective on and after April 1, 1998.

**Part 6 has a delayed expiration date. See notes.**

(21) "Potentially responsible party" means any person who may have liability for assessment, monitoring, treatment, mitigation, or remediation of dry-cleaning solvent contamination resulting from a release at a dry-cleaning facility, an abandoned dry-cleaning facility site, or a wholesale distribution facility.

(22) "Public health" means public health as the term is used in Article 9 of Chapter 130A of the General Statutes and "human health" as the term is used in Articles 21 and 21A of Chapter 143 of the General Statutes.

(23) "Regulated substance" means a hazardous waste, as defined in G.S. 130A-290; a hazardous substance, as defined in G.S. 143-215.77A; oil, as defined in G.S. 143-215.77; or other substance regulated under any remedial program implemented by the Department other than Part 2A of Article 21A of Chapter 143 of the General Statutes.

(24) "Release" means any spillage, leakage, pumping, placement, emptying, or dumping of dry-cleaning solvents resulting from a dry-cleaning operation or the operation of a wholesale distribution facility.

(25) "Remedial program" means a program implemented by the Department for the remediation of any contaminant, including the programs implemented under Article 9 of Chapter 130A of the General Statutes and the Oil Pollution and Hazardous Substances Control Act of 1978 under Part 2 of Article 21A of Chapter 143 of the General Statutes but not the remedial program implemented under Part 2A of Article 21A of Chapter 143 of the General Statutes.

(26) "Remediation" means action to clean up, mitigate, correct, abate, minimize, eliminate, control, or prevent the spreading, migration, leaking, leaching, volatilization, spilling, transporting, or further release of a contaminant into the environment in order to protect public health or the environment.

(27) "Response costs" means costs incurred in connection with a certified facility or abandoned site that the Commission determines are reasonably necessary and consistent with the applicable requirements of the Commission and any applicable dry-cleaning solvent assessment agreement or dry-cleaning solvent remediation agreement.

(28) "Subsidiary" has the same meaning as in 17 Code of Federal Regulations § 240.12b-2 (1 April 1996 Edition).

(29) "Treatment" shall have the meaning ascribed to it in G.S. 130A-290.

(29a) "Unrestricted use standards" when used in connection with "cleanup," "remediated", or "remediation" means that cleanup or remediation of contamination complies with generally applicable standards, guidance, or established methods governing the contaminants that are established by statute or adopted, published, or implemented by the Commission, the Commission for Public Health, or the Department instead of the risk-based standards established by the Commission pursuant to this Part.

(30) "Waters" means any stream, river, creek, brook, run, canal, swamp, lake, sound, tidal estuary, bay, reservoir, waterway, wetlands, or any other body or accumulation of water, surface or underground, public or private, natural or artificial, that is contained within, flows through, or borders upon this State, or any portion thereof, including those portions of the Atlantic Ocean over which this State has jurisdiction.

(31) "Wholesale distribution facility" means a place of business located in this State and engaged in the storage, distribution, or sale of dry-cleaning solvents for use in dry-cleaning facilities.

(32) "Wholesale distributor" means a person who operates a wholesale distribution facility. (1997-392, s. 1; 2000-19, s. 3; 2001-384, s. 11; 2007-182, s. 2; 2007-530, s.1.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — The definitions in subsections (b)(11), (b)(12), (b)(31) and (b)(32) were redesignated in alphabetical order at the direction of the Revisor of Statutes.

The definition in former subdivision (b)(5) was renumbered as subdivision (b)(29a) to maintain alphabetical order at the direction of the Revisor of Statutes.

Session Laws 2007-530, s. 14, provides: "If the Environmental Management Commission adopts rules establishing a risk-based approach applicable to the assessment, prioritization, and remediation of dry-cleaning solvent contamination, the original notice of text for which was published at 21 N.C. Reg. 1818 (April 16, 2007); the Rules Review Commission approves these rules, including any changes incorporated as a result of public comments or Rules Review Commission requirements; and the Rules Review Commission receives 10 or more letters of objection to these rules in accordance with G.S. 150B-21.3(b2), the Environmental Management Commission, notwithstanding the requirements of G.S. 150B-21.1 and G.S. 150B-21.3, may adopt these rules as temporary rules in accordance with the temporary rule-making procedures set out in Chapter 150B of the General Statutes."

Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

## § 143-215.104C. (Expires January 1, 2022 — see notes) Dry-Cleaning Solvent Cleanup Fund.

(a) Creation. — The Dry-Cleaning Solvent Cleanup Fund is established as a special revenue fund to be administered by the Commission. Accordingly, revenue in the Fund at the end of a fiscal year does not revert and interest and other investment income earned by the Fund must be credited to it. The Fund is created to provide revenue to implement this Part.

(b) Sources of Revenue. — The following revenue is credited to the Fund:

(1) Dry-cleaning solvent taxes collected under Article 5D of Chapter 105 of the General Statutes.

(2) Recoveries made pursuant to G.S. 143-215.104N and G.S. 143-215.104O.

(3) Gifts and grants made to the Fund.

(4) Revenues credited to the Fund under G.S. 105-164.44E.

(5) Application fees pursuant to G.S. 143-215.104F(a1).

(c) Disbursements. — A claim filed against the Fund may be paid only from monies in the Fund and only in accordance with the provisions of this Part. Any obligation to pay claims against the Fund shall be expressly contingent upon availability of monies in the Fund. Neither the State nor any of its agencies shall have any obligation to pay any costs for which monies are not available in the Fund. The provisions of this Part shall not constitute a contract, either express or implied, to pay costs in excess of the monies available in the Fund. In making disbursements from the Fund, the Commission shall obligate monies to facilities or sites with higher priority before facilities or sites of lower priority, and facilities or sites with equal priority in the order in which the facilities or sites were prioritized until the revenue is exhausted. Consistent with the provisions of this Part, the Commission may disburse monies from the Fund to abate imminent hazards by dry-cleaning solvent contamination at abandoned dry-cleaning facility sites that have not been certified. Up to twenty percent (20%) of the amount of revenue credited to

**Part 6 has a delayed expiration date. See notes.**

the Fund in a year may be used to defray costs incurred by the Department and the Attorney General's Office in connection with administration of the program described in this Part, including oversight of response activities.

(d) Up to one percent (1%) of the amount of the Fund balance may be used by the Department in each fiscal year for investigation of inactive hazardous substance disposal sites that the Department reasonably believes to be contaminated by dry-cleaning solvent. If the contamination is determined to originate from a dry-cleaning facility, a potentially responsible party may petition for certification of the facility or abandoned facility site. Acceptance of a petition shall be conditioned upon the written acceptance by the petitioner of responsibility for the costs of investigation incurred by the Department pursuant to this subsection. Costs of investigation that are recovered pursuant to this subsection shall not exceed, and shall be credited toward, the financial responsibility of the petitioner pursuant to G.S. 143-215.104F(f). If a potentially responsible party does not petition for certification of the facility or abandoned facility site, the Commission may request the Attorney General to commence a civil action to secure reimbursement of costs incurred under this subsection. (1997-392, s. 1; 2000-19, ss. 2, 5, 5.1-5.3; 2007-530, s. 2.)

**Cross References.** — As to transfer of sales and use taxes to Dry-Cleaning Solvent Cleanup Fund, see G.S. 105-164.44E.

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2001-265, ss. 2(a)-(c), as amended by Session Laws 2004-48, s. 1, effective retroactively to January 1, 2000, provides: "(a) Any person who undertakes assessment or remediation of dry-cleaning solvent contamination pursuant to a notice of violation or enforcement action by the Department of Environment and Natural Resources during the period beginning 1 October 1997 and ending 30 June 2001 may, on or after 30 June 2001 and prior to 1 July 2002, seek reimbursement from the Dry-Cleaning Solvent Cleanup Fund for any costs exceeding fifty thousand dollars ($50,000). The Environmental Management Commission shall reimburse costs if it finds that the costs incurred were (i) appropriately documented and reasonably necessary to assess or remediate the dry-cleaning solvent contamination; (ii) for any of the activities described in subdivisions (1) through (7) of G.S. 143-215.104N(a); (iii) not subject to any of the limitations in subdivisions (4) through (9) of G.S. 143-215.104N(b); (iv) not reimbursable from pollution and remediation legal liability insurance; and (v) required by a notice of violation or a specific order of the Department of Environment and Natural Resources issued on or after 30 June 1996. No reimbursement may be paid pursuant to this section for dry-cleaning solvent contamination that did not result from operations at a dry-cleaning or wholesale distribution facility.

"(b) Any person who, as of 30 June 2001, is undertaking assessment or remediation of dry-cleaning solvent contamination may petition the Environmental Management Commission prior to 1 July 2002 to enter into a dry-cleaning solvent assessment agreement or dry-cleaning solvent remediation agreement with respect to the contamination. The Commission shall determine whether the cost of any assessment or remediation performed prior to entry into an agreement is necessary and reasonable. The Commission shall credit the costs of assessment or remediation that it determines to be necessary and reasonable, and that have been paid by the person, toward the financial responsibility requirements applicable to that person under G.S. 143-215.104F.

"(c) The total of all payments made pursuant to this section in a single fiscal year shall not exceed twenty-five percent (25%) of the revenues credited to the Dry-Cleaning Solvent Cleanup Fund in the preceding fiscal year."

Session Laws 2007-530, s. 14, provides: "If the Environmental Management Commission adopts rules establishing a risk-based approach applicable to the assessment, prioritization, and remediation of dry-cleaning solvent contamination, the original notice of text for which was published at 21 N.C. Reg. 1818 (April 16, 2007); the Rules Review Commission approves these rules, including any changes incorporated as a result of public comments or Rules Review Commission requirements; and the Rules Review Commission receives 10 or more letters of objection to these rules in accordance with G.S. 150B-21.3(b2), the Environmental Management Commission, notwithstanding the requirements of G.S. 150B-21.1 and G.S. 150B-21.3, may adopt these rules as temporary rules in accordance with the temporary rule-making procedures set out in Chapter 150B of the General Statutes."

Session Laws 2008-107, s. 12.5, provides: "There is appropriated from the interest earned on the Dry Cleaning Solvent Cleanup Fund during the 2007-2008 fiscal year to the Department of Environment and Natural Resources the sum of four hundred thousand dollars ($400,000) for the 2008-2009 fiscal year to be used, notwithstanding G.S. 143-215.104C, to assess and remove contamination from inactive hazardous waste sites throughout the State and to provide an alternative drinking water supply to any person whose water supply was contaminated by an inactive hazardous waste site."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

## § 143-215.104D. (Expires January 1, 2022 — see notes) Powers of the Commission.

(a) Administrative Functions. — The Commission may delegate any or all of the powers enumerated in this subsection to the Department. The Commission shall:

(1) Accept petitions for certification and petitions to enter into dry-cleaning solvent assessment agreements or remediation agreements under this Part.

(2) Prioritize certified dry-cleaning facilities, certified wholesale distribution facilities, or certified abandoned dry-cleaning facility sites for the initiation of assessment or remediation activities.

(3) Repealed by Session Laws 2007-530, s. 3, effective August 31, 2007.

(4) Schedule funding of assessment and remediation activities.

(5) Determine whether assessment or remediation is necessary at a site at which dry-cleaning solvent contamination has occurred.

(5a) Enter into contracts with private contractors for assessment and remediation activities at certified dry-cleaning facilities, certified wholesale distribution facilities, and certified abandoned dry-cleaning facility sites.

(6) Determine that all necessary assessment and remediation has been completed at a contamination site.

(7) Make payments from the Fund for the costs of assessment and remediation.

(b) Rule making. — The Commission shall adopt rules as are necessary to implement the provisions of this Part. Rules adopted by the Commission shall be consistent with and shall not duplicate, but may incorporate by reference, the rules adopted by the Commission for Health Services pursuant to Article 9 of Chapter 130A of the General Statutes. The Commission shall not delegate the rule-making powers provided in this subsection.

(1) The Commission may adopt rules governing:
   a. Repealed by Session Laws 2007-530, s. 3, effective August 31, 2007.
   b. The certification and decertification of facilities or abandoned sites.
   c. The prioritization of facilities or abandoned sites and scheduling of funding for assessment and remediation activities. These rules shall provide for:
      1. Consideration of the degree of harm or risk to public health and the environment.

2. Consideration of the order in which certification is issued for the facility or abandoned site.
3. Consideration of the relative cost of assessment and remediation activities.
4. Use of the Fund so as to maximize the reduction of harm or risk posed by certified facilities, certified abandoned sites, uncertified facilities and uncertified sites.

d. The disbursement of revenue from the Fund for payment of approved assessment or remediation costs.

e. The determination whether assessment or remediation is necessary at a contamination site.

f. The determination that all necessary assessment and remediation has been completed at a contamination site.

g. The terms and conditions of dry-cleaning solvent assessment agreements and remediation agreements.

h. The determination whether additional assessment or remediation is necessary at a contamination site previously closed under this Part.

(2) **(See editor's note)** The Commission may adopt rules establishing minimum management practices for handling of dry-cleaning solvent at dry-cleaning facilities and wholesale distribution facilities. The rules may:

a. Require that all perchloroethylene dry-cleaning machines installed at a dry-cleaning facility after the effective date of the rule or temporary rule meet air emission standards that equal or exceed the standards that apply to comparable dry-to-dry perchloroethylene dry-cleaning machines with integral refrigerated condensation.

b. Prohibit the discharge of dry-cleaning solvents or water that contains dry-cleaning solvents into sanitary sewers, septic systems, storm sewers, or waters of the State.

c. Require spill containment structures around dry-cleaning machines, filters, stills, vapor adsorbers, solvent storage areas, and waste solvent storage areas.

d. Require floor sealants for cleaning room areas if the Commission finds the sealants to be effective.

e. Require, by 1 January 2002, the use of improved solvent transfer systems to prevent releases at the time of delivery of solvents to a dry-cleaning facility.

f. Require any other solvent-handling practices the Commission may find necessary and appropriate to minimize the risk of releases at dry-cleaning facilities or wholesale distribution facilities.

(3) The Commission shall adopt rules establishing a risk-based approach applicable to the assessment, prioritization, and remediation of dry-cleaning solvent contamination resulting from releases at facilities or abandoned sites certified pursuant to G.S. 143-215.104G. The rules shall address, at a minimum:

a. Criteria and methods for determining remediation requirements, including the level of remediation necessary to assure adequate protection of public health and the environment.

b. The circumstances under which information specific to the dry-cleaning solvent contamination site should be considered and required.

c. The circumstances under which restrictions on the future use of any remediated dry-cleaning solvent contamination site should be considered and required as a means of achieving and maintaining an adequate level of protection for public health and the environment.

d. Strategies for the assessment and remediation of dry-cleaning solvent contamination, including presumptive remedial responses sufficient to provide an adequate level of protection as described under sub-subdivision a. of this subdivision.

(c) All rules adopted by the Commission shall be applicable to all dry-cleaning facilities, wholesale distribution facilities, and abandoned dry-cleaning facilities in the State and shall, to the maximum extent practicable, be cost-effective and technically feasible while protecting public health and the environment from the release of dry-cleaning solvents.

(d) Unless otherwise provided in this Part, the Commission may delegate any of its rights, duties, and responsibilities under this Part to the Department. (1997-392, s. 1; 2000-19, s. 6; 2007-182, s. 2; 2007-530, s. 3.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2000-19, s. 19, which had authorized the Commission on Health Services to adopt a rule that requires a person who generates wastes at a dry-cleaning facility or wholesale distribution facility, other than wastewater generated from dry-cleaning processes, which contain solvents perchloroethylene, F-1,1,3, or 1,1,1 trichloroethane to deliver the wastes to a facility legally authorized to manage or recycle hazardous wastes containing these solvents, was repealed by Session Laws 2001-265, s. 3.

Session Laws 2000-19, s. 20, contains a severability clause.

Session Laws 2007-530, s. 14, provides: "If the Environmental Management Commission adopts rules establishing a risk-based approach applicable to the assessment, prioritization, and remediation of dry-cleaning solvent contamination, the original notice of text for which was published at 21 N.C. Reg. 1818 (April 16, 2007); the Rules Review Commission approves these rules, including any changes incorporated as a result of public comments or Rules Review Commission requirements; and the Rules Review Commission receives 10 or more letters of objection to these rules in accordance with G.S. 150B-21.3(b2), the Environmental Management Commission, notwithstanding the requirements of G.S. 150B-21.1 and G.S. 150B-21.3, may adopt these rules as temporary rules in accordance with the temporary rule-making procedures set out in Chapter 150B of the General Statutes."

Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

## § 143-215.104E: Repealed by Session Laws 2000-19, s. 3, effective on and after April 1, 1998.

## § 143-215.104F. (Expires January 1, 2022 — see notes) Requirements for certification, assessment agreements, and remediation agreements.

(a) General Requirements. — Any person petitioning for certification of a facility or an abandoned site pursuant to G.S. 143-215.104G, for a dry-cleaning solvent assessment agreement pursuant to G.S. 143-215.104H, or for a dry-cleaning solvent remediation agreement pursuant to G.S. 143-215.104I, shall meet the requirements set out in this section and any other applicable requirements of this Part.

(a1) Application Fees. — Each person petitioning or co-petitioning for certification of a facility or an abandoned site pursuant to G.S. 143-215.104G shall pay an application fee of one thousand dollars ($1,000) to the Commission.

(b) Requirements for Potentially Responsible Persons Generally. — Every petitioner shall provide the Commission with:

(1) Any information that the petitioner possesses relating to the contamination at the facility or abandoned site described in the petition.

(2) Information necessary to demonstrate the person's ability to incur the response costs specified in subsection (f) of this section.

(3) Repealed by Session Laws 2000, c. 19, s. 3, effective on and after April 1, 1998.

(4) Information necessary to demonstrate that the petitioner, and any parent, subsidiary, or other affiliate of the petitioner, has substantially complied with:

a. The terms of any dry-cleaning solvent assessment agreement, dry-cleaning solvent remediation agreement, brownfields agreement, or other similar agreement to which the petitioner or any parent, subsidiary, or other affiliate of the petitioner has been a party.

b. The requirements applicable to any remediation in which the petitioner has previously engaged.

c. Federal and State laws, regulations, and rules for the protection of the environment.

(5) Evidence demonstrating that a release of dry-cleaning solvent has occurred at the facility or abandoned site and that the release has resulted in dry-cleaning solvent contamination.

(c) Requirement for Property Owners. — In addition to the information required by subsection (b) of this section, a petitioner who is the owner of the property on which the dry-cleaning solvent contamination identified in the petition is located shall provide the Commission a written agreement authorizing the Commission, its agent, and its private contractor to have access to the property for purposes of conducting assessment or remediation activities or determining whether assessment or remediation activities are being conducted in compliance with this Part and any assessment agreement or remediation agreement.

(c1) Costs incurred by the petitioner for activities to obtain certification of a facility or abandoned site shall not be reimbursable from the Fund.

(d) The Commission may reject any petition made pursuant to this Part in any of the following circumstances:

(1) The petitioner is an owner or operator of the facility described in the petition and the facility was not being operated in compliance with minimum management practices adopted by the Commission pursuant to G.S. 143-215.104D(b)(2) at the time the contamination was discovered.

(2) The petitioner is an owner or operator of the facility described in the petition and the petitioner owed delinquent taxes under Article 5D of Chapter 105 of the General Statutes at the time the dry-cleaning solvent contamination was discovered.

(3) Repealed by Session Laws 2000, c. 19, s. 3, effective on and after April 1, 1998.

(4) The petitioner fails to provide the information required by subsection (b) of this section.

(5) The petitioner falsified any information in its petition that was material to the determination of the priority ranking, the nature, scope and extent of contamination to be assessed or remediated, or the appropriate means to contain and remediate the contaminants.

**Part 6 has a delayed expiration date. See notes.**

(e) Repealed by Session Laws 2007-530, s. 4, effective August 31, 2007.

(f) Financial Responsibility Requirements. — Each potentially responsible person who petitions the Commission to certify a facility or abandoned site shall accept written responsibility in the amount specified in this section for the assessment or remediation of the dry-cleaning solvent contamination identified in the petition. If two or more potentially responsible persons petition the Commission jointly, the requirements below shall be the aggregate requirements for the financial responsibility of all potentially responsible persons who are party to the petition. Unless an alternative arrangement is agreed to by co-petitioners, the financial responsibility requirements of this section shall be apportioned equally among the co-petitioners. The financial responsibility required shall be as follows:

(1) For dry-cleaning facilities owned by persons who employ fewer than five full-time employees, or the equivalent, in activities related to dry-cleaning operations during the calendar year preceding the date of the petition, one percent (1%) of the costs of assessment or remediation not exceeding one million dollars ($1,000,000).

(2) For abandoned dry-cleaning facility sites and for dry-cleaning facilities owned by persons who employ at least five but fewer than 10 full-time employees, or the equivalent, in activities related to dry-cleaning operations during the calendar year preceding the date of the petition, one and one-half percent (1.5%) of the costs of assessment or remediation not exceeding one million dollars ($1,000,000).

(3) For wholesale distribution facilities and for dry-cleaning facilities owned by persons who employ 10 or more full-time employees, or the equivalent, in activities related to dry-cleaning operations during the calendar year preceding the date of the petition, two percent (2%) of the costs of assessment or remediation not exceeding one million dollars ($1,000,000).

(4) Repealed by Session Laws 2007-530, s. 4, effective retroactively to August 1, 2001, and applicable to assessment agreements and remediation agreements entered into on or after that date.

(g) Repealed by Session Laws 2000, c. 19, s. 3, effective on and after April 1, 1998. (1997-392, s. 1; 2000-19, ss. 3, 4, 7; 2007-530, s. 4.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2000-19, s. 20, contains a severability clause.

Session Laws 2007-530, s. 14, provides: "If the Environmental Management Commission adopts rules establishing a risk-based approach applicable to the assessment, prioritization, and remediation of dry-cleaning solvent contamination, the original notice of text for which was published at 21 N.C. Reg. 1818 (April 16, 2007); the Rules Review Commission approves these rules, including any changes incorporated as a result of public comments or Rules Review Commission requirements; and the Rules Review Commission receives 10 or more letters of objection to these rules in accordance with G.S. 150B-21.3(b2), the Environmental Management Commission, notwithstanding the requirements of G.S. 150B-21.1 and G.S. 150B-21.3, may adopt these rules as temporary rules in accordance with the temporary rule-making procedures set out in Chapter 150B of the General Statutes."

Session Laws 2007-530, s. 15(a), provides: "G.S. 143-215.104F(a1), as enacted by Section 4 of this act, becomes effective on 1 September 2007 and applies to applications for certifications made and assessment agreements and remediation agreements entered into on or after that date. G.S. 143-215.104F(f), as amended by Section 4 of this act, is effective retroactively to 1 August 2001 and applies to assessment agreements and remediation agreements entered into on or after that date. The Environmental Management Commission shall credit any payment received from a petitioner prior to 1 September 2007 against the petitioner's co-payment obligations under G.S. 143-215.104F, but the Environmental Management Commission shall not repay, and this section shall not operate to create any right for a petitioner to demand, any refund of funds received prior to 1 September 2007. All other amendments to G.S. 143-215.104F, as enacted by Section 4 of this act, are effective when this act becomes law."

Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

## § 143-215.104G. (Expires January 1, 2022 — see notes) Certification of facilities and abandoned sites.

(a) A potentially responsible party may petition the Commission to certify a facility or abandoned site where a release of dry-cleaning solvent has occurred. The Commission shall certify the facility or abandoned site if the petitioner meets the applicable requirements of G.S. 143-215.104F. Upon its decision to certify a facility or abandoned site, the Commission shall inform the petitioner of its decision and of the initial priority ranking of the facility or site.

(b) Repealed by Session Laws 2000, ch. 19, s. 8, effective June 26, 2000.

(c) A potentially responsible party who petitions for certification of a facility or abandoned site shall provide the Commission with either of the following:

(1) A written statement of the petitioner's intent to enter into an assessment agreement or remediation agreement.

(2) A written statement of the petitioner's intent to conduct assessment and remediation activities pursuant to subsection (d) of this section.

(d) A person who has access to property that is contaminated by dry-cleaning solvent and who has successfully petitioned for certification of the facility or abandoned site from which the contamination is believed to have resulted may undertake assessment or remediation of dry-cleaning solvent contamination located on the property consistent with the standards established by the Commission pursuant to G.S. 143-215.104D(b)(3) without first entering into a dry-cleaning solvent assessment agreement or a dry-cleaning solvent remediation agreement. No assessment or remediation activities undertaken pursuant to this subsection shall rely on standards that require the creation of land-use restrictions. A person who undertakes assessment or remediation activities pursuant to this subsection shall provide the Commission prior written notice of the activity. Costs associated with assessment or remediation activities undertaken pursuant to this subsection shall not be eligible for reimbursement from the Fund.

(e) The rejection of any petition filed pursuant to this section shall not affect the rights of any other petitioner, other than any parent, subsidiary, or other affiliate of the petitioner, under this Part. The rejection of a petition or the decertification of a facility or abandoned site may be the basis for rejection of a petition by any parent, subsidiary, or other affiliate of the petitioner for the facility or abandoned site. (1997-392, s. 1; 2000-19, s. 8.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

## § 143-215.104H. (Expires January 1, 2022 — see notes) Dry-Cleaning Solvent Assessment Agreements.

(a) Assessment Agreements. — One or more potentially responsible parties may petition the Commission to enter into a dry-cleaning solvent assessment

**Part 6 has a delayed expiration date. See notes.**

agreement regarding a facility or abandoned site that has been certified pursuant to G.S. 143-215.104G. The Commission may, in its discretion, enter into an assessment agreement with any potentially responsible party who satisfies the requirements of this section and the applicable requirements of G.S. 143-215.104F. If more than one potentially responsible party petitions the Commission, the Commission may enter into a single assessment agreement with one or more of the petitioners. The Commission shall not unreasonably refuse to enter into an assessment agreement pursuant to this section. The Commission may require the petitioners to provide the Commission with any information necessary to demonstrate:

(1) The priority ranking assigned to the facility or site is consistent with the rules adopted by the Commission.
(2) through (4a) Repealed by Session Laws 2007-530, s. 5, effective August 31, 2007.
(5) The petitioner has and will continue to have available the financial resources necessary to pay the share of response costs imposed on the petitioner by G.S. 143-215.104F.
(6) The permits or other authorizations required to conduct the assessment activities and to lawfully dispose of any hazardous substances or wastes generated by the assessment activities have been or can be obtained.
(7) The assessment activities will not increase the existing level of public exposure to health or environmental hazards at the contamination site.
(8) Repealed by Session Laws 2007-530, s. 5, effective August 31, 2007.
(9) The petitioner has obtained the consent of other property owners to enter into their property for the purpose of conducting assessment activities specified in the assessment agreement.

(b) The terms and conditions of an assessment agreement regarding dry-cleaning solvent contamination shall be guided by and consistent with the rules adopted by the Commission pursuant to G.S. 143-215.104D and the disbursement authorities and limitations set out in this Part. An assessment agreement shall, subject to the availability of monies from the Fund:

(1) Repealed by Session Laws 2000, ch. 19, s. 9, effective June 26, 2000.
(1a) Require that the petitioner shall be liable to the Fund for an amount equal to the difference, if any, between the applicable amount for which the petitioner is responsible under G.S. 143-215.104F and the amount reasonably paid by the petitioner for assessment or remediation activities of the type specified in G.S. 143-215.104N(a)(1) through (7) and that are otherwise consistent with the requirements of this Part.
(2) Repealed by Session Laws 2007-530, s. 5, effective August 31, 2007.

(c) The Commission may refuse to enter into a dry-cleaning solvent assessment agreement with any petitioner if:

(1) The petitioner will not accept financial responsibility for the petitioner's share of the response costs required by G.S. 143-215.104F.
(2) Repealed by Session Laws 2007-530, s. 5, effective August 31, 2007.
(3) The petitioner fails to provide any information required by subsection (a) of this section.

(d) The refusal of the Commission to enter into a dry-cleaning solvent assessment agreement with any petitioner shall not affect the rights of any other petitioner under this Part, except that the refusal may be the basis for rejection of a petition by any parent, subsidiary or other affiliate of the petitioner for the facility or abandoned site.

**Part 6 has a delayed expiration date. See notes.**

---

(e) If the Commission determines from an assessment prepared pursuant to this Part that the degree of risk to public health or the environment resulting from dry-cleaning solvent contamination otherwise subject to assessment or remediation under this Part and Article 9 of Chapter 130A is acceptable in light of the criteria established pursuant to G.S. 143-215.104D(b)(3) and Article 9 of Chapter 130A, the Commission shall issue a written statement of its determination and notify the owner or operator of the facility or abandoned site responsible for the contamination that no cleanup, no further cleanup, or no further action is required in connection with the contamination.

(f) If the Commission determines that no remediation or further action is required in connection with dry-cleaning solvent contamination otherwise subject to assessment or remediation pursuant to this Part and Article 9 of Chapter 130A, the Commission shall not pay any costs otherwise payable under this Part from the Fund other than costs reasonable and necessary to conduct the risk assessment pursuant to this section and in compliance with a dry-cleaning solvent assessment agreement. (1997-392, s. 1; 2000-19, s. 9; 2007-530, s. 5.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2007-530, s. 14, provides: "If the Environmental Management Commission adopts rules establishing a risk-based approach applicable to the assessment, prioritization, and remediation of dry-cleaning solvent contamination, the original notice of text for which was published at 21 N.C. Reg. 1818 (April 16, 2007); the Rules Review Commission approves these rules, including any changes incorporated as a result of public comments or Rules Review Commission requirements; and the Rules Review Commission receives 10 or more letters of objection to these rules in accordance with G.S. 150B-21.3(b2), the Environmental Management Commission, notwithstanding the requirements of G.S. 150B-21.1 and G.S. 150B-21.3, may adopt these rules as temporary rules in accordance with the temporary rule-making procedures set out in Chapter 150B of the General Statutes."

Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

## § 143-215.104I. (Expires January 1, 2022 — see notes) Dry-Cleaning solvent remediation agreements.

(a) Upon the completion of assessment activities required by a dry-cleaning solvent assessment agreement, one or more potentially responsible parties may petition the Commission to enter into a dry-cleaning solvent remediation agreement for any contamination requiring remediation. The Commission may, in its discretion, enter into a remediation agreement with any petitioner who satisfies the requirements of this section and the applicable requirements of G.S. 143-215.104F. If more than one potentially responsible party petitions the Commission, the Commission may enter into a single remediation agreement with one or more of the petitioners. The Commission shall not unreasonably refuse to enter into a remediation agreement pursuant to this section. The Commission may, in its discretion, enter into a remediation agreement that includes the assessment described in G.S. 143-215.104H. Petitioners shall provide the Commission with any information necessary to demonstrate:

(1) Repealed by Session Laws 2000, c. 19, s. 10, effective June 26, 2000.

(2) As a result of the remediation agreement, the contamination site will be suitable for the uses specified in the remediation agreement while fully protecting public health and the environment from dry-cleaning

solvent contamination and any other contaminants included in the remediation agreement.

(3) There is a public benefit commensurate with the liability protection provided under this Part.

(4) Repealed by Session Laws 2007-530, s. 6, effective August 31, 2007.

(5) The petitioner has complied with or will comply with all applicable procedural requirements.

(6) The remediation agreement will not cause the Department to violate the terms and conditions under which the Department operates and administers remedial programs, including the programs established or operated pursuant to Article 9 of Chapter 130A of the General Statutes, by delegation or similar authorization from the United States or its departments or agencies, including the United States Environmental Protection Agency.

(7) The priority ranking assigned to the facility or site is consistent with the rules adopted by the Commission or the priority ranking that the petitioner agrees to accept is consistent with the rules adopted by the Commission.

(8) Repealed by Session Laws 2007-530, s. 6, effective August 31, 2007.

(9) The petitioner will continue to have available the financial resources necessary to satisfy the share of response costs imposed on the petitioner by G.S. 143-215.104F.

(10) Repealed by Session Laws 2007-530, s. 6, effective August 31, 2007.

(11) The consent of other property owners to enter into their property for purposes of conducting remediation activities specified in the remediation agreement.

(b) In negotiating a remediation agreement, parties may rely on land-use restrictions that will be included in a Notice of Dry-Cleaning Solvent Remediation required under G.S. 143-215.104M. A remediation agreement may provide for remediation in accordance with standards that are based on those land-use restrictions.

(b1) For contaminated properties that are located in the area of a contamination site, in lieu of land-use restrictions authorized by subsection (b) of this section, parties may rely on other State or local land-use controls in negotiating a remediation agreement. Any land-use controls used shall adequately protect human health and the environment, both currently and in the future, from exposure to dry-cleaning solvent contamination. If controls are used in lieu of land-use restrictions, then a Notice of Dry-Cleaning Solvent Remediation shall be prepared in accordance with the provisions set forth in subdivisions (1) through (4) of G.S. 143-215.104M(b) and filed in accordance with subsections (c) through (g) of G.S. 143-215.104M. In the event that the owner of the property fails to submit and file the required Notice within the time specified, the Commission may prepare and file the Notice. This subsection shall not apply to properties on which a dry-cleaning facility is or was located which is the source of the contamination.

(c) A dry-cleaning solvent remediation agreement shall contain a description of the contamination site that would be sufficient as a description of the property in an instrument of conveyance and, as applicable, a statement of:

(1) Any remediation, including remediation of contaminants other than dry-cleaning solvents, to be conducted on the property, including:

a. A description of specific areas where remediation is to be conducted.

b. The remediation method or methods to be employed.

c. Repealed by Session Laws 2007-530, s. 6, effective August 31, 2007.

**Part 6 has a delayed expiration date. See notes.**

d. A schedule of remediation activities.

e. Applicable remediation standards. Applicable remediation standards for dry-cleaning solvent contamination shall not exceed the requirements adopted by the Commission pursuant to G.S. 143-104D(b)(3).

f. A schedule and the method or methods for evaluating the remediation.

(2) Any land-use restrictions and State and local land-use controls that will apply to the contamination site or other property.

(3) The desired results of any remediation, land-use restrictions, or State or local land-use controls with respect to the contamination site.

(4) The guidelines, including parameters, principles, and policies within which the desired results are to be accomplished.

(5) The consequences of achieving or not achieving the desired results.

(6) The priority ranking of the facility or abandoned site.

(7) Repealed by Session Laws 2007-530, s. 6, effective August 31, 2007.

(d) The Commission may refuse to enter into a dry-cleaning solvent assessment agreement or dry-cleaning solvent remediation agreement with any petitioner if the petitioner fails to provide any information that is necessary to demonstrate the facts required to be shown by subsection (a) of this section.

(e) In addition to the basis set forth in subsection (d) of this section, the Commission may refuse to enter into a dry-cleaning solvent remediation agreement with an owner of the property on which a contamination site is located if the owner refuses to accept limitations on the future use of the property and to give notice of these limitations pursuant to G.S. 143-215.104M.

(f) The refusal of the Commission to enter into a dry-cleaning remediation agreement with any petitioner shall not affect the rights of any other petitioner, other than any parent, subsidiary, or other affiliate of the petitioner, under this Part. The refusal of the Commission to enter into a remediation agreement may be the basis for rejection of a petition by any parent, subsidiary, or other affiliate of the petitioner for the facility or abandoned site.

(g) The terms and conditions of a dry-cleaning solvent remediation agreement concerned with dry-cleaning solvent contamination shall be guided by and consistent with the rules adopted by the Commission pursuant to G.S. 143-215.104D and the disbursement authorities and limitations set out in this Part. A remediation agreement shall provide that the Commission's private contractor conduct assessment and remediation activities at the facility or abandoned site.

(h) Any failure of a petitioner or the petitioner's agents or employees to comply with the dry-cleaning solvent remediation agreement constitutes a violation of this Part by the petitioner. (1997-392, s. 1; 2000-19, ss. 10, 11, 13; 2007-530, s. 6; 2009-483, s. 1.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2007-530, s. 14, provides: "If the Environmental Management Commission adopts rules establishing a risk-based approach applicable to the assessment, prioritization, and remediation of dry-cleaning solvent contamination, the original notice of text for which was published at 21 N.C. Reg. 1818 (April 16, 2007); the Rules Review Commission approves these rules, including any changes incorporated as a result of public comments or Rules Review Commission requirements; and the Rules Review Commission receives 10 or more letters of objection to these rules in accordance with G.S. 150B-21.3(b2), the Environmental Management Commission, notwithstanding the requirements of G.S. 150B-21.1 and G.S. 150B-21.3, may adopt these rules as temporary rules in accordance with the temporary rule-making procedures set out in Chapter 150B of the General Statutes."

Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

**Effect of Amendments.** — Session Laws 2009-483, s. 1, effective August 26, 2009, added subsection (b1), inserted "and State and local land-use controls" in subdivision (c)(2); and substituted "remediation, land-use restrictions, or State or local land-use controls" for "remediation or land-use restrictions" in subdivision (c)(3).

## § 143-215.104J. (Expires January 1, 2022 — see notes) Decertification; termination of assessment agreements and remediation agreements.

(a) The Commission may decertify a facility or abandoned site or renegotiate or terminate an assessment agreement or remediation agreement with respect to any party thereto in the following circumstances:

(1) The owner or operator of the facility, at any time subsequent to the certification of the facility, violates any of the minimum management requirements adopted by the Commission pursuant to G.S. 143-215.104D(b)(2).

(2) In the case of dry-cleaning contamination on property that is owned by a petitioner, the petitioner fails to file a Notice of Dry-Cleaning Solvent Remediation, if required, as provided in G.S. 143-215.104M.

(3) The potentially responsible persons who are parties to a dry-cleaning solvent assessment agreement are unable to reach an agreement with the Commission to enter into a dry-cleaning solvent remediation agreement within the time specified in the assessment agreement.

(4) The payment of taxes assessed to the facility under Article 5D of Chapter 105 of the General Statutes is delinquent.

(5) Repealed by Session Laws 2000, ch. 19, s. 3, effective on or after April 1, 1998.

(6) The owner or operator fails to comply with all applicable requirements of this Part or fails to comply with all applicable requirements of an assessment agreement or remediation agreement.

(7) The owner or operator of a facility for which an assessment or remediation activity is scheduled or in progress transfers the ownership or operation of the facility or abandoned site to another person without the prior consent of the Commission and the execution of a substitute assessment agreement or remediation agreement.

(8) The standards applied to the dry-cleaning solvent contamination remediation or containment under the provisions of this Part and the dry-cleaning solvent remediation agreement will, or are likely to, cause the Department to fail to comply with the terms and conditions under which it operates and administers a remediation program by delegation or similar authorization from the United States or one of its departments or agencies, including the Environmental Protection Agency.

(9) A petitioner fails to pay the Commission any amounts for which a petitioner is responsible pursuant to G.S. 143-215.104F.

(b) Prior to decertifying any facility or abandoned site or renegotiating or terminating any assessment agreement or remediation agreement, the Commission shall give the petitioners notice and opportunity for hearing. The Commission is not required to give the petitioners notice and opportunity for hearing when the Commission reasonably takes an emergency action to abate an imminent hazard caused by or arising from assessment or remediation activities at a contamination site whether the Commission issues a special order pursuant to G.S. 143-215.2 or takes other action.

**Part 6 has a delayed expiration date. See notes.**

---

(c) Decertification of any facility or abandoned site or renegotiation or termination of any assessment agreement or remediation agreement pursuant to this section shall not affect the rights of any petitioner, other than a petitioner whose violation of the provisions of subsection (a) of this section was the basis for the decertification, renegotiation, or termination and any parent, subsidiary, or other affiliate of that petitioner. If the Commission decertifies a facility or abandoned site or terminates an assessment agreement or remediation agreement with any party to the agreement pursuant to subsection (a) of this section, the Commission shall use its best efforts to negotiate a substitute agreement with any remaining parties to the agreement. (1997-392, s. 1; 2000-19, s. 3; 2007-530, s. 7.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2007-530, s. 14, provides: "If the Environmental Management Commission adopts rules establishing a risk-based approach applicable to the assessment, prioritization, and remediation of drycleaning solvent contamination, the original notice of text for which was published at 21 N.C. Reg. 1818 (April 16, 2007); the Rules Review Commission approves these rules, including any changes incorporated as a result of public comments or Rules Review Commission requirements; and the Rules Review Commission receives 10 or more letters of objection to these rules in accordance with G.S. 150B-21.3(b2), the Environmental Management Commission, notwithstanding the requirements of G.S. 150B-21.1 and G.S. 150B-21.3, may adopt these rules as temporary rules in accordance with the temporary rule-making procedures set out in Chapter 150B of the General Statutes."

Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

## § 143-215.104K. (Expires January 1, 2022 — see notes) Liability protection.

(a) A potentially responsible party who enters into an assessment agreement or remediation agreement with the Commission and who is complying with the agreement shall not be held liable for assessment or remediation of areas of contamination identified in the agreement except as specified in the assessment agreement or remediation agreement, so long as any activities conducted at the contamination site by or under the control or direction of the petitioner do not increase the risk of harm to public health or the environment and the petitioner is not required to undertake additional remediation to unrestricted use standards pursuant to subsection (c) of this section. The liability protection provided under this Part applies to all of the following persons to the same extent as the petitioner, so long as these persons are not otherwise potentially responsible parties or parents, subsidiaries, or affiliates of potentially responsible parties and the person is not required to undertake additional remediation to unrestricted use standards pursuant to subsection (c) of this section:

(1) Repealed by Session Laws 2007-503, s. 8, effective August 31, 2007.
(2) Any future owner of the contamination site.
(3) A person who occupies the contamination site.
(4) A successor or assign of any person to whom the liability protection provided under this Part applies.
(5) Any lender or fiduciary that provides financing to the petitioner to pay the petitioner's financial obligations under G.S. 143-215.104F.

(b) A person who conducts an environmental assessment or transaction screen on contamination resulting from a release at a certified facility or certified abandoned site consistent with a dry-cleaning solvent assessment agreement, if any was required under this Part, and who is not otherwise a potentially responsible party is not a potentially responsible party as a result of conducting the environmental assessment or transaction screen unless that person increases the risk of harm to public health or the environment by failing to exercise due diligence and reasonable care in performing the environmental assessment or transaction screen.

(c) If a land-use restriction set out in a Notice of Dry-Cleaning Solvent Remediation required under G.S. 143-215.104M is violated, the owner of the contamination site at the time the land-use restriction is violated, the owner's successors and assigns, and the owner's agents who direct or contract for alteration of the contamination site in violation of a land-use restriction shall be liable for remediation of all contaminants to unrestricted use standards. A petitioner who completes the remediation required under a dry-cleaning solvent remediation agreement or other person who receives liability protection under this Part shall not be required to undertake additional remediation unless:

(1) The petitioner knowingly or recklessly provides false information that forms a basis for the remediation agreement or that is offered to demonstrate compliance with the remediation agreement or fails to disclose relevant information about contamination related to a facility or abandoned site.

(2) New information indicates the existence of previously unreported dry-cleaning solvent contaminants or any other contaminants to be remediated under the remediation agreement, or an area of previously unreported contamination by contaminants addressed in the remediation agreement is discovered to be associated with the facility or abandoned site and has not been remediated to unrestricted use standards, unless the remediation agreement is amended to include any previously unreported contaminants and any additional area of contamination. If the remediation agreement sets maximum concentrations for contaminants and new information indicates the existence of previously unreported areas of these contaminants, further remediation shall be required only if the areas of previously unreported contaminants raise the risk of the contamination to public health or the environment to a level less protective of public health and the environment than that required by the remediation agreement.

(3) The level of risk to public health and the environment from contaminants is unacceptable at or in the vicinity of the contamination site due to changes in exposure conditions, including (i) a change in land use that increases the probability of exposure to contaminants at or in the vicinity of the contamination site; (ii) the failure of remediation to mitigate risks to the extent required to make the contamination site fully protective of public health and the environment as planned in the remediation agreement; or (iii) removal of a State or local land-use control.

(4) The Commission obtains new information about a contaminant to be remediated under the remediation agreement and associated with the facility or abandoned site or exposures at or around the contamination site that raises the risk to public health or the environment associated with the contamination site beyond an acceptable range and in a manner or to a degree not anticipated in the remediation agreement. Any person whose use, including any change in use, of the contami-

nation site causes an unacceptable risk to public health or the environment may be required by the Commission to undertake additional remediation measures under the provisions of this Part.

(5) A petitioner fails to file a timely and proper Notice of Dry-Cleaning Solvent Remediation under this Part.

(6) A facility or abandoned site loses its certification before the assessment and any remediation required under the provisions of this Part and the dry-cleaning solvent remediation agreement are completed to the satisfaction of the Department.

(7) The remediation required in the remediation agreement has resulted in notification from the United States or its departments and agencies, including the Environmental Protection Agency, that the Department will violate the terms and conditions under which it operates and administers remedial programs by delegation or similar authorization. (1997-392, s. 1; 2001-384, s. 11; 2007-530, s. 8; 2009-483, s. 2.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2007-530, s. 14, provides: "If the Environmental Management Commission adopts rules establishing a risk-based approach applicable to the assessment, prioritization, and remediation of dry-cleaning solvent contamination, the original notice of text for which was published at 21 N.C. Reg. 1818 (April 16, 2007); the Rules Review Commission approves these rules, including any changes incorporated as a result of public comments or Rules Review Commission requirements; and the Rules Review Commission receives 10 or more letters of objection to these rules in accordance with G.S. 150B-21.3(b2), the Environmental Management Commission, notwithstanding the requirements of G.S. 150B-21.1 and G.S. 150B-21.3, may adopt these rules as temporary rules in accordance with the temporary rule-making procedures set out in Chapter 150B of the General Statutes."

Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

**Effect of Amendments.** — Session Laws 2009-483, s. 2, effective August 26, 2009, substituted "the remediation required" for "the remediation or redevelopment required" in the last sentence of the introductory paragraph of subsection (c); and, in subdivision (c)(3), added clause (iii) and made related changes.

## § 143-215.104L. (Expires January 1, 2022 — see notes) Public notice and community involvement.

(a) If a petitioner desires to enter into a dry-cleaning solvent remediation agreement based on remediation standards that rely on the creation of land-use restrictions, or on the use of State or local land-use controls, the Commission or the Commission's private contractor on behalf of the petitioner shall notify the public and the community in which the facility or abandoned site is located of the planned remediation activities. On behalf of the petitioner, the Commission or the Commission's private contractor shall prepare a Notice of Intent to Remediate a Dry-Cleaning Solvent Facility or Abandoned Site and a summary of the Notice of Intent. The Notice of Intent shall provide, to the extent known, a legal description of the location of the contamination site, a map showing the location of the contamination site, a description of the contaminants involved and their concentrations in the media of the contamination site, a description of the future use of the contamination site, any proposed investigation and remediation, and a description of any land-use restrictions and State and local land-use controls that will be used. Both the Notice of Intent and the summary of the Notice of Intent shall state the time period and means for submitting written comment and for requesting a public meeting on the proposed dry-cleaning solvent remediation agreement. The summary of the Notice of Intent shall include a statement as to the public availability of the full Notice of Intent. After approval of the Notice of Intent and summary of the Notice of Intent by the Commission, the Commission or the Commission's private contractor shall provide a copy of the Notice of Intent to all local governments having jurisdiction over the contamination site. The Commission or Commission's private contractor shall publish the summary of the Notice of Intent in a newspaper of general circulation serving the area in which the contamination is located and shall mail a copy of the summary to each owner of property located within the contamination site and to each owner of property that is contiguous to the contamination site. The Commission or the Commission's private contractor shall also conspicuously post a copy of the summary of the Notice of Intent at the contamination site.

(b) Publication of the approved summary of the Notice of Intent in a newspaper of general circulation shall begin a public comment period of at least 30 days from the date of publication. During the public comment period, members of the public, residents of the community in which the contamination site is located, and local governments having jurisdiction over the contamination site may submit comment on the proposed dry-cleaning solvent remediation agreement, including methods and degree of remediation, future land uses, and impact on local employment.

(c) Any person who desires a public meeting on a proposed dry-cleaning solvent remediation agreement shall submit a written request for a public meeting to the Commission within 30 days after the public comment period begins. The Commission shall consider all requests for a public meeting and shall hold a public meeting if the Commission determines that there is significant public interest in the proposed remediation agreement. If the Commission decides to hold a public meeting, the Commission shall, at least 30 days prior to the public meeting, mail written notice of the public meeting to all persons who requested the public meeting and to any other person who had previously requested notice. The Commission shall also publish, at least 30 days prior to the date of the public meeting, a notice of the public meeting at least one time in a newspaper having general circulation in the county where the contamination site is located. In any county in which there is more than one newspaper having general circulation, the Commission shall publish a copy of the notice in as many newspapers having general circulation in the county as the Commission in its discretion determines to be necessary to assure that the notice is generally available throughout the county. The Commission shall prescribe the form and content of the notice to be published. The Commission shall prescribe the procedures to be followed in the public meeting. The Commission shall take detailed minutes of the meeting. The minutes shall include any written comments received during the public meeting. The Commission shall take into account the comment received during the comment period and at the public meeting if the Commission holds a public meeting. The Commission shall incorporate into the remediation agreement provisions that reflect comment received during the comment period and at the public meeting to the extent practical. The Commission shall give particular consideration to written comment that is supported by valid scientific and technical information and analysis. (1997-392, s. 1; 2007-530, s. 9; 2009-483, s. 3.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2007-530, s.

14, provides: "If the Environmental Management Commission adopts rules establishing a risk-based approach applicable to the assessment, prioritization, and remediation of dry-cleaning solvent contamination, the original notice of text for which was published at 21 N.C. Reg. 1818 (April 16, 2007); the Rules Review Commission approves these rules, including any changes incorporated as a result of public comments or Rules Review Commission requirements; and the Rules Review Commission receives 10 or more letters of objection to these rules in accordance with G.S. 150B-21.3(b2), the Environmental Management Commission, notwithstanding the requirements of G.S. 150B-21.1 and G.S. 150B-21.3, may adopt these rules as temporary rules in accordance with the temporary rule-making procedures set out in Chapter 150B of the General Statutes."

Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

**Effect of Amendments.** — Session Laws 2009-483, s. 3, effective August 26, 2009, in subsection (a), inserted "or on the use of State or local land-use controls" and substituted "remediation activities" for "remediation and redevelopment activities" in the first sentence, substituted "description of any land-use restrictions and State and local land-use controls that will be used" for "proposed Notice of Dry-Cleaning Solvent Remediation prepared in accordance with G.S. 143-215.104M" at the end of third sentence, and substituted "shall mail a copy of the summary to each owner of property located within the contamination site and to each owner of property that is contiguous to the contamination site" for "shall file a copy of the summary of the Notice of Intent with the Codifier of Rules, who shall publish the summary of the Notice of Intent in the North Carolina Register" at the end of the next to last sentence; in the first sentence of subsection (b), deleted "in the North Carolina Register and publication" preceding "in a newspaper" and substituted "30 days from the date" for "sixty days from the later date"; and, in subsection (c), substituted "comments received during the public meeting" for "dry-cleaning solvent remediation agreement" at the end of the third to last sentence.

## § 143-215.104M. (Expires January 1, 2022 — see notes) Notice of Dry-Cleaning Solvent Remediation; land-use restrictions in deeds.

(a) Land-Use Restriction. — In order to reduce or eliminate the danger to public health or the environment posed by a dry-cleaning solvent contamination site, the owner of property upon which dry-cleaning solvent contamination has been discovered may file a Notice of Dry-Cleaning Solvent Remediation approved by the Commission identifying the site on which the contamination has been discovered and providing for current or future restrictions on the use of the property. If a petitioner requests that a contamination site be remediated to standards that require land-use restrictions, the owner of the property must file a Notice of Dry-Cleaning Solvent Remediation for the remediation agreement to become effective.

(b) Notice of Restriction. — A Notice of Dry-Cleaning Solvent Remediation shall include:

(1) A survey plat of the contamination site that has been prepared and certified by a professional land surveyor and that meets the requirements of G.S. 47-30.

(2) A legal description of the property that would be sufficient as a description in an instrument of conveyance.

(3) A description of the location and dimensions of the areas of potential environmental concern with respect to permanently surveyed benchmarks.

(4) The type, location, and quantity of dry-cleaning solvent contamination known to exist on the property.

(5) Any restrictions on the current or future use of the property or other property that are necessary to assure adequate protection of public health and the environment as provided in rules adopted pursuant to

G.S. 143-215.104D(b)(3). These land-use restrictions may apply to activities on, over, or under the land, including, but not limited to, use of groundwater, building, filling, grading, excavating, and mining. Where a contamination site encompasses more than one parcel or tract of land, a composite map or plat showing all parcels or tracts may be recorded.

(c) Recordation of Notice. — After the Commission approves and certifies the Notice of Dry-Cleaning Solvent Remediation under subsection (a) of this section, a certified copy of a Notice of Dry-Cleaning Solvent Remediation shall be filed in the office of the register of deeds of the county or counties in which the property described is located. The owner of the property shall file the Notice of Dry-Cleaning Solvent Remediation within 15 days of the property owner's receipt of the Commission's approval of the notice or the effective date of the dry-cleaning solvent remediation agreement, whichever is later. The register of deeds shall record the certified copy of the Notice of Dry-Cleaning Solvent Remediation and index it in the grantor index under the names of the owners of the land.

(d) Notice of Transfer. — When property for which a Notice of Dry-Cleaning Solvent Remediation has been filed is sold, leased, conveyed, or transferred, the deed or other instrument of transfer shall contain in the description section, in no smaller type than that used in the body of the deed or instrument, a statement that the property has been contaminated with dry-cleaning solvent and, if appropriate, cleaned up under this Part.

(e) Cancellation of Notice. — A Notice of Dry-Cleaning Solvent Remediation filed pursuant to this Part may, at the request of the owner of the property subject to the Notice of Dry-Cleaning Solvent Remediation, be canceled by the Secretary after the risk to public health and the environment associated with the dry-cleaning solvent contamination and any other contaminants included in the dry-cleaning solvent remediation agreement has been eliminated as a result of remediation of the property. The Secretary shall forward notice of cancellation to the register of deeds of the county or counties where the Notice of Dry-Cleaning Solvent Remediation is recorded and request that the Notice of Dry-Cleaning Solvent Remediation be canceled. The notice of cancellation shall contain the names of the landowners as shown in the Notice of Dry-Cleaning Solvent Remediation. The register of deeds shall record the notice of cancellation in the deed books and index it on the grantor index in the name of the landowner as shown in the Notice of Dry-Cleaning Solvent Remediation and on the grantee index in the name "Secretary of Environment and Natural Resources". The register of deeds shall make a marginal entry on the Notice of Dry-Cleaning Solvent Remediation showing the date of cancellation and the book and page where the notice of cancellation is recorded, and the register of deeds shall sign the entry. If a marginal entry is impracticable because of the method used to record maps and plats, the register of deeds shall not be required to make a marginal entry.

(f) Enforcement. — Any restriction on the current or future use of property subject to a Notice of Dry-Cleaning Solvent Remediation filed pursuant to this section shall be enforced by any owner of the property or by any other potentially responsible party. Any land-use restriction may also be enforced by the Commission through the remedies provided in this Part or by means of a civil action in the superior court. The Commission may enforce any land-use restriction without first having exhausted any available administrative remedies. Restrictions also may be enforced by any unit of local government having jurisdiction over any part of the property by means of a civil action without the unit of local government having first exhausted any available administrative remedy. A land-use restriction may also be enforced by any person eligible for liability protection under this Part who will lose liability protection if the land-use restriction is violated. A restriction shall not be declared unenforceable due to lack of privity of estate or contract, due to lack of benefit to particular land, or due to lack of privity of any property interest in particular land. Any person who owns or leases a property subject to a land-use restriction under this section shall abide by the land-use restriction.

(g) Relation to Brownfields Notice. — Unless the Commission decertifies a previously certified facility or a previously certified abandoned site, this section shall apply in lieu of the provisions of Article 9 of Chapter 130A of the General Statutes and Parts 1 and 2 of Article 21A of Chapter 143 of the General Statutes for properties remediated under this Part. (1997-392, s. 1; 1997-443, s. 11A.119(b); 2007-530, s. 10.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2007-530, s. 14, provides: "If the Environmental Management Commission adopts rules establishing a risk-based approach applicable to the assessment, prioritization, and remediation of dry-cleaning solvent contamination, the original notice of text for which was published at 21 N.C. Reg. 1818 (April 16, 2007); the Rules Review Commission approves these rules, including any changes incorporated as a result of public comments or Rules Review Commission requirements; and the Rules Review Commission receives 10 or more letters of objection to these rules in accordance with G.S. 150B-21.3(b2), the Environmental Management Commission, notwithstanding the requirements of G.S. 150B-21.1 and G.S. 150B-21.3, may adopt these rules as temporary rules in accordance with the temporary rule-making procedures set out in Chapter 150B of the General Statutes."

Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

## § 143-215.104N. (Expires January 1, 2022 — see notes) Disbursement of dry-cleaning solvent assessment and remediation costs; limitations; cost recovery.

(a) Allowable Costs. — To the extent monies are available in the Fund, the Commission shall pay for reasonable and necessary assessment and remediation activities at a contamination site associated with a certified facility or a certified abandoned site pursuant to a dry-cleaning solvent assessment agreement or dry-cleaning solvent remediation agreement for the following assessment and remediation response costs, for which appropriate documentation is submitted:

(1) Costs of assessment with respect to dry-cleaning solvent contamination.

(2) Costs of treatment or replacement of potable water supplies affected by the contamination.

(3) Costs of remediation of affected soil, groundwater, surface waters, bedrock or other rock formations, or buildings.

(4) Monitoring of the contamination.

(5) Inspection and supervision of activities described in this subsection.

(6) Reasonable costs of restoring property as nearly as practicable to the conditions that existed prior to activities associated with assessment and remediation conducted pursuant to this Part.

**Part 6 has a delayed expiration date. See notes.**

---

(7) Other activities reasonably required to protect public health and the environment.

(b) Limitations. — Notwithstanding subsection (a) of this section, the Commission shall not make any disbursement from the Fund:

(1) For costs incurred in connection with facilities or abandoned sites not certified pursuant to G.S. 143-215.104G.

(2) For costs not incurred pursuant to a dry-cleaning solvent assessment agreement or a dry-cleaning solvent remediation agreement.

(3) Repealed by Session Laws 2007-530, s. 11, effective August 31, 2007.

(4) For costs at a contamination site that has been identified by the United States Environmental Protection Agency as a federal Superfund site pursuant to 40 Code of Federal Regulations, Part 300 (1 July 1996 Edition), except that the Commission may authorize distribution of the required State match in an amount not to exceed two hundred thousand dollars ($200,000) per year per site. The Commission shall not delegate its authority to disburse funds pursuant to this subdivision.

(5) For remediation beyond the level required under the Commission's risk-based criteria for determining the appropriate level of remediation.

(6) For assessment or remediation response costs incurred in connection with any individual dry-cleaning solvent assessment agreement or dry-cleaning solvent remediation agreement in excess of five hundred thousand dollars ($500,000) per year. However, that the Commission may disburse up to one million dollars ($1,000,000) per year for assessment and remediation costs incurred in connection with a facility or an abandoned site if the facility or abandoned site has been certified and poses an imminent hazard.

(7) That would result in a diminution of the Fund balance below one hundred thousand dollars ($100,000), unless an emergency exists in connection with a dry-cleaning solvent contamination abandoned site that constitutes an imminent hazard.

(8) For any costs incurred in connection with dry-cleaning solvent contamination from a facility located on a United States military base or owned by the United States or a department or agency of the United States.

(9) For any costs incurred in connection with dry-cleaning solvent contamination from a facility or abandoned site owned by the State or a department or agency of the State, unless the contamination at the State-owned site was not caused by the State, but was caused by another person.

(c) Repealed by Session Laws 2007-530, s. 11, effective August 31, 2007.

(d) If, at any time, the Commission determines that the cost of assessment and remediation activities incurred pursuant to existing dry-cleaning solvent assessment agreements and dry-cleaning solvent remediation agreements equals or exceeds the total revenues expected to be credited to the Fund over the life of the Fund, the Commission shall publish notice of the determination in the North Carolina Register. Following the publication of a notice pursuant to this section, the Commission may continue to enter into dry-cleaning solvent assessment agreements and dry-cleaning solvent remediation agreements until the day of adjournment of the first regular session of the General Assembly that begins after the date the notice is published, but shall have no authority to enter into additional dry-cleaning solvent assessment agreements and dry-cleaning solvent remediation agreements after that date unless the

Commission first determines either (i) that revenues will be available from the Fund to pay the costs of assessment and remediation activities expected to be incurred pursuant to the agreements, or (ii) that assessment and remediation activities undertaken pursuant to the agreements will be paid entirely from sources other than the Fund. For the purposes of this subsection, the term "day of adjournment" shall mean: (i) in the case of a regular session held in an odd-numbered year, the day the General Assembly adjourns by joint resolution for more than 10 days, and (ii) in the case of a regular session held in an even-numbered year, the day the General Assembly adjourns sine die.

(e) If the cleanup of the contamination site is not completed through fault of the petitioner as required by the remediation agreement, the petitioner shall reimburse the Fund for any response costs previously disbursed from the fund for the cleanup, with interest. The Commission shall request the Attorney General to commence a civil action to secure repayment of response costs and interest of the costs. (1997-392, s. 1; 2000-19, ss. 12, 14(a), (b); 2007-530, s. 11; 2009-483, s. 4.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2007-530, s. 14, provides: "If the Environmental Management Commission adopts rules establishing a risk-based approach applicable to the assessment, prioritization, and remediation of dry-cleaning solvent contamination, the original notice of text for which was published at 21 N.C. Reg. 1818 (April 16, 2007); the Rules Review Commission approves these rules, including any changes incorporated as a result of public comments or Rules Review Commission requirements; and the Rules Review Commission receives 10 or more letters of objection to these rules in accordance with G.S. 150B-21.3(b2), the Environmental Management Commission, notwithstanding the requirements of G.S. 150B-21.1 and G.S. 150B-21.3, may adopt these rules as temporary rules in accordance with the temporary rule-making procedures set out in Chapter 150B of the General Statutes."

Session Laws 2007-530, s. 15(b), provides: "G.S. 143-215.104N(b)(6), as enacted by Section 11 of this act, is effective retroactively to 1 January 2007. All other amendments to G.S. 143-215.104N, as enacted by Section 11 of this act, are effective when this act becomes law."

Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

**Effect of Amendments.** — Session Laws 2009-483, s. 4, effective August 26, 2009, added "unless the contamination at the State-owned site was not caused by the State, but was caused by another person" at the end of subdivision (b)(9).

## § 143-215.104O. (Expires January 1, 2022 — see notes) Remediation of uncertified sites.

(a) In the event the owner or operator of a facility or the current owner of an abandoned site cannot be identified or located, unreasonably refuses to enter into either an assessment agreement or remediation agreement or cannot be made to comply with the provisions of an assessment agreement or remediation agreement between the petitioner and the Commission, the Commission may direct the Department or a private contractor engaged by the Commission to use staff, equipment, or materials under the control of the Department or contractor or provided by other cooperating federal, State, or local agencies to develop and implement a plan for abatement of an imminent hazard, or to provide interim alternative sources of drinking water to third parties affected by dry-cleaning solvent contamination resulting from a release at the facility or abandoned site. The cost of any of these actions shall be paid from the Fund. The Department or private contractor shall keep a record of all expenses incurred for personnel and for the use of equipment and materials and all other expenses of developing and implementing the remediation plan.

(b) The Commission shall request the Attorney General to commence a civil action to secure reimbursement of costs incurred under this section.

(c) In the event a civil action is commenced pursuant to this Part to recover monies paid from the Fund, the Commission may recover, in addition to any amount due, the costs of the action, including reasonable attorneys' fees and investigation expenses. Any monies received or recovered as reimbursement shall be paid into the Fund or other source from which the expenditures were made. (1997-392, s. 1; 2000-19, s. 15.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

## § 143-215.104P. (Expires January 1, 2022 — see notes) Enforcement procedures; civil penalties.

(a) The Secretary may assess a civil penalty of not more than ten thousand dollars ($10,000) or, if the violation involves a hazardous waste, as defined in G.S. 130-290, of not more than twenty-five thousand dollars ($25,000) against any person who:

(1) Repealed by Session Laws 2000, ch. 19, s. 3, effective on and after April 1, 1998.
(2) Engages in dry-cleaning operations using dry-cleaning solvent for which the appropriate sales or use tax has not been paid.
(3) Fails to comply with rules adopted by the Commission pursuant to this Part.
(4) Fails to file, submit, or make available, as the case may be, any documents, data, or reports required by this Part.
(5) Violates or fails to act in accordance with the terms, conditions, or requirements of any special order or other appropriate document issued pursuant to G.S. 143-215.2.
(6) Falsifies or tampers with any recording or monitoring device or method required to be operated or maintained under this Part or rules implementing this Part.
(7) Knowingly renders inaccurate any recording or monitoring device or method required to be operated or maintained under this Part or rules implementing this Part.
(8) Knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Part or rule implementing this Part.
(9) Knowingly makes a false statement of material fact in a rule-making proceeding or contested case under this Part.
(10) Refuses access to the Commission or its duly designated representative to any premises for purposes of conducting a lawful inspection provided for in this Part or rule implementing this Part.

(b) If any action or failure to act for which a penalty may be assessed under subsection (a) of this section is continuous, the Secretary may assess a penalty not to exceed ten thousand dollars ($10,000) per day or, if the violation involves a hazardous waste, as defined in G.S. 130-290, not exceed twenty-five thousand dollars ($25,000) per day. A penalty for a continuous violation shall not exceed two hundred thousand dollars ($200,000) for each period of 30 days during which the violation continues.

(c) In determining the amount of the penalty, the Secretary shall consider the factors set out in G.S. 143B-282.1(b). The procedures set out in G.S. 143B-282.1 shall apply to civil penalty assessments that are presented to the Commission for final agency decision.

(d) The Secretary shall notify any person assessed a civil penalty for the assessment and the specific reasons therefor by registered or certified mail or by any means authorized by G.S. 1A-1, Rule 4. Contested case petitions shall be filed pursuant to G.S. 150B-23 within 30 days of receipt of the notice of assessment. The Secretary shall make the final decision regarding assessment of a civil penalty under this section.

(e) Requests for remission of civil penalties shall be filed with the Secretary. Remission requests shall not be considered unless made within 30 days of receipt of the notice of assessment. Remission requests must be accompanied by a waiver of the right to a contested case hearing pursuant to Chapter 150B of the General Statutes and a stipulation of the facts on which the assessment was based. Consistent with the limitations in G.S. 143B-282.1(c) and (d), remission requests may be resolved by the Secretary and the violator. If the Secretary and the violator are unable to resolve the request, the Secretary shall deliver the remission request and the recommended action to the Committee on Civil Penalty Remissions of the Environmental Management Commission appointed pursuant to G.S. 143B-282.1(c).

(f) If any civil penalty has not been paid within 30 days after notice of assessment has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the superior court of any county in which the violator resides or the violator's principal place of business is located in order to recover the amount of the assessment, unless the violator contests the assessment as provided in subsection (d) of this section or requests remission of the assessment in whole or in part as provided in subsection (e) of this section. If any civil penalty has not been paid within 30 days after the final agency decision or order has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the superior court of any county in which the violator resides or the violator's principal place of business is located to recover the amount of the assessment. A civil action must be filed within three years of the date the final agency decision or court order was served on the violator. (1997-392, s. 1; 2000-19, s. 3.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

## § 143-215.104Q. (Expires January 1, 2022 — see notes) Enforcement procedures; criminal penalties.

(a) Any person who negligently commits any of the offenses set out in subdivisions (1) through (10) of G.S. 143-215.104P(a) shall be guilty of a Class 2 misdemeanor, which may include a fine not to exceed fifteen thousand dollars ($15,000) per day of violation, provided that the fine shall not exceed a cumulative total of two hundred thousand dollars ($200,000) for each period of 30 days during which a violation continues.

(b) Any person who knowingly and willfully commits any of the offenses set out in subdivisions (1) through (10) of G.S. 143-215.104P(a) shall be guilty of a Class I felony, which may include a fine not to exceed one hundred thousand dollars ($100,000) per day of violation, provided that this fine shall not exceed a cumulative total of five hundred thousand dollars ($500,000) for each period of 30 days during which the violation continues. For the purposes of this subsection, the phrase "knowingly and willfully" shall mean "intentionally and consciously" as the courts of this State, according to the principles of common law, interpret the phrase in the light of reason and experience.

(c)(1) Any person who knowingly commits any of the offenses set out in subdivisions (3) through (10) of G.S. 143-215.104P(a) and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury shall be guilty of a Class C felony, which may include a fine not to exceed two hundred fifty thousand dollars ($250,000) per day of violation, provided that this fine shall not exceed a cumulative total of one million dollars ($1,000,000) for each period of 30 days during which the violation continues.

(2) For the purposes of this subsection, a person's state of mind is knowing with respect to:

a. His conduct, if he is aware of the nature of his conduct.

b. An existing circumstance, if he is aware or believes that the circumstance exists.

c. A result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(3) Under this subsection, the following should be considered in determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury:

a. The person is responsible only for actual awareness or actual belief that he possessed, and

b. Knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant.

(4) It is an affirmative defense to a prosecution under this subsection that the conduct charged was conduct consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of an occupation, a business or profession, or of medical treatment or medical or scientific experimentation conducted by professionally approved methods, and the person had been made aware of the risks involved prior to giving consent. The defendant may establish an affirmative defense under this subdivision by a preponderance of the evidence.

(d) No proceeding shall be brought or continued under this section for or on account of a violation by any person who has previously been convicted of a federal violation based upon the same set of facts.

(e) In proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information. Consistent with the principles of common law, the subjective mental state of defendants may be inferred from their conduct.

(f) For the purposes of the felony provisions of this section, a person's state of mind shall not be found "knowingly and willfully" or "knowingly" if the conduct that is the subject of the prosecution is the result of any of the following occurrences or circumstances:

(1) A natural disaster or other act of God that could not have been prevented or avoided by the exercise of due care or foresight.

(2) An act of third parties other than agents, employees, contractors, or subcontractors of the defendant.

(3) An act done in reliance on the written advice or emergency on-site direction of an employee of the Department. In emergencies, oral advice may be relied upon if written confirmation is delivered to the employee as soon as practicable after receiving and relying on the advice.

(4) An act causing no significant harm to the environment or risk to public health, safety, or welfare and done in compliance with other conflicting environmental requirements or other constraints imposed in writing by environmental agencies or officials after written notice is delivered to all relevant agencies that the conflict exists and will cause a violation of the identified standard.

(5) Violations causing no significant harm to the environment or risk to public health, safety, or welfare for which no enforcement action or civil penalty could have been imposed under any written civil enforcement guidelines in use by the Department at the time. This subdivision shall not be construed to require the Department to develop or use written civil enforcement guidelines.

(6) Occasional, inadvertent, short-term violations causing no significant harm to the environment or risk to public health, safety, or welfare. If the violation occurs within 30 days of a prior violation or lasts for more than 24 hours, it is not an occasional, short-term violation.

(g) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other criminal offenses under law may apply to prosecutions brought under this section or other criminal statutes that refer to this section and shall be determined by the courts of this State according to the principles of common law as they may be applied in light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in light of reason and experience.

(h) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other criminal offenses under law may apply to prosecutions brought under this section or other criminal statutes that refer to this section and shall be determined by the courts of this State according to the principles of common law as they may be applied in light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in light of reason and experience.

(i) For purposes of this section, the term "person" means, in addition to the definition contained in G.S. 143-212, any responsible corporate or public office or employee. If a vote of the people is required to effectuate the intent and purpose of this Article by a county, city, town, or other political subdivision of the State and the vote on the referendum is against the means or machinery for carrying out the intent and purpose, then this section shall not apply to elected officials or to any responsible appointed officials or employees of the county, city, town, or other political subdivision. (1997-392, s. 1.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

### § 143-215.104R. (Expires January 1, 2022 — see notes) Enforcement procedures; injunctive relief.

Whenever the Commission has reasonable cause to believe that any person has violated or is threatening to violate any of the provisions of this Part or rule implementing this Part, the Commission may, either before or after the institution of any other action or proceeding authorized by this Part, request the Attorney General to institute a civil action in the name of the State upon the relation of the Commission for injunctive relief to restrain the violation or threatened violation and for other and further relief in the premises as the court shall deem proper. The Attorney General may institute an action in the superior court of the county in which the violation occurred or may occur or, in the Attorney General's discretion, in the superior court of the county in which the person responsible for the violation or threatened violation resides or has a principal place of business. Upon a determination by the court that the alleged violation of the provisions of this Part or the rules of the Commission has occurred or is threatened, the court shall grant the relief necessary to prevent or abate the violation or threatened violation. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to the proceedings from any penalty prescribed for violation of this Part. In the event a civil action is commenced pursuant to this section, the Commission may recover the costs of the action, including attorneys' fees and investigation expenses. All monies received or recovered shall be paid into the Fund or other source from which the expenditures were made. (1997-392, s. 1.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

### § 143-215.104S. (Expires January 1, 2022 — see notes) Appeals.

Any person who is aggrieved by a decision of the Commission under G.S. 143-215.104F through G.S. 143-215.104O may commence a contested case by filing a petition under G.S. 150B-23 within 60 days after the Commission's decision. If no contested case is initiated within the allotted time period, the Commission's decision shall be final and not subject to review. The Commission shall make the final agency decision in contested cases initiated pursuant to this section. Notwithstanding the provisions of G.S. 6-19.1, no party seeking to compel remediation of dry-cleaning solvent contamination in excess of that required by a dry-cleaning solvent remediation agreement approved by the Commission shall be eligible to recover attorneys' fees. The Commission shall not delegate its authority to make a final agency decision pursuant to this section. (1997-392, s. 1; 2000-19, s. 16; 2002-165, s. 1.5.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — G.S. 143-215.104E, referred to in this section, was repealed by Session Laws 2000-19, s. 3, effective April 1, 1998.

Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

## § 143-215.104T. (Expires January 1, 2022 — see notes) Construction of this Part.

(a) This Part is not intended to and shall not be construed to:

(1) Affect the ability of local governments to regulate land use under Article 19 of Chapter 160A of the General Statutes and Article 18 of Chapter 153A of the General Statutes. The use of the identified contamination site and any land-use restrictions in the dry-cleaning solvent remediation agreement shall be consistent with local land-use controls adopted under those statutes.

(2) Amend, modify, repeal, or otherwise alter any provision of any remedial program or other provision of law relating to civil and criminal penalties or enforcement actions and remedies available to the Department, except as may be provided in a dry-cleaning solvent remediation agreement.

(3) Prevent or impede the immediate response of the Department or responsible party to an emergency that involves an imminent or actual release of a regulated substance that threatens public health or the environment.

(4) Relieve a person receiving liability protection under this Part from any liability for contamination later caused by that person at a facility or abandoned site.

(5) Affect the right of any person to seek any relief available against any party to the dry-cleaning solvent remediation agreement who may have liability with respect to the facility or abandoned site, except that this Part does limit the relief available against any party to a remediation agreement with respect to assessment or remediation of the contamination site to the assessment remediation required under the remediation agreement.

(6) Affect the right of any person who may have liability with respect to the facility or abandoned site to seek contribution from any other person who may have liability with respect to the facility or abandoned site and who neither received nor has liability protection under this Part.

(7) Prevent the State from enforcing specific numerical remediation standards, monitoring, or compliance requirements specifically required to be enforced by the federal government as condition to receive program authorization, delegation, primacy, or federal funds.

(8) Create a defense against the imposition of criminal and civil fines or penalties or administrative penalties otherwise authorized by law and imposed as the result of the illegal disposal of waste or from the pollution of the land, air, or waters of this State on a facility or abandoned site.

(9) Relieve a person of any liability for failure to exercise due diligence and reasonable care in performing an environmental assessment or transaction screen.

(b) Notwithstanding the provision of the Tort Claims Act, G.S. 143-291 through G.S. 143-300.1 or any other provision of law waiving the sovereign immunity of the State of North Carolina, the State, its agencies, officers, employees, and agents shall be absolutely immune from any liability in any proceeding for any injury or claim arising from negotiating, entering into, implementing, monitoring, or enforcing a dry-cleaning solvent assessment agreement, a dry-cleaning solvent remediation agreement, or a Notice of Dry-Cleaning Solvent Remediation under this Part or any other action implementing this Part. (1997-392, s. 1; 2007-530, s. 12.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — This section, as amended by Session Laws 2007-530, s. 12, which inserted "implementing" in subsection (b), is effective retroactively to January 1, 1998.

Session Laws 2007-530, s. 14, provides: "If the Environmental Management Commission adopts rules establishing a risk-based approach applicable to the assessment, prioritization, and remediation of dry-cleaning solvent contamination, the original notice of text for which was published at 21 N.C. Reg. 1818 (April 16, 2007); the Rules Review Commission approves these rules, including any changes incorporated as a result of public comments or Rules Review Commission requirements; and the Rules Review Commission receives 10 or more letters of objection to these rules in accordance with G.S. 150B-21.3(b2), the Environmental Management Commission, notwithstanding the requirements of G.S. 150B-21.1 and G.S. 150B-21.3, may adopt these rules as temporary rules in accordance with the temporary rule-making procedures set out in Chapter 150B of the General Statutes."

Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

## § 143-215.104U. (Expires January 1, 2022 — see notes) Reporting requirements.

(a) The Secretary shall present an annual report to the Environmental Review Commission that shall include at least the following:

(1) A list of all dry-cleaning solvent contamination reported to the Department.

(2) A list of all facilities and abandoned sites certified by the Commission and the status of contamination associated with each facility or abandoned site.

(3) An estimate of the cost of assessment and remediation required in connection with facilities or abandoned sites certified by the Commission and an estimate of assessment and remediation costs expected to be paid from the Fund.

(4) A statement of receipts and disbursements for the Fund.

(5) A statement of all claims against the Fund, including claims paid, claims denied, pending claims, anticipated claims, and any other obligations.

(6) The adequacy of the Fund to carry out the purposes of this Part together with any recommendations as to measures that may be necessary to assure the continued solvency of the Fund.

(b) The Secretary shall make the annual report required by this section on or before 1 October of each year. (1997-392, s. 1.)

**Part Expires Effective January 1, 2022.** — For January 1, 2022, sunset provision and exceptions thereto, see G.S. 143-215.104A.

**Editor's Note.** — Session Laws 2009-483, s. 5, amended Session Laws 1997-392, s. 8, deleting the repeal date for Session Laws 1997-392, s. 1, which enacted Part 6 of Article 21A (G.S. 143-215.104A through 143-215.104U). Therefore, this section is not repealed effective January 1, 2012. Now see G.S. 143-215.104A for sunset provision.

CASE NOTES

**Cited** in State Props., LLC v. Ray, 155 N.C. App. 65, 574 S.E.2d 180, 2002 N.C. App. LEXIS 1701 (2002).

## ARTICLE 21B.

## *Air Pollution Control.*

### § 143-215.105. Declaration of policy; definitions.

The declaration of public policy set forth in G.S. 143-211, the definitions in G.S. 143-212, and the definitions in G.S. 143-213, applicable to the control and abatement of air pollution, shall be applicable to this Article. (1973, c. 821, s. 6; 1987, c. 827, s. 203.)

**Editor's Note.** — For provisions of the Permit Extension Act of 2009, Session Laws 2009-406, see the notes under G.S. 153A-344.1 and G.S. 160A-385.1.

**Legal Periodicals.** — For note regarding North Carolina air toxics regulations, see 69 N.C.L. Rev. 1579 (1991).

CASE NOTES

**Appeal.** — Third party was entitled under the North Carolina Administrative Procedures Act, G.S. 150B-1 to 150B-53 (1991), and the Air Pollution Control Act, and this section to G.S. 143-215.114C (1993), to appeal to the Office of Administrative Hearings from the decision of the Department of Environmental Management, to grant an air pollution control permit to Duke Power Company. Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 768, rehearing denied, 338 N.C. 314, 451 S.E.2d 634 (1994).

**Cited** in Lewis v. White, 287 N.C. 625, 216 S.E.2d 134 (1975); Steele Creek Community Ass'n v. United States DOT, 435 F. Supp. 196 (W.D.N.C. 1977); Craig v. County of Chatham, 143 N.C. App. 30, 545 S.E.2d 455, 2001 N.C. App. LEXIS 221 (2001).

### § 143-215.106. Administration of air quality program.

The Department shall administer the air quality program of the State. (1973, c. 821, s. 6; c. 1262, s. 23; 1977, c. 771, s. 4; 1987, c. 827, s. 204.)

CASE NOTES

**Cited** in Lewis v. White, 287 N.C. 625, 216 S.E.2d 134 (1975).

### § 143-215.106A. Assessments to establish Title V program.

(a) The holders of permits issued by the Commission for the control of sources of air pollution are assessed Title V program implementation fees on an annual basis in accordance with the schedule established in this section. The assessments are in addition to any other fees required to be paid by the permit holders in conjunction with the permits. The assessments shall be credited to the Title V Account. The Secretary shall issue annual notices of the assessments to permit holders on or before 1 July of each fiscal year. Each notice of assessment shall include a summary of the data on which the assessment is based. Assessments shall be payable 30 days after receipt of notice. Failure to make timely payment within 90 days shall be grounds to revoke the permit and to institute a collection action against the permit holder by the Attorney General.

(b) Assessments are made in accordance with the following schedule:

(1) Sources emitting at least 100 tons and less than 500 tons per year, two thousand dollars ($2,000) for fiscal year 1991-92 and two thousand five hundred dollars ($2,500) for each year thereafter;

(2) Sources emitting at least 500 tons and less than 1,000 tons per year, four thousand dollars ($4,000) for fiscal year 1991-92 and twelve thousand five hundred dollars ($12,500) for each year thereafter;

(3) Sources emitting at least 1,000 tons and less than 5,000 tons per year, six thousand dollars ($6,000) for fiscal year 1991-92, and twenty-five thousand dollars ($25,000) for each year thereafter; and

(4) Sources emitting at least 5,000 tons per year, six thousand dollars ($6,000) for fiscal year 1991-92, and one hundred thousand dollars ($100,000) for each year thereafter.

(c) Notices of assessment shall not be issued for any fiscal year in which the permit fees for the Title V program adopted by the Commission pursuant to G.S. 143-215.3(a)(1d) are in effect. Should a Title V program permit fee become due and payable during a fiscal year when the permit holder has paid an assessment, the Title V program permit fee shall be reduced in an amount equal to the pro rata share of the assessment for the months remaining in the fiscal year. The pro rata share is determined by dividing the assessment into 12 equal parts and multiplying that sum by the number of months remaining in the fiscal year. (1991, c. 552, s. 10; 1991 (Reg. Sess., 1992), c. 1039, s. 17.)

## § 143-215.107. Air quality standards and classifications.

(a) Duty to Adopt Plans, Standards, etc. — The Commission is hereby directed and empowered, as rapidly as possible within the limits of funds and facilities available to it, and subject to the procedural requirements of this Article and Article 21:

(1) To prepare and develop, after proper study, a comprehensive plan or plans for the prevention, abatement and control of air pollution in the State or in any designated area of the State.

(2) To determine by means of field sampling and other studies, including the examination of available data collected by any local, State or federal agency or any person, the degree of air contamination and air pollution in the State and the several areas of the State.

(3) To develop and adopt, after proper study, air quality standards applicable to the State as a whole or to any designated area of the State as the Commission deems proper in order to promote the policies and purposes of this Article and Article 21 most effectively.

(4) To collect information or to require reporting from classes of sources which, in the judgment of the Environmental Management Commission, may cause or contribute to air pollution. Any person operating or responsible for the operation of air contaminant sources of any class for which the Commission requires reporting shall make reports containing such information as may be required by the Commission concerning location, size, and height of contaminant outlets, processes employed, fuels used, and the nature and time periods or duration of emissions, and such other information as is relevant to air pollution and available or reasonably capable of being assembled.

(5) To develop and adopt emission control standards as in the judgment of the Commission may be necessary to prohibit, abate, or control air pollution commensurate with established air quality standards. This subdivision does not apply to that portion of the National Emission

Standards for Hazardous Air Pollutants for asbestos that governs demolition and renovation as set out in 40 C.F.R. § 61.141, 61.145, 61.150, and 61.154 (1 July 1993 edition).

(6) To adopt motor vehicle emissions standards; to adopt, when necessary and practicable, a motor vehicle emissions inspection and maintenance program to improve ambient air quality; to require manufacturers of motor vehicles to furnish to the Equipment and Tool Institute and, upon request and at a reasonable charge, to any person who maintains or repairs a motor vehicle, all information necessary to fully make use of the on-board diagnostic equipment and the data compiled by that equipment; to certify to the Commissioner of Motor Vehicles that ambient air quality will be improved by the implementation of a motor vehicle emissions inspection and maintenance program in a county. The Commission shall implement this subdivision as provided in G.S. 143-215.107A.

(7) To develop and adopt standards and plans necessary to implement programs for the prevention of significant deterioration and for the attainment of air quality standards in nonattainment areas.

(8) To develop and adopt standards and plans necessary to implement programs to control acid deposition and to regulate the use of sulfur dioxide (SO2) allowances and oxides of nitrogen (NOx) emissions in accordance with Title IV and implementing regulations adopted by the United States Environmental Protection Agency.

(9) To regulate the content of motor fuels, as defined in G.S. 105-449.60, to require use of reformulated gasoline as the Commission determines necessary, to implement the requirements of Title II and implementing regulations adopted by the United States Environmental Protection Agency, and to develop standards and plans to implement this subdivision. Rules may authorize the use of marketable oxygen credits for gasoline as provided in federal requirements.

(10) To develop and adopt standards and plans necessary to implement requirements of the federal Clean Air Act and implementing regulations adopted by the United States Environmental Protection Agency.

(11) To develop and adopt economically feasible standards and plans necessary to implement programs to control the emission of odors from animal operations, as defined in G.S. 143-215.10B.

(12) To develop and adopt a program of incentives to promote voluntary reductions of emissions of air contaminants, including, but not limited to, emissions banking and trading and credit for voluntary early reduction of emissions.

(13) To develop and adopt rules governing the certification of persons who inspect vehicle-mounted tanks used to transport motor fuel and to require that inspection of these tanks be performed only by certified personnel.

(14) To develop and adopt rules governing the sale and service of mobile source exhaust emissions analyzers and to require that vendors of these analyzers provide adequate surety to purchasers for the performance of the vendor's contractual or other obligations related to the sale and service of analyzers.

(b) Criteria for Standards. — In developing air quality and emission control standards, motor vehicle emissions standards, motor vehicle emissions inspection and maintenance requirements, rules governing the content of motor fuels or requiring the use of reformulated gasoline, and other standards and plans to improve ambient air quality, the Commission shall consider varying local conditions and requirements and may prescribe uniform standards and plans throughout the State or different standards and plans for different counties or areas as may be necessary and appropriate to improve ambient air quality in the State or within a particular county or area, achieve attainment or preclude violations of state or national ambient air quality standards, meet other federal requirements, or achieve the purposes of this Article and Article 21.

(c) Chapter 150B of the General Statutes governs the adoption and publication of rules under this Article.

(d), (e) Repealed by Session Laws 1987, c. 827, s. 205.

(f), (g) Repealed by Session Laws 1995, c. 507, s. 27. (1973, c. 821, s. 6; c. 1262, s. 23; 1975, c. 784; 1979, c. 545, s. 1; c. 931; 1987, c. 827, ss. 154, 205; 1989, c. 132; c. 168, s. 48; 1991, c. 403, s. 3; c. 552, s. 9; c. 761, s. 40; 1991 (Reg. Sess., 1992), c. 889, s. 3; 1993, c. 400, s. 7; 1993 (Reg. Sess., 1994), c. 686, s. 6; 1995, c. 123, s. 9; c. 507, s. 27.8(s); 1997-458, s. 3.1; 1999-328, s. 3.12; 2000-134, s. 1; 2002-4, s. 3; 2002-165, s. 1.7.)

**Cross References.** — As to motor vehicle emission standards, see G.S. 20-128.2.

**Editor's Note.** — Session Laws 1991, c. 403, which amended this section, in s. 5 provides: "This act shall not be construed to affect the validity of any rule in force on the date this act becomes effective [January 1, 1992] or to proposed rules for which a notice of rule making is published in the North Carolina Register before the date this act becomes effective [January 1, 1992]."

Session Laws 1991, c. 403, s. 6 provides: "This act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act. Each agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency."

Session Laws 1999-328, s. 5.1 provides that this act shall not be construed to obligate the General Assembly to appropriate any funds to implement the provisions of this act. Every State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency.

Session Laws 2000-134, s. 21, provides that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, and that, notwithstanding G.S. 150B-21.1(a)(2) and 26 NCAC 2C.0102(11), the Environmental Management Commission and the Division of Motor Vehicles of the Department of Transportation may adopt temporary rules to implement the provisions of this act. This section is to continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

Session Laws 2000-134, s. 23, directs the Environmental Review Commission, with the assistance of the Department of Environment and Natural Resources, the Division of Motor Vehicles of the Department of Transportation, the affected parties, and the Fiscal Research Division of the Legislative Services Office to study issues related to the costs associated with the motor vehicle safety and emissions inspection and maintenance program, specifically to determine what constitutes a reasonable fee for motor vehicle inspections under the current program and under the enhanced inspection and maintenance program to be implemented pursuant to G.S. 20-183.3, as amended by the act, taking into consideration the cost of emissions inspection equipment, the useful life of the equipment, the average period of time during which a purchaser of this equipment is able to amortize this cost, telephone charges incurred in connection with the registration denial program, whether a fee should be charged to reinspect a vehicle that fails an emissions inspection after repairs to the vehicle have been made, the cost of the safety inspection program in relation to the emissions inspection program, and any other factors that the Commission determines to be relevant. The Commission may also evaluate strategies to ensure an efficient and orderly implementation of the enhanced inspection and maintenance program required by Part III of S.L. 1999-328 and this act. The Environmental Review Commission is to recommend legislation to amend G.S. 20-183.7 to increase the fee for motor vehicle emissions inspections to the 2001 General Assembly.

Session Laws 2006-255, s. 5.4, provides: "The provisions of 15A NCAC 2D.0530(b)(1)(A)(iv) as adopted by the Environmental Management Commission on 10 February 2005 and as approved by the Rules Review Commission on 21 April 2005, do not apply to any application for an air quality permit that is submitted and determined to be administratively complete by the Department of Environment and Natural Resources on or before 1 August 2006. An air quality permit issued pursuant to an application described in this section shall both:

"(1) Include a requirement that the permittee will install advanced control technology designed to remove ninety-nine percent (99%) of any pollutants at each electric generating unit to which 15A NCAC 2D.0530(b)(1)(A)(iv) would otherwise apply and that the permittee will operate the advanced control technology at any time that electricity is being produced by the electric generating unit other than during startup of the unit.

"(2) State that the actual emissions of sulfur dioxide (SO2) shall be no greater than 0.15 pound per million British Thermal Units (BTUs) as measured on a rolling 30-day average."

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

For 1997 legislative survey, see 20 Campbell L. Rev. 450.

## CASE NOTES

**Open Burning.** — The trial court properly appled the whole record test, where it found that the North Carolina Department of Environment and Natural Resources and the Environmental Management Commission did not exceed their discretion and authority under G.S. 143-211(c), 143-215.107(a)(1), (3), and 143-215.114A(a)(1) in finding that the contractor had open burning piles within 1,000 feet from a dwelling. MW Clearing & Grading, Inc. v. N.C. Dep't of Env't & Natural Res., 171 N.C. App. 170, 614 S.E.2d 568, 2005 N.C. App. LEXIS 1210 (2005), cert. denied, 360 N.C. 65, 623 S.E.2d 585 (2005), rev'd in part, 360 N.C. 392, 628 S.E.2d 379 (2006) (as to finding violations rather than one).

**Cited** in Lewis v. White, 287 N.C. 625, 216 S.E.2d 134 (1975); State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).

## OPINIONS OF ATTORNEY GENERAL

**Adoption of Air Quality Rules and Procedures on Matters Not Covered by EPA.** — Subsection (f) of this section does not prohibit the Environmental Management Commission from adopting air quality rules and procedures covering matters on which there are no corresponding EPA regulations. See opinion of Attorney General to Mr. Ronald L. Lindsay, 45 N.C.A.G. 170 (1975), issued prior to 1979 amendment.

# § 143-215.107A. Motor vehicle emissions testing and maintenance program.

(a) General Provisions. —

(1) G.S. 143-215.107(a)(6) shall be implemented as provided in this section.

(2) Motor vehicle emissions inspections shall be performed by a person who holds an emissions inspection mechanic license issued as provided in G.S. 20-183.4A(c) at a station that holds an emissions inspection station license issued under G.S. 20-183.4A(a) or at a place of business that holds an emissions self-inspector license issued as provided in G.S. 20-183.4A(d). Motor vehicle emissions inspections may be performed by a decentralized network of test-and-repair stations as described in 40 Code of Federal Regulations § 51.353 (1 July 1998 Edition). The Commission may not require that motor vehicle emissions inspections be performed by a network of centralized or decentralized test-only stations.

(b) Repealed by Session Laws 2000, ch. 134, s. 2, effective July 14, 2000.

(c) Counties Covered. — Motor vehicle emissions inspections shall be performed in the following counties: Alamance, Buncombe, Burke, Cabarrus, Caldwell, Catawba, Chatham, Cleveland, Cumberland, Davidson, Durham, Edgecombe, Forsyth, Franklin, Gaston, Granville, Guilford, Harnett, Haywood, Henderson, Iredell, Johnston, Lee, Lenoir, Lincoln, Mecklenburg, Moore, Nash, Orange, Pitt, Randolph, Robeson, Rockingham, Rowan, Rutherford, Stanly, Stokes, Surry, Union, Wake, Wayne, Wilkes and Wilson.

(d) Additional Counties. — The Commission may require that motor vehicle emissions inspections be performed in counties in addition to those set out in subsection (c) of this section. In determining whether to require that motor vehicle emissions inspections be performed in a county, the Commission may consider the population of, and distribution of population in, the county; the projected change in population of, and distribution of population in, the county; the number of vehicles registered in the county; the projected change in the number of vehicles registered in the county; vehicle miles traveled in the county; the projected change in vehicle miles traveled in the county; current and projected commuting patterns in the county; and the current and projected impact of these factors on attainment of air quality standards in the county and in areas outside the county. The Commission may not require that motor vehicle emissions inspections be performed in any county with a population of less than 40,000 based on the most recent population estimates prepared by the State Budget Officer. The Commission may not require that motor vehicle emissions inspections be performed in any county in which the number of vehicle miles traveled per day is less than 900,000, based on the most recent estimates prepared by the Department of Transportation. In order to disapprove a rule that requires that motor vehicle emissions inspections be performed in one or more additional counties, a bill introduced pursuant to G.S. 150B-21.3(b) must amend subsection (c) of this section to add one or more other counties in which the total population and vehicle miles traveled per day equal or exceed the total population and vehicle miles traveled in the county or counties listed in the rule that the bill would disapprove. (1999-328, ss. 3.1, 3.3, 3.4, 3.5, 3.6, 3.7; 2000-134, ss. 2, 3; 2004-203, s. 5(l).)

**Editor's Note.** — Session Laws 1999-328, s. 3.2, as amended by Session Laws 2000-134, s. 4, in part provides that the Environmental Management Commission shall not require that motor vehicle emissions inspections be performed in any county pursuant to G.S. 143-215.107A(d), as enacted by Section 3.1 of this act, prior to July 1, 2006. The Environmental Management Commission shall not require motor vehicle emissions inspections for diesel powered vehicles prior to July 1, 2001.

Session Laws 2000-134, s. 4, amended Session Laws 1999-328, s. 3.2, to delete a provision that the Environmental Management Commission shall adopt rules to implement G.S. 143-215.107A(b), as enacted by Section 3.1 of the act, which rules were to become effective on July 1, 2002.

Session Laws 1999-328, ss. 3.3 through 3.8, as amended by Session Laws 2000-134, s. 4.1, amend G.S. 143-215.107A(c), as enacted by Section 3.1 of the 1999 act. The postponed amendment by Session Laws 1999-328, s. 3.3, has been set out as the second version of subsection (c) above, effective July 1, 2003. The postponed amendment by Session Laws 1999-328, s. 3.4, has been set out as the third version of subsection (c) above, effective January 1, 2004. The postponed amendment by Session Laws 1999-328, s. 3.5, has been set out as the fourth version of subsection (c), effective July 1, 2004. The postponed amendment by Session Laws 1999-328, s. 3.6, has been set out as the fifth version of subsection (c), effective January 1, 2005. The amendment by Session Laws 1999-328, s. 3.7, has been set out as the sixth version of subsection (c), effective July 1, 2005. The amendment by Session Laws 1999-328, s. 3.8, adds Brunswick, Carteret, Craven, New Hanover and Onslow to the list of counties in subsection (c), effective January 1, 2006.

Session Laws 2000-134, s. 5, repealed Session Laws 1999-328, s. 3.9, which provided that Sections 3.3 through 3.8 of the 1999 act become effective only if G.S. 20-183.7 has been amended to increase the fee for motor vehicle inspections no later than December 31, 2000 and that G.S. 143-215.107A(b), as enacted by Section 3.1 of this act, and Section 3.2 of this act are repealed effective January 1, 2001, unless, prior to January 1, 2001, G.S. 20-183.7 has been amended to increase the fee for motor vehicle emissions inspection.

Session Laws 1999-328, s. 4.4 provides in part that the Department of Transportation and the Department of Environment and Natural Resources shall jointly develop a draft plan for the purchase of buses, under which, beginning January 1, 2004, at least fifty percent (50%) of the new and replacement buses purchased to provide public transportation in counties in which motor vehicle emissions inspections are required to be performed under subsection (c) or (d) of G.S. 143-215.107A will be alternative-fueled or low emission vehicles. The Department of Transportation shall submit the draft plan to the Environmental Review Commission on or before September 1, 2000.

Session Laws 1999-328, s. 5.1 provides that this act shall not be construed to obligate the General Assembly to appropriate any funds to implement the provisions of this act. Every State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency.

Session Laws 1999-328, s. 5.3 contains a severability clause.

Session Laws 2000-134, s. 21, provides that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, and that, notwithstanding G.S. 150B-21.1(a)(2) and 26 NCAC 2C.0102(11), the Environmental Management Commission and the Division of Motor Vehicles of the Department of Transportation may adopt temporary rules to implement the provisions of this act. This section is to continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

Session Laws 2000-134, s. 23, directs the Environmental Review Commission, with the assistance of the Department of Environment and Natural Resources, the Division of Motor Vehicles of the Department of Transportation, the affected parties, and the Fiscal Research Division of the Legislative Services Office to study issues related to the costs associated with the motor vehicle safety and emissions inspection and maintenance program, specifically to determine what constitutes a reasonable fee for motor vehicle inspections under the current program and under the enhanced inspection and maintenance program to be implemented pursuant to G.S. 20-183.3, as amended by the act, taking into consideration the cost of emissions inspection equipment, the useful life of the equipment, the average period of time during which a purchaser of this equipment is able to amortize this cost, telephone charges incurred in connection with the registration denial program, whether a fee should be charged to reinspect a vehicle that fails an emissions inspection after repairs to the vehicle have been made, the cost of the safety inspection program in relation to the emissions inspection program, and any other factors that the Commission determines to be relevant. The Commission may also evaluate strategies to ensure an efficient and orderly implementation of the enhanced inspection and maintenance program required by Part III of S.L. 1999-328 and this act. The Environmental Review Commission is to recommend legislation to amend G.S. 20-183.7 to increase the fee for motor vehicle emissions inspections to the 2001 General Assembly.

Session Laws 2007-465, s. 1, provides: "Legislative Findings. — The General Assembly makes the following findings:

"(1) Diesel emissions, due in large part to their high concentrations of particulate matter, are associated with severe and multiple health risks to the citizens of North Carolina, including increased risk of cancer, decreased lung function, aggravated asthma, heart attacks, and premature death.

"(2) The United States Environmental Protection Agency, recognizing the harmful effects of diesel emissions, issued new fuel and engine emission standards that will reduce particulate matter emissions from new engines ninety percent (90%) below previous levels, beginning with vehicle model year 2007.

"(3) The same technology that makes ninety percent (90%) reductions in diesel emissions possible for new engines can be retrofitted onto existing engines.

"(4) The Safe Accountable, Flexible, Efficient Transportation Equity Act — A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, 119 Stat. 1144, 23 U.S.C. § 149, clarified eligibility for diesel matter retrofit projects from federal congestion mitigation and air quality improvement program funds apportioned to the State by the United States pursuant to 23 U.S.C. § 104(b)(2) and establishes those projects as a priority for funding. North Carolina should act now to position itself to maximize eighty percent (80%) federal matching dollars available through this program as provided in 23 U.S.C. § 120."

Session Laws 2007-465, s. 2, provides: "(a) Pilot Program to Retrofit Certain School Buses. — The Department of Environment and Natural Resources, in consultation with the Department of Public Instruction, the Department of Transportation, and stakeholders, shall develop a pilot program, to be administered by the Department of Environment and Natural Resources, to award grants to retrofit school buses in order to reduce diesel emissions from school buses in any county that is located in an area that is designated by the United States Environmental Protection Agency as nonattainment or maintenance for ozone or particulate matter. A local school administrative unit may submit an application to the Department of Environment and Natural Resources for a grant to have any eligible school bus retrofitted in order to utilize an appropriate verified diesel emission control device as determined by the Department of Environment and Natural Resources. A school bus is eligible to have a diesel retrofit using grant funds if the school bus: (i) has a model year 1994 through model year 2006 engine; (ii) is registered in a county that is located in an area that is designated by the United States Environmental Protection Agency as nonattainment or maintenance for ozone or particulate matter; (iii) is capable of operating on diesel fuel and; (iv) is used for the transportation of public school students. The Department of Environment and Natural Resources may adopt guidelines and engineering standards as needed to implement this act. The Department of Environment and Natural Resources shall develop grant application procedures, the criteria and priorities for selecting grant recipients and further selection of which school buses of these grant recipients may use grant funds for diesel retrofits under this pilot program, and procedures for distribution of grant funds and federal-aid funds reimbursed under Section 7 of this act to a local school administrative unit selected as a grant recipient. The criteria that may be considered in grant recipient selection includes the remaining useful life of a school bus and the accumulated mileage and years of service of a school bus. Priority designation for selection of school buses for retrofits using grant funds may be given for a diesel retrofit that results in the greatest particulate matter reduction, considering the costs of operating, maintaining, and repairing the verified diesel emission control device, for the longest remaining useful life of the school bus.

"(b) Definitions. — As used in this act, the following definitions apply:

"(1) Diesel retrofit. — Defined in Chapter 149 of Title 23 of the United States Code.

"(2) Level 1 Control. — A verified diesel emission control device that achieves a particulate matter emission reduction of twenty-five percent (25%) or more but less than fifty percent (50%) from uncontrolled engine emissions levels.

"(3) Level 2 Control. — A verified diesel emission control device that achieves a particulate matter emission reduction of fifty percent (50%) or more but less than eighty-five percent (85%) from uncontrolled engine emissions levels.

"(4) Level 3 Control. — A verified diesel emission control device that achieves a particulate matter emission reduction of eighty-five percent (85%) or more from uncontrolled engine emission levels, or that reduces emissions to less than or equal to 0.01 grams of particulate matter per brake horsepower-hour. Level 3 Control includes repowering or replacing the existing diesel engine with an engine that meets the United States Environmental Protection Agency 2007 Heavy Duty Highway Diesel Standards set out in the Final Rule published on 18 January 2001 in the Federal Register, Volume 66, Number 12, Pages 5002 through 5193. Level 3 Control also includes new diesel engines for the 2007 model year or later that meet the emissions standards that achieve particulate matter emissions reductions that are ninety percent (90%) less than particulate matter emissions standards for diesel engines in the 2006 model year.

"(5) Verified diesel emission control device. — An emission control device or strategy that has been verified by the United States Environmental Protection Agency or the California Air Resources Board; the replacement or repowering of the vehicle with an engine that is certified to specific particulate matter emissions performance by the United States Environmental Protection Agency or the California Air Resources Board; or a device that reduces crankcase emissions by ninety percent (90%) or more from uncontrolled crankcase emissions levels, whether or not the device is verified by United States Environmental Protection Agency or the California Air Resources Board as an emission control device or strategy.

"(c) Appropriate Retrofit Technology. — Within one year of the effective date of this section, the Secretary of Environment and Natural Resources, in consultation with the Department of Public Instruction, may make a written finding that a model, model year, or any other category concerning the type or use of a school bus that is eligible for a grant under subsection (a) of this section cannot be retrofitted with Level 3 Control, and that the category may use grant funds to be retrofitted with Level 2 Control, if it is available and appropriate for the category, installed, and operational. Within one year of the effective date of this section, the Secretary of Environment and Natural Resources, in consultation with the Department of Public Instruction, may make a written finding that a model, model year, or any other category concerning the type or use of a school bus that is eligible for a grant under subsection (a) of this section cannot be retrofitted with Level 2 Control, and that the category may use grant funds to be retrofitted with Level 1 Control, if it is available and appropriate for the category, installed, and operational. The Secretary of Environment and Natural Resources may require additional emissions control to be used for those school buses retrofitted with Level 1 Control using grant funds. Within one year of the effective date of this section, the Secretary of Environment and Natural Resources, in consultation with the Department of Public Instruction, may make a written finding regarding: the comparative economic impact, health benefits, and technological feasibility of using Level 1 Control, Level 2 Control, Level 3 Control, or other verified diesel emission control device under this pilot program; which device results in the greatest emissions reductions, considering the cost of operating, maintaining, and repairing the devices over their anticipated useful life; recommendations regarding the appropriate verified diesel emission control device to be used for retrofits under this pilot program consistent with these findings. In addition to any other issues of retrofit technology considered when making any finding under this subsection, the Secretary of Environment and Natural Resources and the Department of Public Instruction may consider the remaining useful life of a school bus and the accumulated mileage and years of service of a school bus.

"(d) Coordination Among Departments. — The Department of Environment and Natural Resources shall coordinate with the Department of Public Instruction, the Department of Transportation, and the Department of Administration to determine if the effective and efficient implementation of this pilot program requires any of these departments to have a role beyond any role specified in this act, and if so, the Department of Public Instruction, the Department of Transportation, and the Department of Administration, as applicable, may adopt guidelines and engineering standards as needed to implement this section. The Department of Transportation may amend its Transportation Improvement Program and otherwise satisfy any other requirement under federal law so that school bus retrofits under this pilot program qualify for reimbursement of federal-aid funds as provided under Section 6 of this act."

Session Laws 2007-465, s. 3, provides: "(a) School Bus Diesel Emissions Reduction Account Established. — The School Bus Diesel Emissions Reduction Account is established as a nonreverting account within the Department of Environment and Natural Resources. The Account shall consist of funds appropriated to it by the General Assembly and any contributions or grants from public or private sources.

"(b) Permissible Uses of the School Bus Diesel Emissions Reduction Account. — The Department of Environment and Natural Resources shall distribute funds in the School Bus Diesel Emissions Reduction Account as grants to local school administrative units for retrofitting school buses under this pilot program. The distributed funds shall be in an amount that is equal to twenty percent (20%) of the costs of purchasing a diesel retrofit for each school bus selected for retrofitting, based upon the costs of purchasing a diesel retrofit for a school bus as determined by the Department of Environment and Natural Resources. The funds shall be used by the local school unit to match the federal-aid funds that are to be reimbursed under Section 6 of this act, provided the Metropolitan Planning Organization for the area in which that local school administrative unit seeking grant funds under this pilot program has amended its Transportation Improvement Program and has otherwise satisfied any requirement under federal law so that the diesel retrofit as it applies to this local school administrative unit qualifies for reimbursement of federal-aid funds as provided under Section 6 of this act. Funds in the School Bus Diesel Emissions Reduction Account shall not be used for any costs associated with any school bus retrofit in excess of the sum of the twenty-percent (20%) share the local school administrative unit received in grant funds under this section for each diesel retrofit and the eighty-percent (80%) share in federal-aid funds for each diesel retrofit. Costs associated with any school bus retrofit in excess of this sum, if any, shall be borne by the local school administrative unit that operates the school bus. Any funds in the School Bus Diesel Emissions Reduction Account that have not been used or obligated as of 1 July 2008 in accordance with this section may be used to make grants to local school administrative units for one hundred percent (100%) of the costs for purchasing a diesel retrofit for a school bus as determined by the Department of Environment and Natural Resources. Funds in the School Bus Diesel Emissions Reduction Account shall not be used for any costs associated with any school bus retrofit in excess of one hundred percent (100%) of the costs for purchasing a diesel retrofit for a school bus as determined by the Department of Environment and Natural Resources, and excess costs associated with any school bus retrofit, if any, shall be borne by the local school administrative unit that operates the school bus.

"(c) Prohibited Uses of the School Bus Diesel Emissions Reduction Account. — Funds in the School Bus Diesel Emissions Reduction Account shall not be used for any school bus with tampered, nonconforming, or defective emission control components."

Session Laws 2007-465, s. 4, provides: "(a) Transfer of Information. — On or before 1 August 2008, the Department of Public Instruction shall submit to the Department of Environment and Natural Resources the following information:

"(1) The total number of school buses that are eligible for grants under Section 2(a) of this act.

"(2) The number of school buses that are equipped with an engine certified to the applicable United States Environmental Protection Agency standard for particulate matter as set out in 40 Code of Federal Regulations §§ 86.007-11 (1 July 2006 Edition).

"(b) Annual Report Required. — On or before 1 September 2008, and again on or before 1 September 2009, the Department of Environment and Natural Resources shall submit a report to the Department of Public Instruction, the Department of Transportation, and the Environmental Review Commission on the pilot program under this act. This report shall include the information submitted under subsection (a) of this section and shall also include:

"(1) The total number of school buses that have the retrofit technology installed and operational under this pilot program, including a breakdown by location, vehicle model year, engine year, and the type of verified diesel emission control device used for each school bus.

"(2) The anticipated emissions reductions based on the emissions certification of the verified diesel emission control devices used and the annual miles the school buses are expected to drive.

"(3) Any recommendations to further reduce diesel emissions from school buses and whether the program to retrofit certain school buses registered in a county that is located in an area that is designated by the United States Environmental Protection Agency as nonattainment or maintenance for ozone or particulate matter is accomplishing its purpose to reduce diesel emissions, improve air quality, and protect students' health.

"(4) The feasibility and the cost of expanding the funding for this pilot program for all eligible school buses for local school administrative units in counties that are located in an area that is designated by the United States Environmental Protection Agency as nonattainment or maintenance for ozone or particulate matter.

"(5) The feasibility and the cost of expanding this pilot program statewide."

Session Laws 2007-465, s. 5, provides: "Credit for Emissions Reductions. — The Department of Environment and Natural Resources shall work together with federal, State, and local air quality and transportation agencies to determine how emissions reductions achieved through implementation of this act may be quantified and credited by the United States Environmental Protection Agency to the appropriate emissions reduction objectives in the State Implementation Plan or Transportation Conformity determinations."

Session Laws 2007-465, s. 6, provides: "Reimbursement of Federal-Aid Funds. — The Department of Transportation may reimburse up to two million dollars ($2,000,000) for the 2007-2008 fiscal year from the federal congestion mitigation and air quality improvement program funds apportioned to the State of North Carolina by the United States pursuant to 23 U.S.C. § 104(b)(2), to the Department of Environment and Natural Resources for the costs of purchasing diesel retrofits for school buses under the pilot program under this act. This reimbursement may provide the eighty percent (80%) in federal-aid funds, as provided in 23 U.S.C. § 120, for the costs of purchasing diesel retrofits for school buses to supplement the funds awarded as grants under Section 3(b) of this act. The Department of Transportation and the Department of Environment and Natural Resources may enter into a contract that provides for the terms and method by which the Department of Environment and Natural Resources bills the Department of Transportation for reimbursement of eligible costs of purchasing diesel retrofits for school buses and submits itemized invoices with proper supporting documentation. This contract may provide a reimbursement schedule."

## § 143-215.107B. Statewide goals for reduction in emissions of oxides of nitrogen; report.

It shall be the goal of the State to reduce emissions of oxides of nitrogen (NOx) from all sources by at least twenty-five percent (25%) by 1 July 2009. It shall be the goal of the State to reduce the growth of vehicle miles traveled in the State by at least twenty-five percent (25%) of that growth that would otherwise occur by 1 July 2009. The Department of Environment and Natural Resources and the Department of Transportation shall evaluate progress toward achieving these goals in each fiscal year and shall report their findings and recommendations as to any measures that may be needed to achieve these goals to the Environmental Review Commission on or before 1 October of each year. (1999-328, s. 1.1; 2003-340, s. 1.7.)

**Editor's Note.** — Session Laws 1999-328, s. 5.1 provides that this act shall not be construed to obligate the General Assembly to appropriate any funds to implement the provisions of this act. Every State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency.

Session Laws 2002-4, which enacted G.S. 143-215.107D and G.S. 62-133.6, in ss. 10-14, as amended by Session Laws 2006-79, s. 12, provide: "It is the intent of the General Assembly that the State use all available resources and means, including negotiation, participation in interstate compacts and multistate and interagency agreements, petitions pursuant to 42 U.S.C. § 7426, and litigation to induce other states and entities, including the Tennessee Valley Authority, to achieve reductions in emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) comparable to those required by G.S. 143-215.107D, as enacted by Section 1 of this act, on a comparable schedule. The State shall give particular attention to those states and other entities whose emissions negatively impact air quality in North Carolina or whose failure to achieve comparable reductions would place the economy of North Carolina at a competitive disadvantage.

"The Environmental Management Commission shall study the desirability of requiring and the feasibility of obtaining reductions in emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) beyond those required by G.S. 143-215.107D, as enacted by Section 1 of this act. The Environmental Management Commission shall consider the availability of emissions reduction technologies, increased cost to consumers of electric power, reliability of electric power supply, actions to reduce emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) taken by states and other entities whose emissions negatively impact air quality in North Carolina or whose failure to achieve comparable reductions would place the economy of North Carolina at a competitive disadvantage, and the effects that these reductions would have on public health, the environment, and natural resources, including visibility. In its conduct of this study, the Environmental Management Commission may consult with the Utilities Commission and the Public Staff. The Environmental Management Commission shall report its findings and recommendations to the General Assembly and the Environmental Review Commission annually beginning 1 September 2007.

"The General Assembly anticipates that measures implemented to achieve the reductions in emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) required by G.S. 143-215.107D, as enacted by Section 1 of this act, will also result in significant reductions in the emissions of mercury from coal-fired generating units. The Division of Air Quality of the Department of Environment and Natural Resources shall study issues related to monitoring emissions of mercury and the development and implementation of standards and plans to implement programs to control emissions of mercury from coal-fired generating units. The Division shall evaluate available control technologies and shall estimate the benefits and costs of alternative strategies to reduce emissions of mercury. The Division shall annually report its interim findings and recommendations to the Environmental Management Commission and the Environmental Review Commission beginning 1 September 2003. The Division shall report its final findings and recommendations to the Environmental Management Commission and the Environmental Review Commission no later than 1 September 2005. The costs of implementing any air quality standards and plans to reduce the emission of mercury from coal-fired generating units below the standards in effect on the date this act becomes effective, except to the extent that the emission of mercury is reduced as a result of the reductions in the emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) required to achieve the emissions limitations set out in G.S. 143-215.107D, as enacted by Section 1 of this act, shall not be recoverable pursuant to G.S. 62-133.6, as enacted by Section 9 of this act.

"The Division of Air Quality of the Department of Environment and Natural Resources shall study issues related to the development and implementation of standards and plans to implement programs to control emissions of carbon dioxide (CO2) from coal-fired generating units and other stationary sources of air pollution. The Division shall evaluate available control technologies and shall estimate the benefits and costs of alternative strategies to reduce emissions of carbon dioxide (CO2). The Division shall annually report its interim findings and recommendations to the Environmental Management Commission and the Environmental Review Commission beginning 1 September 2003. The Division shall report its final findings and recommendations to the Environmental Management Commission and the Environmental Review Commission no later than 1 September 2005. The costs of implementing any air quality standards and plans to reduce the emission of carbon dioxide (CO2) from coal-fired generating units below the standards in effect on the date this act becomes effective, except to the extent that the emission of carbon dioxide (CO2) is reduced as a result of the reductions in the emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) required to achieve the emissions limitations set out in G.S. 143-215.107D, as enacted by Section 1 of this act, shall not be recoverable pursuant to G.S. 62-133.6, as enacted by Section 9 of this act.

"On or before 1 June of each year, the Department of Environment and Natural Resources and the Utilities Commission shall report on the implementation of this act to the Environmental Review Commission and the Joint Legislative Utility Review Committee. The first report required by this section shall be submitted no later than 1 June 2003."

Session Laws 2002-4, s. 15, contains a severability clause.

## § 143-215.107C. State agency goals, plans, duties, and reports.

(a) As used in this section, alternative-fueled vehicle means a motor vehicle capable of operating on electricity; natural gas; propane; hydrogen; reformulated gasoline; ethanol; other alcohol fuels, separately or in mixtures of eighty-five percent (85%) or more of alcohol by volume; or fuels, other than alcohol, derived from biological materials. For purposes of this section, a vehicle that has been converted to operate on a fuel other than the fuel for which it was originally designed is not a new or replacement vehicle.

(b) It shall be the goal of the State that on and after 1 January 2004 at least seventy-five percent (75%) of the new or replacement light duty cars and trucks purchased by the State will be alternative-fueled vehicles or low emission vehicles. The Department of Administration, the Department of Transportation, and the Department of Environment and Natural Resources shall jointly develop a plan to achieve this goal and to fuel and maintain these vehicles. For purposes of this section, a light duty car or truck is one that is rated at 8,500 pounds or less Gross Vehicle Weight Rating (GVWR).

(c) Repealed by Session Laws 2006-79, s. 13, effective July 10, 2006.

(d) The Department of Administration, the Office of State Personnel, the Department of Transportation, and the Department of Environment and Natural Resources shall jointly develop and periodically update a plan to reduce vehicle miles traveled by State employees and vehicle emissions resulting from job-related travel, including commuting to and from work. The plan shall consider the use of carpooling, vanpooling, public transportation, incentives, and other appropriate strategies. The Department of Transportation shall report on the development and implementation of the plan to the Joint Legislative Transportation Oversight Committee and the Environmental Review Commission on or before 1 October of each year beginning 1 October 2000.

(e) The Department of Transportation, the Department of Commerce, and the Department of Environment and Natural Resources shall jointly develop and periodically update a plan to reduce vehicle miles traveled by private sector employees and vehicle emissions resulting from job-related travel, including commuting to and from work. The plan shall consider the use of incentives for both private sector employees and employers to promote carpooling, vanpooling, use of public transportation, and other appropriate strategies. The Department of Transportation shall report on the development and implementation of the plan to the Joint Legislative Transportation Oversight Committee and the Environmental Review Commission on or before 1 October of each year beginning 1 October 2000.

(f) The Office of State Personnel shall implement a policy that promotes telework/telecommuting for State employees as recommended by the report of the State Auditor entitled "Establishing a Formal Telework/Telecommuting Program for State Employees" and dated October 1997. It shall be the goal of the State to reduce State employee vehicle miles traveled in commuting by twenty percent (20%) without reducing total work hours or productivity. (1999-328, ss. 4.1, 4.2, 4.5, 4.6, 4.7, 4.8; 2004-195, s. 2.4; 2005-386, s. 2.2; 2006-79, s. 13.)

**Editor's Note.** — Session Laws 1999-328, ss. 4.1, 4.2, 4.5, 4.6, 4.7, and 4.8, were codified as this section at the direction of the Revisor of Statutes.

Session Laws 1999-328, s. 4.3, directs the Department of Public Instruction, the Department of Transportation, and the Department of Environment and Natural Resources to jointly develop a draft plan for the purchase of school buses under which, beginning 1 January 2004, at least fifty percent (50%) of the new and replacement public school buses purchased for use in counties with a population of at least 100,000, will be alternative-fueled or low emission vehicles. These departments are to invite interested parties to participate in the development of the draft plan, which plan will consider the infrastructure requirements that would be needed to fuel and maintain these buses and the costs and benefits of implementation of the plan, including the impact on ambient air quality. The Department of Public Instruction is to submit the draft plan to the Environmental Review Commission on or before 1 September 2000.

Session Laws 1999-328, s. 4.4, directs the Department of Transportation and the Department of Environment and Natural Resources to jointly develop a draft plan for the purchase of buses under which, beginning 1 January 2004, at least fifty percent (50%) of the new and replacement buses purchased to provide public transportation in counties in which motor vehicle emissions inspections are required to be performed under subsection (c) or (d) of G.S. 143-215.107A will be alternative-fueled or low emission vehicles. These departments are to invite interested parties to participate in the development of the draft plan, which plan will consider the infrastructure requirements that would be needed to fuel and maintain these buses and the costs and benefits of implementation of the plan, including the impact on ambient air quality. The Department of Transportation shall submit the draft plan to the Environmental Review Commission on or before 1 September 2000.

Session Laws 1999-328, s. 4.5, in part, directs the Department of Transportation, the Department of Commerce, and the Department of Environment and Natural Resources to jointly develop recommendations for incentives to increase the use of alternative-fueled and low emission light duty cars and trucks in privately owned fleets. The Department of Environment and Natural Resources is to submit these recommendations to the Environmental Review Commission on or before 1 February 2000.

Session Laws 1999-328, s. 5.1, provides that this act shall not be construed to obligate the General Assembly to appropriate any funds to implement the provisions of this act. Every State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency.

Session Laws 1999-328, s. 5.3, contains a severability clause.

Session Laws 2007-465, ss. 1 through 5, provide: "SECTION 1. Legislative Findings. — The General Assembly makes the following findings:

"(1) Diesel emissions, due in large part to their high concentrations of particulate matter, are associated with severe and multiple health risks to the citizens of North Carolina, including increased risk of cancer, decreased lung function, aggravated asthma, heart attacks, and premature death.

"(2) The United States Environmental Protection Agency, recognizing the harmful effects of diesel emissions, issued new fuel and engine emission standards that will reduce particulate matter emissions from new engines ninety percent (90%) below previous levels, beginning with vehicle model year 2007.

"(3) The same technology that makes ninety percent (90%) reductions in diesel emissions possible for new engines can be retrofitted onto existing engines.

"(4) The Safe Accountable, Flexible, Efficient Transportation Equity Act — A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, 119 Stat. 1144, 23 U.S.C. § 149, clarified eligibility for diesel matter retrofit projects from federal congestion mitigation and air quality improvement program funds apportioned to the State by the United States pursuant to 23 U.S.C. § 104(b)(2) and establishes those projects as a priority for funding. North Carolina should act now to position itself to maximize eighty percent (80%) federal matching dollars available through this program as provided in 23 U.S.C. § 120.

"SECTION 2.(a) Pilot Program to Retrofit Certain School Buses. — The Department of Environment and Natural Resources, in consultation with the Department of Public Instruction, the Department of Transportation, and stakeholders, shall develop a pilot program, to be administered by the Department of Environment and Natural Resources, to award grants to retrofit school buses in order to reduce diesel emissions from school buses in any county that is located in an area that is designated by the United States Environmental Protection Agency as nonattainment or maintenance for ozone or particulate matter. A local school administrative unit may submit an application to the Department of Environment and Natural Resources for a grant to have any eligible school bus retrofitted in order to utilize an appropriate verified diesel emission control device as determined by the Department of Environment and Natural Resources. A school bus is eligible to have a diesel retrofit using grant funds if the school bus: (i) has a model year 1994 through model year 2006 engine; (ii) is registered in a county that is located in an area that is designated by the United States Environmental Protection Agency as nonattainment or maintenance for ozone or particulate matter; (iii) is capable of operating on diesel fuel and; (iv) is used for the transportation of public school students. The Department of Environment and Natural Resources may adopt guidelines and engineering standards as needed to implement this act. The Department of Environment and Natural Resources shall develop grant application procedures, the criteria and priorities for selecting grant recipients and further selection of which school buses of these grant recipients may use grant funds for diesel retrofits under this pilot program, and procedures for distribution of grant funds and federal-aid funds reimbursed under Section 7 of this act to a local school administrative unit selected as a grant recipient. The criteria that may be considered in grant recipient selection includes the remaining useful life of a school bus and the accumulated mileage and years of service of a school bus. Priority designation for selection of school buses for retrofits using grant funds may be given for a diesel retrofit that results in the greatest particulate matter reduction, considering the costs of operating, maintaining, and repairing the verified diesel emission control device, for the longest remaining useful life of the school bus.

"(b) Definitions. — As used in this act, the following definitions apply:

"(1) Diesel retrofit. — Defined in Chapter 149 of Title 23 of the United States Code.

"(2) Level 1 Control. — A verified diesel emission control device that achieves a particulate matter emission reduction of twenty-five percent (25%) or more but less than fifty percent (50%) from uncontrolled engine emissions levels.

"(3) Level 2 Control. — A verified diesel emission control device that achieves a particulate matter emission reduction of fifty percent (50%) or more but less than eighty-five percent (85%) from uncontrolled engine emissions levels.

"(4) Level 3 Control. — A verified diesel emission control device that achieves a particulate matter emission reduction of eighty-five percent (85%) or more from uncontrolled engine emission levels, or that reduces emissions to less than or equal to 0.01 grams of particulate matter per brake horsepower-hour. Level 3 Control includes repowering or replacing the existing diesel engine with an engine that meets the United States Environmental Protection Agency 2007 Heavy Duty Highway Diesel Standards set out in the Final Rule published on 18 January 2001 in the Federal Register, Volume 66, Number 12, Pages 5002 through 5193. Level 3 Control also includes new diesel engines for the 2007 model year or later that meet the emissions standards that achieve particulate matter emissions reductions that are ninety percent (90%) less than particulate matter emissions standards for diesel engines in the 2006 model year.

"(5) Verified diesel emission control device. — An emission control device or strategy that has been verified by the United States Environmental Protection Agency or the California Air Resources Board; the replacement or repowering of the vehicle with an engine that is certified to specific particulate matter emissions performance by the United States Environmental Protection Agency or the California Air Resources Board; or a device that reduces crankcase emissions by ninety percent (90%) or more from uncontrolled crankcase emissions levels, whether or not the device is verified by United States Environmental Protection Agency or the California Air Resources Board as an emission control device or strategy.

"(c) Appropriate Retrofit Technology. — Within one year of the effective date of this section, the Secretary of Environment and Natural Resources, in consultation with the Department of Public Instruction, may make a written finding that a model, model year, or any other category concerning the type or use of a school bus that is eligible for a grant under subsection (a) of this section cannot be retrofitted with Level 3 Control, and that the category may use grant funds to be retrofitted with Level 2 Control, if it is available and appropriate for the category, installed, and operational. Within one year of the effective date of this section, the Secretary of Environment and Natural Resources, in consultation with the Department of Public Instruction, may make a written finding that a model, model year, or any other category concerning the type or use of a school bus that is eligible for a grant under subsection (a) of this section cannot be retrofitted with Level 2 Control, and that the category may use grant funds to be retrofitted with Level 1 Control, if it is available and appropriate for the category, installed, and operational. The Secretary of Environment and Natural Resources may require additional emissions control to be used for those school buses retrofitted with Level 1 Control using grant funds. Within one year of the effective date of this section, the Secretary of Environment and Natural Resources, in consultation with the Department of Public Instruction, may make a written finding regarding: the comparative economic impact, health benefits, and technological feasibility of using Level 1 Control, Level 2 Control, Level 3 Control, or other verified diesel emission control device under this pilot program; which device results in the greatest emissions reductions, considering the cost of operating, maintaining, and repairing the devices over their anticipated useful life; recommendations regarding the appropriate verified diesel emission control device to be used for retrofits under this pilot program consistent with these findings. In addition to any other issues of retrofit technology considered when making any finding under this subsection, the Secretary of Environment and Natural Resources and the Department of Public Instruction may consider the remaining useful life of a school bus and the accumulated mileage and years of service of a school bus.

"(d) Coordination Among Departments. —

The Department of Environment and Natural Resources shall coordinate with the Department of Public Instruction, the Department of Transportation, and the Department of Administration to determine if the effective and efficient implementation of this pilot program requires any of these departments to have a role beyond any role specified in this act, and if so, the Department of Public Instruction, the Department of Transportation, and the Department of Administration, as applicable, may adopt guidelines and engineering standards as needed to implement this section. The Department of Transportation may amend its Transportation Improvement Program and otherwise satisfy any other requirement under federal law so that school bus retrofits under this pilot program qualify for reimbursement of federal-aid funds as provided under Section 6 of this act.

"SECTION 3.(a) School Bus Diesel Emissions Reduction Account Established. — The School Bus Diesel Emissions Reduction Account is established as a nonreverting account within the Department of Environment and Natural Resources. The Account shall consist of funds appropriated to it by the General Assembly and any contributions or grants from public or private sources.

"(b) Permissible Uses of the School Bus Diesel Emissions Reduction Account. — The Department of Environment and Natural Resources shall distribute funds in the School Bus Diesel Emissions Reduction Account as grants to local school administrative units for retrofitting school buses under this pilot program. The distributed funds shall be in an amount that is equal to twenty percent (20%) of the costs of purchasing a diesel retrofit for each school bus selected for retrofitting, based upon the costs of purchasing a diesel retrofit for a school bus as determined by the Department of Environment and Natural Resources. The funds shall be used by the local school unit to match the federal-aid funds that are to be reimbursed under Section 6 of this act, provided the Metropolitan Planning Organization for the area in which that local school administrative unit seeking grant funds under this pilot program has amended its Transportation Improvement Program and has otherwise satisfied any requirement under federal law so that the diesel retrofit as it applies to this local school administrative unit qualifies for reimbursement of federal-aid funds as provided under Section 6 of this act. Funds in the School Bus Diesel Emissions Reduction Account shall not be used for any costs associated with any school bus retrofit in excess of the sum of the twenty-percent (20%) share the local school administrative unit received in grant funds under this section for each diesel retrofit and the eighty-percent (80%) share in federal-aid funds for each diesel retrofit. Costs associated with any school bus retrofit in excess of this sum, if any, shall be borne by the local school administrative unit that operates the school bus. Any funds in the School Bus Diesel Emissions Reduction Account that have not been used or obligated as of 1 July 2008 in accordance with this section may be used to make grants to local school administrative units for one hundred percent (100%) of the costs for purchasing a diesel retrofit for a school bus as determined by the Department of Environment and Natural Resources. Funds in the School Bus Diesel Emissions Reduction Account shall not be used for any costs associated with any school bus retrofit in excess of one hundred percent (100%) of the costs for purchasing a diesel retrofit for a school bus as determined by the Department of Environment and Natural Resources, and excess costs associated with any school bus retrofit, if any, shall be borne by the local school administrative unit that operates the school bus.

"(c) Prohibited Uses of the School Bus Diesel Emissions Reduction Account. — Funds in the School Bus Diesel Emissions Reduction Account shall not be used for any school bus with tampered, nonconforming, or defective emission control components.

"SECTION 4.(a) Transfer of Information. — On or before 1 August 2008, the Department of Public Instruction shall submit to the Department of Environment and Natural Resources the following information:

"(1) The total number of school buses that are eligible for grants under Section 2(a) of this act.

"(2) The number of school buses that are equipped with an engine certified to the applicable United States Environmental Protection Agency standard for particulate matter as set out in 40 Code of Federal Regulations §§ 86.007-11 (1 July 2006 Edition).

"(b) Annual Report Required. — On or before 1 September 2008, and again on or before 1 September 2009, the Department of Environment and Natural Resources shall submit a report to the Department of Public Instruction, the Department of Transportation, and the Environmental Review Commission on the pilot program under this act. This report shall include the information submitted under subsection (a) of this section and shall also include:

"(1) The total number of school buses that have the retrofit technology installed and operational under this pilot program, including a breakdown by location, vehicle model year, engine year, and the type of verified diesel emission control device used for each school bus.

"(2) The anticipated emissions reductions based on the emissions certification of the verified diesel emission control devices used and the annual miles the school buses are expected to drive.

"(3) Any recommendations to further reduce diesel emissions from school buses and whether the program to retrofit certain school buses registered in a county that is located in an area that is designated by the United States Environmental Protection Agency as nonattainment or maintenance for ozone or particulate matter is accomplishing its purpose to reduce diesel emissions, improve air quality, and protect students' health.

"(4) The feasibility and the cost of expanding the funding for this pilot program for all eligible school buses for local school administrative units in counties that are located in an area that is designated by the United States Environmental Protection Agency as nonattainment or maintenance for ozone or particulate matter.

"(5) The feasibility and the cost of expanding this pilot program statewide.

"SECTION 5. Credit for Emissions Reductions. — The Department of Environment and Natural Resources shall work together with federal, State, and local air quality and transportation agencies to determine how emissions reductions achieved through implementation of this act may be quantified and credited by the United States Environmental Protection Agency to the appropriate emissions reduction objectives in the State Implementation Plan or Transportation Conformity determinations."

Session Laws 2007-465, s. 6, provides: "Reimbursement of Federal-Aid Funds. — The Department of Transportation may reimburse up to two million dollars ($2,000,000) for the 2007-2008 fiscal year from the federal congestion mitigation and air quality improvement program funds apportioned to the State of North Carolina by the United States pursuant to 23 U.S.C. § 104(b)(2), to the Department of Environment and Natural Resources for the costs of purchasing diesel retrofits for school buses under the pilot program under this act. This reimbursement may provide the eighty percent (80%) in federal-aid funds, as provided in 23 U.S.C. § 120, for the costs of purchasing diesel retrofits for school buses to supplement the funds awarded as grants under Section 3(b) of this act. The Department of Transportation and the Department of Environment and Natural Resources may enter into a contract that provides for the terms and method by which the Department of Environment and Natural Resources bills the Department of Transportation for reimbursement of eligible costs of purchasing diesel retrofits for school buses and submits itemized invoices with proper supporting documentation. This contract may provide a reimbursement schedule."

## § 143-215.107D. Emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) from certain coal-fired generating units.

(a) As used in this section:

(1) "Coal-fired generating unit" means a coal-fired generating unit, as defined by 40 Code of Federal Regulations § 96.2 (1 July 2001 Edition), that is located in this State and has the capacity to generate 25 or more megawatts of electricity.

(2) "Investor-owned public utility" means an investor-owned public utility, as defined in G.S. 62-3.

(b) An investor-owned public utility that owns or operates coal-fired generating units that collectively emitted more than 75,000 tons of oxides of nitrogen (NOx) in calendar year 2000:

(1) Shall not collectively emit from the coal-fired generating units that it owns or operates more than 35,000 tons of oxides of nitrogen (NOx) in any calendar year beginning 1 January 2007.

(2) Shall not collectively emit from the coal-fired generating units that it owns or operates more than 31,000 tons of oxides of nitrogen (NOx) in any calendar year beginning 1 January 2009.

(c) An investor-owned public utility that owns or operates coal-fired generating units that collectively emitted 75,000 tons or less of oxides of nitrogen (NOx) in calendar year 2000 shall not collectively emit from the coal-fired generating units that it owns or operates more than 25,000 tons of oxides of nitrogen (NOx) in any calendar year beginning 1 January 2007.

(d) An investor-owned public utility that owns or operates coal-fired generating units that collectively emitted more than 225,000 tons of sulfur dioxide (SO2) in calendar year 2000:

(1) Shall not collectively emit from the coal-fired generating units that it owns or operates more than 150,000 tons of sulfur dioxide (SO2) in any calendar year beginning 1 January 2009.

(2) Shall not collectively emit from the coal-fired generating units that it owns or operates more than 80,000 tons of sulfur dioxide (SO2) in any calendar year beginning 1 January 2013.

(e) An investor-owned public utility that owns or operates coal-fired generating units that collectively emitted 225,000 tons or less of sulfur dioxide (SO2) in calendar year 2000:

(1) Shall not collectively emit from the coal-fired generating units that it owns or operates more than 100,000 tons of sulfur dioxide (SO2) in any calendar year beginning 1 January 2009.

(2) Shall not collectively emit from the coal-fired generating units that it owns or operates more than 50,000 tons of sulfur dioxide (SO2) in any calendar year beginning 1 January 2013.

(f) Each investor-owned public utility to which this section applies may determine how it will achieve the collective emissions limitations imposed by this section. Compliance with the emissions limitations set out in this section does not alter the obligation of any person to comply with any other federal or State law, regulation, or rule related to air quality or visibility. This subsection shall not be construed to limit the authority of the Commission to impose specific limitations on the emission of oxides of nitrogen (NOx) and sulfur dioxide (SO2) from an individual coal-fired generating unit owned or operated by an investor-owned public utility.

(g) A coal-fired generating unit that is subject to the collective emissions limitations set out in this section on 1 July 2002 shall remain subject to the collective emissions limitations whether or not it thereafter continues to be owned or operated by an investor-owned public utility.

(h) The Commission shall require that any permit or modified permit issued for a coal-fired generating unit that is subject to this section include conditions that provide for testing, monitoring, record keeping, and reporting adequate to assure compliance with the requirements of this section.

(i) The Governor may enter into an agreement with an investor-owned public utility under which the investor-owned public utility voluntarily agrees to transfer to the State any emissions allowances acquired or that may be acquired by the investor-owned public utility pursuant to 42 U.S.C. §§ 7651-7651o, as implemented by 40 Code of Federal Regulations §§ 73.1 through 73.90 (1 July 2001 Edition); 42 U.S.C. 7410(a)(2)(D)(i)(I), as implemented by 40 Code of Federal Regulations § 51.121 (1 July 2001 Edition), related federal regulations, and the associated State Implementation Plan; 42 U.S.C. § 7426, as implemented by 40 Code of Federal Regulations § 52.34 (1 July 2001 Edition) and related federal regulations; or any similar program established under federal law that result from compliance with the emissions limitations set out in this section. An agreement entered into pursuant to this subsection shall be binding and shall be enforceable by specific performance. If the Governor enters into an agreement that provides for the transfer of emissions allowances to the State, the Governor shall file verified copies of the agreement with the Attorney General, the Secretary of State, the State Treasurer, the Secretary of Environment and Natural Resources, and the Utilities Commission. The State Treasurer shall hold all emissions allowances that are transferred to the State as provided in this subsection in trust for the people of this State and shall sell, trade, transfer, or otherwise dispose of the emissions allowances only as the General Assembly shall provide by law.

(j) An investor-owned public utility that is subject to the emissions limitations set out in this section shall submit to the Utilities Commission and to the Department on or before 1 April of each year a verified statement pursuant to subsection (i) of G.S. 62-133.6. (2002-4, s. 1.)

**Cross References.** — As to recovery of environmental compliance costs, see G.S. 62-133.6.

**Legislative Commission on Global Climate Change.** — Session Laws 2005-442, s. 1, provides: "Commission Established; Membership. — The Legislative Commission on Global Climate Change is hereby established. The Commission shall consist of 34 members as follows:

"(1) Nine members appointed by the President Pro Tempore of the Senate.

"(2) Nine members appointed by the Speaker of the House of Representatives.

"(3) The President of Duke Power or the President's designee.

"(4) The President of Progress Energy or the President's designee.

"(5) The President of the North Carolina Citizens for Business and Industry or the President's designee.

"(6) The President of the Manufacturers and Chemical Industry Council of North Carolina or the President's designee.

"(7) The President of the North Carolina Farm Bureau Federation or the President's designee.

"(8) The President of the North Carolina Forestry Association or the President's designee.

"(9) The Southeast Regional Director of Environmental Defense or the Regional Director's designee.

"(10) The Executive Director of the Southern Alliance for Clean Energy or the Executive Director's designee.

"(11) The Executive Director of the North Carolina Coastal Federation or the Executive Director's designee.

"(12) The Executive Director of the North Carolina Conservation Council or the Executive Director's designee.

"(13) The Dean of the Nicholas School of the Environment and Earth Sciences, Duke University, or the Dean's designee.

"(14) The Dean of the College of Agriculture and Life Sciences at North Carolina State University or the Dean's designee.

"(15) The Dean of the School of Agriculture and Environmental Sciences at North Carolina Agricultural and Technical State University or the Dean's designee.

"(16) The Director of the Carolina Environmental Program at the University of North Carolina at Chapel Hill or the Director's designee.

"(17) The Distinguished Research Professor (with expertise in sea level change), Department of Geology at East Carolina University.

"(18) The North Carolina State Climatologist."

Session Laws 2005-442, s. 2, provides: "Cochairs. — The Commission shall have two cochairs, one designated by the President Pro Tempore of the Senate and one designated by the Speaker of the House of Representatives from among their respective appointees. The Commission shall meet upon the call of the cochairs."

Session Laws 2005-442, s. 3, provides: "Quorum. — A quorum of the Commission shall consist of 18 members."

Session Laws 2005-442, s. 4, provides: "Vacancies. — Any vacancy on the Commission shall be filled by the original appointing authority."

Session Laws 2005-442, s. 5, provides: "Purpose and Duties. — The Commission shall have the following purposes and duties:

"(1) The Commission shall conduct an in-depth examination of issues related to global climate change. This examination shall include all of the following:

"a. A review of current scientific literature on the possible natural and anthropogenic causes of global climate change.

"b. A review of actions taken by the federal government and by other states to address global warming.

"c. An examination of the emissions of greenhouse gases from within the State and the extent to which reductions in the emissions of these gases in the State, region, nation, and worldwide could be expected to affect global climate change.

"d. An evaluation of the economic opportunities for the State that may result from international, national, and State action to address global climate change and the emerging carbon market.

"e. The potential impacts of global climate change on the citizens, natural resources, and economy of the State, including agriculture, travel and tourism, recreation, coastal real estate, insurance, and other economic sectors.

"f. The costs of any action taken by the State to address global climate change on individuals, individual households, local governments, businesses, educational institutions, agricultural operations, the State government, and other institutions and economic sectors.

"g. The benefits of any action taken by or within the State or other states and at the national or international levels to address global climate change on individuals, individual households, local governments, businesses, educational institutions, agricultural operations, the State government, and other institutions and economic sectors.

"(2) If, in the course of its examination, the Commission determines that it would be appropriate and desirable for the State to establish a global warming pollutant reduction goal, the Commission may develop a recommended global warming pollutant reduction goal for the State.

"(3) In conducting its examination of global climate change, the Commission shall consider and integrate the findings and recommendations of the study of issues related to the development and implementation of standards and plans to control emissions of carbon dioxide required by Section 13 of S.L. 2002-4.

"(4) Based on its examination of global climate change, the Commission shall develop findings and recommendations, including any legislative proposals it determines to be appropriate, for consideration by the General Assembly."

Session Laws 2005-442, s. 6, provides: "Additional Duties. — The Commission may work cooperatively with other state and national governments to organize a forum on global climate change, including its causes, impacts, challenges, and opportunities in the southeastern United States. The Commission may also work cooperatively with other State agencies with respect to the agencies' areas of responsibilities regarding greenhouse gas emissions and climate change."

Session Laws 2005-442, s. 7, provides: "Expenses of Members. — Members of the Commission shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate."

Session Laws 2005-442, s. 8, provides: "Staff. — Upon the prior approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional staff to the Commission to aid in its work."

Session Laws 2005-442, s. 9, provides: "Consultants. — The Commission may hire consultants to assist with the study as provided in G.S. 120-32.02(b)."

Session Laws 2005-442, s. 10, provides: "Meetings. — The Commission may meet in the Legislative Building or the Legislative Office Building upon the approval of the Legislative Services Commission."

Session Laws 2005-442, s. 11, as amended by Session Laws 2006-73, s. 1, and as amended by Session Laws 2008-81, s.1; and as amended by Session Laws 2009-306, s. 1, provides: "Reports. — The Commission may submit interim reports at its discretion. The Commission shall submit a final report, including any findings and recommendations, to the General Assembly and the Environmental Review Commission on or before October 1, 2010, at which time the Commission shall terminate."

Session Laws 2005-442, s. 12, provides: "Funding. — From funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds for the purpose of conducting the study provided for in this Part."

**Editor's Note.** — Session Laws 2002-4, s. 16, provides: "This act is effective when it becomes law except that G.S. 143-215.107D(i), as enacted by Section 1 of this act, is effective retroactively to 1 June 2002."

Session Laws 2002-4, which enacted G.S. 143-107D and G.S. 62-133.6, in ss. 10-14, as amended by Session Laws 2006-79, s. 12, provide: "10. It is the intent of the General Assembly that the State use all available resources and means, including negotiation, participation in interstate compacts and multistate and interagency agreements, petitions pursuant to 42 U.S.C. § 7426, and litigation to induce other states and entities, including the Tennessee Valley Authority, to achieve reductions in emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) comparable to those required by G.S. 143-215.107D, as enacted by Section 1 of this act, on a comparable schedule. The State shall give particular attention to those states and other entities whose emissions negatively impact air quality in North Carolina or whose failure to achieve comparable reductions would place the economy of North Carolina at a competitive disadvantage.

"11. The Environmental Management Commission shall study the desirability of requiring and the feasibility of obtaining reductions in emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) beyond those required by G.S. 143-215.107D, as enacted by Section 1 of this act. The Environmental Management Commission shall consider the availability of emissions reduction technologies, increased cost to consumers of electric power, reliability of electric power supply, actions to reduce emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) taken by states and other entities whose emissions negatively impact air quality in North Carolina or whose failure to achieve comparable reductions would place the economy of North Carolina at a competitive disadvantage, and the effects that these reductions would have on public health, the environment, and natural resources, including visibility. In its conduct of this study, the Environmental Management Commission may consult with the Utilities Commission and the Public Staff. The Environmental Management Commission shall report its findings and recommendations to the General Assembly and the Environmental Review Commission annually beginning 1 September 2007.

"12. The General Assembly anticipates that measures implemented to achieve the reductions in emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) required by G.S. 143-215.107D, as enacted by Section 1 of this act, will also result in significant reductions in the emissions of mercury from coal-fired generating units. The Division of Air Quality of the Department of Environment and Natural Resources shall study issues related to monitoring emissions of mercury and the development and implementation of standards and plans to implement programs to control emissions of mercury from coal-fired generating units. The Division shall evaluate available control technologies and shall estimate the benefits and costs of alternative strategies to reduce emissions of mercury. The Division shall annually report its interim findings and recommendations to the Environmental Management Commission and the Environmental Review Commission beginning 1 September 2003. The Division shall report its final findings and recommendations to the Environmental Management Commission and the Environmental Review Commission no later than 1 September 2005. The costs of implementing any air quality standards and plans to reduce the emission of mercury from coal-fired generating units below the standards in effect on the date this act becomes effective, except to the extent that the emission of mercury is reduced as a result of the reductions in the emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) required to achieve the emissions limitations set out in G.S. 143-215.107D, as enacted by Section 1 of this act, shall not be recoverable pursuant to G.S. 62-133.6, as enacted by Section 9 of this act.

"13. The Division of Air Quality of the Department of Environment and Natural Resources shall study issues related to the development and implementation of standards and plans to implement programs to control emissions of carbon dioxide (CO2) from coal-fired generating units and other stationary sources of air pollution. The Division shall evaluate available control technologies and shall estimate the benefits and costs of alternative strategies to reduce emissions of carbon dioxide (CO2). The Division shall annually report its interim findings and recommendations to the Environmental Management Commission and the Environmental Review Commission beginning 1 September 2003. The Division shall report its final findings and recommendations to the Environmental Management Commission and the Environmental Review Commission no later than 1 September 2005. The costs of implementing any air quality standards and plans to reduce the emission of carbon dioxide (CO2) from coal-fired generating units below the standards in effect on the date this act becomes effective, except to the extent that the emission of carbon dioxide (CO2) is reduced as a result of the reductions in the emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) required to achieve the emissions limitations set out in G.S. 143-215.107D, as enacted by Section 1 of this act, shall not be recoverable pursuant to G.S. 62-133.6, as enacted by Section 9 of this act.

"14. On or before 1 June of each year, the Department of Environment and Natural Resources and the Utilities Commission shall report on the implementation of this act to the Environmental Review Commission and the Joint Legislative Utility Review Committee. The first report required by this section shall be submitted no later than 1 June 2003."

Session Laws 2002-4, s. 15, contains a severability clause.

## § 143-215.108. Control of sources of air pollution; permits required.

(a) Except as provided in subsections (a1) and (a2) of this section, no person shall do any of the following things or carry out any of the following activities that contravene or will be likely to contravene standards established pursuant to G.S. 143-215.107 or set out in G.S. 143-215.107D unless that person has obtained a permit for the activity from the Commission and has complied with any conditions of the permit:

(1) Establish or operate any air contaminant source, except as provided in G.S. 143-215.108A.

(2) Build, erect, use, or operate any equipment that may result in the emission of an air contaminant or that is likely to cause air pollution, except as provided in G.S. 143-215.108A.

(3) Alter or change the construction or method of operation of any equipment or process from which air contaminants are or may be emitted.

(4) Repealed by Session Laws 2003-428, s. 1, effective August 19, 2003.

(a1) The Commission may by rule establish procedures that meet the requirements of section 502(b)(10) of Title V (42 U.S.C. § 7661a(b)(10)) and 40 Code of Federal Regulations § 70.4(b) (12) (1 July 1993 Edition) to allow a permittee to make changes within a permitted facility without requiring a revision of the permit.

(a2) The Commission may adopt rules that provide for a minor modification of a permit. At a minimum, rules that provide for a minor modification of a permit shall meet the requirements of 40 Code of Federal Regulations § 70.7(e)(2) (1 July 1993 Edition). If the Commission adopts rules that provide for a minor modification of a permit, a permittee shall not make a change in the permitted facility while the application for the minor modification is under review unless the change is authorized under the rules adopted by the Commission.

(b) The Commission shall act upon all applications for permits so as to effectuate the purposes of this Article by reducing existing air pollution and preventing, so far as reasonably possible, any increased pollution of the air from any additional or enlarged sources.

(c) The Commission shall have the power:

(1) To grant and renew a permit with any conditions attached that the Commission believes necessary to achieve the purposes of this Article or the requirements of the Clean Air Act and implementing regulations adopted by the United States Environmental Protection Agency;

(2) To grant and renew any temporary permit for such period of time as the Commission shall specify even though the action allowed by such permit may result in pollution or increase pollution where conditions make such temporary permit essential;

(3) To terminate, modify, or revoke and reissue any permit upon not less than 60 days' written notice to any person affected;

(3a) To suspend any permit pursuant to the provisions of G.S. 150B-3(c);

(4) To require all applications for permits and renewals to be in writing and to prescribe the form of such applications;

(5) To request such information from an applicant and to conduct such inquiry or investigation as it may deem necessary and to require the submission of plans and specifications prior to acting on any application for a permit;

(5a) To require that an applicant satisfy the Department that the applicant, or any parent, subsidiary, or other affiliate of the applicant or parent:

a. Is financially qualified to carry out the activity for which a permit is required under subsection (a); and

b. Has substantially complied with the air quality and emission control standards applicable to any activity in which the applicant has previously engaged, and has been in substantial compliance with federal and state laws, regulations, and rules for the protection of the environment.

As used in this subdivision, the words "affiliate," "parent," and "subsidiary" have the same meaning as in 17 Code of Federal Regulations 240.12b-2 (1 April 1990 Edition);

(6) To adopt rules, as it deems necessary, establishing the form of applications and permits and procedures for the granting or denial of permits and renewals pursuant to this section; and all permits, renewals and denials shall be in writing;

(7) To prohibit any stationary source within the State from emitting any air pollutant in amounts that will prevent attainment or maintenance by any other state of any national ambient air quality standard or that will interfere with measures required to be included in the applicable implementation plan for any other state to prevent deterioration of air quality or protect visibility; and

(8) To designate certain classes of activities for which a general permit may be issued, after considering the environmental impact of an activity, the frequency of the activity, the need for individual permit

oversight, and the need for public review and comment on individual permits.

(d)(1) The Commission may conduct any inquiry or investigation it considers necessary before acting on an application and may require an applicant to submit plans, specifications, and other information the Commission considers necessary to evaluate the application. A permit application may not be deemed complete unless it is accompanied by a copy of the request for determination as provided in subsection (f) of this section that bears a date of receipt entered by the clerk of the local government and until the 15-day period for issuance of a determination has elapsed.

(2) The Commission shall adopt rules specifying the times within which it must act upon applications for permits required by Title V and other permits required by this section. The times specified shall be extended for the period during which the Commission is prohibited from issuing a permit under subdivisions (3) and (4) of this subsection. The Commission shall inform a permit applicant as to whether or not the application is complete within the time specified in the rules for action on the application. If the Commission fails to act on an application for a permit required by Title V or this section within the time period specified, the failure to act on the application constitutes a final agency decision to deny the permit. A permit applicant, permittee, or other person aggrieved, as defined in G.S. 150B-2, may seek judicial review of a failure to act on the application as provided in G.S. 143-215.5 and Article 4 of Chapter 150B of the General Statutes. Notwithstanding the provisions of G.S. 150B-51, upon review of a failure to act on an application for a permit required by Title V or this section, a court may either: (i) affirm the denial of the permit or (ii) remand the application to the Commission for action upon the application within a specified time.

(3) If the Administrator of the United States Environmental Protection Agency validly objects to the issuance of a permit required by Title V within 45 days after the Administrator receives the proposed permit and the required portions of the permit application, the Commission shall not issue the permit until the Commission revises the proposed permit to meet all objections noted by the Administrator or otherwise satisfies all objections consistent with Title V and implementing regulations adopted by the United States Environmental Protection Agency.

(4) If the Administrator of the United States Environmental Protection Agency validly objects to the issuance of a permit required by Title V after the expiration of the 45-day review period specified in subdivision (3) of this subsection as a result of a petition filed pursuant to section 505(b)(2) of Title V (42 U.S.C. § 7661d(b)(2)) and prior to the issuance of the permit by the Commission, the Commission shall not issue the permit until the Commission revises the proposed permit to meet all objections noted by the Administrator or otherwise satisfies all objections consistent with Title V and implementing regulations adopted by the United States Environmental Protection Agency.

(d1) No permit issued pursuant to this section shall be issued or renewed for a term exceeding five years.

(e) A permit applicant or permittee who is dissatisfied with a decision of the Commission may commence a contested case by filing a petition under G.S. 150B-23 within 30 days after the Commission notifies the applicant or permittee of its decision. If the permit applicant or permittee does not file a petition within the required time, the Commission's decision on the application is final and is not subject to review.

(f) An applicant for a permit under this section for a new facility or for the expansion of a facility permitted under this section shall request each local government having jurisdiction over any part of the land on which the facility and its appurtenances are to be located to issue a determination as to whether the local government has in effect a zoning or subdivision ordinance applicable to the facility and whether the proposed facility or expansion would be consistent with the ordinance. The request to the local government shall be accompanied by a copy of the draft permit application and shall be delivered to the clerk of the local government personally or by certified mail. The determination shall be verified or supported by affidavit signed by the official designated by the local government to make the determination and, if the local government states that the facility is inconsistent with a zoning or subdivision ordinance, shall include a copy of the ordinance and the specific reasons for the determination of inconsistency. A copy of any such determination shall be provided to the applicant when it is submitted to the Commission. The Commission shall not act upon an application for a permit under this section until it has received a determination from each local government requested to make a determination by the applicant. If a local government determines that the new facility or the expansion of an existing facility is inconsistent with a zoning or subdivision ordinance, and unless the local government makes a subsequent determination of consistency with all ordinances cited in the determination or the proposed facility is determined by a court of competent jurisdiction to be consistent with the cited ordinances, the Commission shall attach as a condition of the permit a requirement that the applicant, prior to construction or operation of the facility under the permit, comply with all lawfully adopted local ordinances, including those cited in the determination, that apply to the facility at the time of construction or operation of the facility. If a local government fails to submit a determination to the Commission as provided by this subsection within 15 days after receipt of the request, the Commission may proceed to consider the permit application without regard to local zoning and subdivision ordinances. This subsection shall not be construed to affect the validity of any lawfully adopted franchise, local zoning, subdivision, or land-use planning ordinance or to affect the responsibility of any person to comply with any lawfully adopted franchise, local zoning, subdivision, or land-use planning ordinance. This subsection shall not be construed to limit any opportunity a local government may have to comment on a permit application under any other law or rule. This subsection shall not apply to any facility with respect to which local ordinances are subject to review under either G.S. 104E-6.2 or G.S. 130A-293.

(g) Any person who is required to hold a permit under this section shall submit to the Department a written description of his current and projected plans to reduce the emission of air contaminants under such permit by source reduction or recycling. The written description shall accompany the payment of the annual permit fee. The written description shall also accompany any application for a new permit, or for modification of an existing permit, under this section. The written description required by this subsection shall not be considered part of a permit application and shall not serve as the basis for the denial of a permit or permit modification.

(h) Expedited Review of Applications Certified by a Professional Engineer. — The Commission shall adopt rules governing the submittal of permit applications certified by a professional engineer, including draft permits, that can be sent to public notice and hearing upon receipt and subjected to technical review by personnel within the Department. These rules shall specify, at a minimum, any forms to be used; a checklist for applicants that lists all items of information required to prepare a complete permit application; the form of the certification required on the application by a professional engineer; and the information that must be included in the draft permit. The Department shall process an application that is certified by a professional engineer as provided in subdivisions (1) through (7) of this subsection.

(1) Initiation of Review. Upon receipt of an application certified by a professional engineer in accordance with this subsection and the rules adopted pursuant to this subsection, the Department shall determine whether the application is complete as provided in subdivision (2) of this subsection. Within 30 days after the date on which an application is determined to be complete, the Department shall:
  a. Publish any required notices, using the draft permit included with the application;
  b. Schedule any required public meetings or hearings on the application and permit; and
  c. Initiate any and all technical review of the application in a manner to ensure substantial completion of the technical review by the time of any public hearing on the application, or if there is no hearing, by the close of the notice period.

(2) Completeness Review. Within 10 working days of receipt of the permit application certified by a professional engineer under this subsection, the Department shall determine whether the application is complete for purposes of this subsection. The Department shall determine whether the permit application certified by a professional engineer is complete by comparing the information provided in the application with the checklist contained in the rules adopted by the Commission pursuant to this subsection.
  a. If the application is not complete, the Department shall promptly notify the applicant in writing of all deficiencies of the application, specifying the items that need to be included, modified, or supplemented in order to make the application complete, and the 10-day time period is suspended after this request for further information. If the applicant submits the requested information within the time specified, the 10-day time period shall begin again on the day the additional information was submitted. If the additional information is not submitted within the time periods specified, the Department shall return the application to the applicant, and the applicant may treat the return of the application as a denial of the application or may resubmit the application at a later time.
  b. If the Department fails to notify the applicant that an application is not complete within the time period set forth in this subsection, the application shall be deemed to be complete.

(3) Time for Permit Decision. For any application found to be complete under subdivision (2) of this subsection, the Department shall issue a permit decision within 30 days of the last day of any public hearing on the application, or if there is no hearing, within 30 days of the close of the notice period.

(4) Rights if Permit Decision Not Made in Timely Fashion. If the Department fails to issue a permit decision within the time periods specified in subdivision (3) of this subsection, the applicant may:
  a. Take no action, thereby consenting to the continued review of the application; or
  b. Treat the failure to issue a permit decision as a denial of the application and appeal the denial as provided in subdivision (2) of subsection (d) of this section.

(5) Power to Halt Review. At any time after the permit application certified by a professional engineer has been determined to be

complete under subdivision (2) of this subsection, the Department may immediately terminate review of that application, including technical review and any hearings or meetings scheduled on the application, upon a determination of one of the following:

a. The permit application is not in substantial compliance with the applicable rules; or

b. The applicant failed to pay all permit application fees.

(6) Rights if Review Halted. If the Department terminates review of an application under subdivision (5) of this subsection, the applicant may take any of the following actions:

a. Revise and resubmit the application; or

b. Treat the action as a denial of the application and appeal the denial under Article 3 of Chapter 150B of the General Statutes.

(7) Option; No Additional Fee. The submittal of a permit application certified by a professional engineer to be considered under this subsection shall be an option and shall not be required of any applicant. The Department shall not impose any additional fees for the receipt or processing of a permit application certified by a professional engineer.

(i) Rules for Review of Applications Other Than Those Certified by a Professional Engineer. — The Commission shall adopt rules governing the times of review for all permit applications submitted pursuant to this section other than those certified by a professional engineer pursuant to subsection (h) of this section. Those rules shall specify maximum times for, among other things, the following actions in reviewing the permit applications covered by this subsection:

(1) Determining that the permit application is complete;

(2) Requesting additional information to determine completeness;

(3) Determining that additional information is needed to conduct a technical review of the application;

(4) Completing all technical review of the permit application;

(5) Holding and completing all public meetings and hearings required for the application;

(6) Completing the record from reviewing and acting on the application; and

(7) Taking final action on the permit, including granting or denying the application. (1973, c. 821, s. 6; c. 1262, s. 23; 1979, c. 545, ss. 2, 3; 1987, c. 461, s. 2; c. 827, ss. 154, 206; 1989, c. 168, s. 30; c. 492; 1989 (Reg. Sess., 1990), c. 1037, s. 2; 1991, c. 552, s. 5; c. 629, s. 1; c. 761, s. 27(a)-(c); 1993, c. 400, s. 8; 1995, c. 484, s. 2; 1995 (Reg. Sess., 1996), c. 728, s. 1; 2002-4, s. 2; 2003-340, s. 1.8(b); 2003-428, ss. 1, 2.)

**Editor's Note.** — Session Laws 1989, c. 168, which amended this section, in s. 47(c), as amended by Session Laws 1991 (Reg. Sess., 1992), c. 990, s. 6 provides: "(c) All information received pursuant to G.S. 130A-294(k), G.S. 143-215.1(g) and G.S. 143-215.108(c) [now 143-215.108(g)] shall be transmitted to the Solid Waste Management Division of the Department for review and analysis. The Solid Waste Management Division shall consider this information in the development of the comprehensive hazardous waste management plan required by G.S. 130A-294(i) and shall prepare a report on the feasibility of incorporating waste reduction requirements into existing solid and hazardous waste permitting processes. The Solid Waste Management Division shall report to the Environmental Review Commission as to progress in implementing this section annually beginning 1 January 1993."

Session Laws 2003-340, s. 1.8(a), rewrote subsection (a) of this section, contingent upon Senate Bill 945, 2003 Regular Session, not becoming law. That act [S.L. 2003-428] did become law and, consequently, the amendments by Session Laws 2003-340, s. 1.8(a), were never implemented.

Session Laws 2006-255, s. 5.4, provides: "The provisions of 15A NCAC 2D.0530(b)(1)(A)(iv) as adopted by the Environmental Management Commission on 10 February 2005 and as approved by the Rules Review Commission on 21

April 2005, do not apply to any application for an air quality permit that is submitted and determined to be administratively complete by the Department of Environment and Natural Resources on or before 1 August 2006. An air quality permit issued pursuant to an application described in this section shall both:

"(1) Include a requirement that the permittee will install advanced control technology designed to remove ninety-nine percent (99%) of any pollutants at each electric generating unit to which 15A NCAC 2D.0530(b)(1)(A)(iv) would otherwise apply and that the permittee will operate the advanced control technology at any time that electricity is being produced by the electric generating unit other than during startup of the unit.

"(2) State that the actual emissions of sulfur dioxide (SO2) shall be no greater than 0.15 pound per million British Thermal Units (BTUs) as measured on a rolling 30-day average."

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

## CASE NOTES

**This section does not amend, repeal, or make exception to the North Carolina Administrative Procedure Act (NCAPA)** so as to deprive petitioner of his right to an administrative hearing thereunder, thus petitioner was entitled to commence an administrative hearing to determine his right under the air pollution control act. Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 768, rehearing denied, 338 N.C. 314, 451 S.E.2d 634 (1994).

**Contravention, or likelihood of contravention, is a condition precedent to necessity for a permit** from the Environmental Management Commission. Lewis v. White, 287 N.C. 625, 216 S.E.2d 134 (1975).

**Timeliness of Challenge to Commission Decision.** — Where power company did not file a petition challenging the decision of the Department of Environment, Health and Natural Resources (now the Department of Environment and Natural Resources) within 30 days after DEHNR notified it of the permitting decision, the permitting decision was final. Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 112 N.C. App. 566, 436 S.E.2d 594 (1993), rev'd on other grounds, 337 N.C. 569, 447 S.E.2d 768, reh'g denied, 338 N.C. 314, 451 S.E.2d 634 (1994).

**Cited** in Tri-County Paving, Inc. v. Ashe County, 281 F.3d 430, 2002 U.S. App. LEXIS 2747 (4th Cir. 2002).

## OPINIONS OF ATTORNEY GENERAL

**The signing of a proposed Memorandum of Understanding with federal land managers of National Parks and Wilderness Areas in and around North Carolina would not constitute rulemaking** under the N.C. Administrative Procedures Act and, therefore, did not require rulemaking by the Environmental Management Commission. See Opinion of Attorney General to Mr. William R. Gilkeson, Staff Attorney, N.C. General Assembly, 1998 N.C.A.G. 54 (12/4/98).

**When Air Quality Permit Must Be Obtained.** — Subdivision (a)(2) requires that a person secure an air quality permit prior to the actual on-site assembling of materials that will constitute an air contaminant source. See opinion of Attorney General to Alan W. Klimek, Director, North Carolina Division of Air Quality, 2001 N.C. AG LEXIS 7 (2/8/2001).

## § 143-215.108A. Control of sources of air pollution; construction of new facilities; alteration or expansion of existing facilities.

(a) New Facilities. — A person may not, without obtaining a permit under G.S. 143-215.108, construct or operate an air contaminant source, equipment, or associated air cleaning device at a site or facility where, at the time of the construction, there is no other air contaminant source, equipment, or associated air cleaning device for which a permit is required under G.S. 143-215.108. A person may, however, undertake the following activities prior to obtaining a permit if the person complies with the requirements of this section:

(1) Clearing and grading.

(2) Construction of access roads, driveways, and parking lots.
(3) Construction and installation of underground pipe work, including water, sewer, electric, and telecommunications utilities.
(4) Construction of ancillary structures, including fences and office buildings, that are not a necessary component of an air contaminant source, equipment, or associated air cleaning device for which a permit is required under G.S. 143- 215.108.

(b) Permitted Facilities. — A person who holds a permit under G.S. 143-215.108 may apply to the Commission for a modification of the permit to allow the person to alter or expand the physical arrangement or operation of an air contaminant source, equipment, or associated air cleaning device in a manner that alters the emission of air contaminants. The permittee may not operate the altered, expanded, or additional air contaminant source, equipment, or associated air cleaning device in a manner that alters the emission of any air contaminant without obtaining a permit modification under G.S. 143-215.108. A permittee may, however, alter or expand the physical arrangement or operation of an air contaminant source, equipment, or associated air cleaning device at a facility permitted under G.S. 143-215.108 if the permittee complies with the requirements of this section. At least 15 days prior to commencing alteration or expansion under this subsection, the permittee shall give notice by publication and shall submit to the Commission a notice of the permittee's intent to alter or expand the physical arrangement or operation of an air contaminant source, equipment, or associated air cleaning device. Notice by publication shall be in a newspaper having general circulation in the county or counties where the facility is to be located; shall be at the permittee's own expense; shall include a statement that written comment may be submitted to the Commission, that the Commission will consider any comment that it receives, and the Commission's address for submission of written comment; and shall include all the information required by subdivisions (1) through (6) of this subsection. The permittee shall submit a proof of publication of the notice to the Commission within 15 days of the date of publication. The notice of intent to the Commission shall include all of the following:

(1) The name and location of the facility and the name and address of the permittee.
(2) The permit number of each permit issued under G.S. 143-215.108 for the facility.
(3) The nature of the air contaminant sources and equipment associated with the proposed modification of the permit.
(4) An estimate of total regulated air contaminant emissions associated with the proposed modification of the permit.
(5) The air cleaning devices that are to be employed to address each of the air contaminant sources associated with the modification of the permit.
(6) The schedule for alteration or expansion of the facility associated with the proposed modification of the permit.
(7) An acknowledgment by the permittee that the air contaminant sources, equipment, and associated air cleaning devices may not be operated in a manner that alters the emission of any air contaminant until the permittee has obtained a modified permit under G.S. 143-215.108.
(8) An acknowledgment by the permittee that any alteration or expansion of the physical arrangement or operation of an air contaminant source, equipment, or associated air cleaning device prior to the modification of a permit under G.S. 143-215.108 is undertaken at the permittee's own risk and with the knowledge that the permittee may be denied a modification of the permit under G.S. 143-215.108 without

regard to the permittee's financial investment or alteration or expansion of the facility.

(9) A certification under oath that all of the information contained in the notice of intent is complete and accurate to the best of the permittee's knowledge and ability, executed by the permittee or, if the permittee is a corporation, by the appropriate officers of the corporation.

(c) Review and Determination by the Commission. —

(1) Upon receipt of a complete notice of intent required under subsection (b) of this section, the Commission shall determine whether:

a. The permittee is and has been in substantial compliance with other permits issued the permittee.

b. The facility will be altered or expanded so that it will be used for either the same or a similar use as the use already permitted.

c. The alteration or expansion will not result in a disproportionate increase in the size of the facility already permitted.

d. The alteration or expansion will result in the same or substantially similar emissions as that of the facility already permitted.

e. The alteration or expansion will not have a significant effect on air quality.

f. The Commission is likely to issue the permit modification.

(2) Within 15 days after the Commission receives a complete notice of intent required under subsection (b) of this section, the Commission shall notify the permittee of its determination as to whether each of the conditions set out in subdivision (1) of this subsection has or has not been met. If the Commission finds that all of the conditions have been met, the notice shall state that the alteration or expansion of the physical arrangement or operation of an air contaminant source, equipment, or associated air cleaning device may begin. If the Commission finds that one or more of the conditions has not been met, the notice shall state that the alteration or expansion of the physical arrangement or operation of an air contaminant source, equipment, or associated air cleaning device may not begin.

(d) Order to Cease Construction, Alteration, or Expansion. — If at any time during the construction, alteration, or expansion of the physical arrangement or operation of an air contaminant source, equipment, or associated air cleaning device, the Commission determines that the permittee will not qualify for a permit or permit modification under G.S. 143-215.108, the Commission may order that the construction, alteration, or expansion cease until the Commission makes a decision on the application for a permit or permit modification. If the Commission orders that construction, alteration, or expansion cease, then construction, alteration, or expansion may resume only if the Commission either makes a subsequent determination that the circumstances that resulted in the order to cease construction, alteration, or expansion have been adequately addressed or if the Commission issues a permit or permit modification under G.S. 143-215.108 that authorizes construction, alteration, or expansion to resume.

(e) Evaluation of Permit Applications; Administrative and Judicial Review of Permit Decisions. — The Commission shall evaluate an application for a permit or permit modification under G.S. 143-215.108 and make its decision on the same basis as if the construction, alteration, or expansion allowed under this section had not occurred. The Commission shall consider any written comment that it receives in response to a notice by publication given pursuant to subsection (b) of this section. No evidence regarding any contract entered into, financial investment made, construction, alteration, or expansion undertaken, or economic loss incurred by any person or permittee who proceeds under this section without first obtaining a permit under G.S. 143-215.108 is admissible in any contested case or judicial proceeding involving any permit required under G.S. 143-215.108. No evidence as to any determination or order by the Commission pursuant to subsection (c) or (d) of this section shall be admissible in any contested case or judicial proceeding related to any permit required under G.S. 143-215.108.

(f) State, Commission, and Employees Not Liable. — Every person, permittee, and owner of a facility who proceeds under this section shall hold the State, the Commission, and the officials, agents, and employees of the State and the Commission harmless and not liable for any loss resulting from any contract entered into, financial investment made, construction, alteration, or expansion undertaken, or economic loss incurred by any person, permittee, or owner of any facility pursuant to this section.

(g) Local Zoning Ordinances Not Affected. — This section shall not be construed to affect the validity of any lawfully adopted franchise, local zoning, subdivision, or land-use planning ordinance or to affect the responsibility of any person to comply with any lawfully adopted franchise, local zoning, subdivision, or land-use planning ordinance.

(h) Compliance With Other State Laws Not Affected. — This section does not relieve any person of the obligation to comply with any other requirement of State law, including any requirement to obtain any other permit or approval prior to undertaking any activity associated with preparation of the site or the alteration or expansion of the physical arrangement or operation of an air contaminant source, equipment, or associated air cleaning device at a facility for which a permit is required under G.S. 143-215.108.

(i) Federal Air Quality Programs Not Affected. — This section does not relieve any person from any preconstruction or construction prohibition imposed by any federal requirement, federal delegation, federally approved requirement in any State Implementation Plan, or federally approved requirement under the Title V permitting program, as determined solely by the Commission or by a local air pollution control program certified by the Commission as provided in G.S. 143-215.112. This section does not apply to any construction, alteration, or expansion that is subject to requirements for prevention of significant deterioration or federal nonattainment new source review, as determined solely by the Commission or by a local air pollution control program certified by the Commission as provided in G.S. 143-215.112. This section does not apply if it is inconsistent with any federal requirement, federal delegation, federally approved requirement in any State Implementation Plan, or federally approved requirement under the Title V permitting program, as determined solely by the Commission or by a local air pollution control program certified by the Commission as provided in G.S. 143-215.112.

(j) Fee. — A permittee who submits a notice of intent under subsection (b) of this section shall pay a fee of two hundred dollars ($200.00) for each notice of intent submitted to cover a portion of the administrative costs of implementing this section. (2003-428, s. 3.)

## § 143-215.109. Control of complex sources.

(a) The Commission shall by rule establish criteria for controlling the effects of complex sources on air quality. The rules shall set forth such basic minimum criteria or standards under which the Commission shall approve or disapprove any such construction or modification. The rules shall further provide for the submission of plans, specifications and such other information as may be necessary for the review and evaluation of proposed or modified complex sources.

(b) If the Commission shall determine that the construction or modification of any complex sources will result in a violation of ambient air quality standards or interfere with the attainment of such standards in any area where an air pollution abatement control program has been established, the Commission shall have authority to disapprove such construction or modification or to approve such construction or modification under such conditions as the Commission shall deem necessary or appropriate.

(c) Repealed by Session Laws 1987, c. 827, s. 207. (1973, c. 821, s. 6; c. 1262, s. 23; 1987, c. 827, ss. 154, 207.)

**Editor's Note.** — Session Laws 1999-328, s. 4.9, provides: "The Environmental Management Commission shall initiate rule making to regulate the emissions of nitrogen oxides (NOx) from complex sources pursuant to G.S. 143-215.109 no later than 1 October 1999. The Environmental Management Commission shall report on the progress of this rule making as a part of each quarterly report the Commission makes to the Environmental Review Commission pursuant to G.S. 143B-282(b)."

## § 143-215.110. Special orders.

(a) Issuance. — The Commission is hereby empowered, after the effective date of standards and classifications adopted pursuant to G.S. 143-215.107, to issue (and from time to time to modify or revoke) a special order or other appropriate instrument, to any person whom it finds responsible for causing or contributing to any pollution of the air within the area for which standards have been established. Such an order or instrument may direct such person to take or refrain from taking such action, or to achieve such results, within a period of time specified by such special order, as the Commission deems necessary and feasible in order to alleviate or eliminate such pollution. The Commission is authorized to enter into consent special orders, assurances of voluntary compliance or other similar documents by agreement with the person responsible for pollution of the air, subject to the provisions of subsection (a1) of this section regarding proposed orders, and such consent order, when entered into by the Commission after public review, shall have the same force and effect as a special order of the Commission issued pursuant to hearing.

(a1) Public Notice and Review of Consent Orders.

(1) The Commission shall give notice of a proposed consent order to the proper State, interstate, and federal agencies, to interested persons, and to the public. The Commission may also provide any other data it considers appropriate to those notified. The Commission shall prescribe the form and content of the notice. The notice shall be given at least 45 days prior to any final action regarding the consent order. Public notice shall be given by publication of the notice one time in a newspaper having general circulation within the county in which the pollution originates.

(2) Any person who desires a public meeting on any proposed consent order may request one in writing to the Commission within 30 days following date of the notice of the proposed consent order. The Commission shall consider all such requests for meetings. If the Commission determines that there is significant public interest in holding a meeting, the Commission shall schedule a meeting and shall give notice of such meeting at least 30 days in advance to all persons to whom notice of the proposed consent order was given and to any other person requesting notice. At least 30 days prior to the date of meeting, the Commission shall also have a copy of the notice of the meeting published at least one time in a newspaper having general circulation within the county in which the pollution originates. The

Commission shall prescribe the form and content of notices under this subsection.

(3) The Commission shall prescribe the procedures to be followed in such meetings. If the meeting is not conducted by the Commission, detailed minutes of the meeting shall be kept and shall be submitted, along with any other written comment, exhibits or other documents presented at the meeting, to the Commission for its consideration prior to final action granting or denying the consent order.

(4) The Commission shall take final action on a proposed consent not later than 60 days following notice of the proposed consent order or, if a public meeting is held, within 90 days following such meeting.

(b) Procedure to Contest Certain Orders. — A special order that is issued without the consent of the person affected may be contested by that person by filing a petition for a contested case under G.S. 150B-23 within 30 days after the order is issued. If the person affected does not file a petition within the required time, the order is final and is not subject to review.

(c) Repealed by Session Laws 1987, c. 827, s. 208.

(d) Effect of Compliance. — Any person who installs an air-cleaning device for purpose of alleviating or eliminating air pollution in compliance with the terms of, or as result of the conditions specified in, a permit issued pursuant to G.S. 143-215.108, or a special order, consent special order, assurance of voluntary compliance or similar document issued pursuant to this section, or a final decision of the Commission or a court, rendered pursuant to either of said sections, shall not be required to take or refrain from any further action nor be required to achieve any further results under the terms of this or any other State law relating to the control of air pollution, for a period to be fixed by the Commission or court as it shall deem fair and reasonable in the light of all the circumstances after the date such special order, consent special order, assurance of voluntary compliance, other document or decision, or the conditions of such permit become finally effective, if:

(1) The air-cleaning devices result in the elimination or alleviation of air pollution to the extent required by such permit, special order, consent special order, assurance of voluntary compliance, or other document or decision and complies with any other terms thereof; and

(2) Such person complies with the terms and conditions of such permit, special order, consent special order, assurance of voluntary compliance, other document or decision within the time limit, if any, specified therein or as the same may be extended, and thereafter remains in compliance.

(e) Compliance Bonds. — A special order or other instrument authorized by this section may provide that a bond or other surety be posted to ensure compliance. In determining the amount of such bond the Commission shall consider the degree and extent of harm which may result if the person to whom the special order is directed fails to comply with the terms of the order, the cost of rectifying such harm, the economic consequences to the person to whom the special order is directed if the special order is issued as compared to the consequences of a denial, suspension, or revocation of the special order or permit, and the person's history of compliance with pollution control requirements, other special orders, history of payment of any penalties which may have been previously assessed by the Commission. In the event of noncompliance with the special order or other instrument, the bond shall be forfeited and the clear proceeds of the bond shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1973, c. 821, s. 6; c. 1262, s. 23; 1987, c. 827, ss. 154, 208; 1989, c. 133; c. 766, s. 2; 1998-215, s. 72.)

## § 143-215.111. General powers of Commission; auxiliary powers.

In addition to the specific powers prescribed elsewhere in this Article and the applicable general powers prescribed in G.S. 143-215.3, and for the purpose of carrying out its duties, the Commission shall have the power:

(1) To make a continuing study of the effects of the emission of air contaminants from motor vehicles on the quality of the outdoor atmosphere of the State and the several areas thereof, and make recommendations to the General Assembly and other appropriate public and private bodies for the control of such air contaminants.

(2) To consult, upon request, with any person proposing to construct, install, or otherwise acquire an air pollution source or air-cleaning device for the control of air contaminants concerning the efficacy of such device, or the air problem which may be related to such source, or device; provided, however, that nothing in any such consultation shall be construed to relieve any person from compliance with this Article and Article 21, rules adopted pursuant thereto, or any other provision of law.

(3) To encourage local units of government to handle air pollution problems within their respective jurisdictions and on a cooperative basis, and to provide such local units technical and consultative assistance to the maximum extent possible.

(4) To establish procedures providing for public notice, public comment, and public hearings on applications for permits required by Title V to meet the requirements of Title V and implementing regulations adopted by the United States Environmental Protection Agency.

(5) To establish procedures providing for notice to the Administrator of the United States Environmental Protection Agency and affected states of proposals to issue permits required by Title V and allowing affected states the opportunity to submit written comment as required by section 505(a) of Title V (42 U.S.C. § 7661d) and implementing regulations adopted by the United States Environmental Protection Agency. (1973, c. 821, s. 6; c. 1262, s. 23; 1987, c. 827, ss. 154, 209; 1993, c. 400, s. 9.)

### CASE NOTES

**Cited** in Donoho v. City of Asheville, 153 N.C. App. 110, 569 S.E.2d 19, 2002 N.C. App. LEXIS 1087 (2002).

## § 143-215.112. Local air pollution control programs.

(a) The Commission is authorized and directed to review and have general oversight and supervision over all local air pollution control programs and to this end shall review and certify such programs as being adequate to meet the requirements of this Article and Article 21 of this Chapter and any applicable standards and rules adopted pursuant thereto. The Commission shall certify any local program which:

(1) Provides by ordinance or local law for requirements compatible with those imposed by the provisions of this Article and Article 21 of this Chapter, and the standards and rules issued pursuant thereto; provided, however, the Commission upon request of a municipality or other local unit may grant special permission for the governing body of such unit to adopt a particular class of air contaminant regulations

which would result in more effective air pollution control than applicable standards or rules promulgated by the Commission;

(2) Provides for the adequate enforcement of such requirements by appropriate administrative and judicial process;

(3) Provides for an adequate administrative organization, staff, financial and other resources necessary to effectively and efficiently carry out its programs; and

(4) Is approved by the Commission as adequate to meet the requirements of this Article and any applicable rules pursuant thereto.

(b) No municipality, county, local board or commission or group of municipalities and counties may establish and administer an air pollution control program unless such program meets the requirements of this section and is so certified by the Commission.

(c)(1) The governing body of any county, municipality, or group of counties and municipalities within a designated area of the State, as defined in this Article and Article 21, subject to the approval of the Commission, is hereby authorized to establish, administer, and enforce a local air pollution control program for the county, municipality, or designated area of the State which includes but is not limited to:

a. Development of a comprehensive plan for the control and abatement of new and existing sources of air pollution;

b. Air quality monitoring to determine existing air quality and to define problem areas, as well as to provide background data to show the effectiveness of a pollution abatement program;

c. An emissions inventory to identify specific sources of air contamination and the contaminants emitted, together with the quantity of material discharged into the outdoor atmosphere;

d. Adoption, after notice and public hearing, of air quality and emission control standards, or adoption by reference, without public hearing, of any applicable rules and standards duly adopted by the Commission; and administration of such rules and standards in accordance with provisions of this section.

e. Provisions for the establishment or approval of time schedules for the control or abatement of existing sources of air pollution and for the review of plans and specifications and issuance of approval documents covering the construction and operation of pollution abatement facilities at existing or new sources;

f. Provision for adequate administrative staff, including an air pollution control officer and technical personnel, and provision for laboratory and other necessary facilities.

(2) Subject to the approval of the Commission as provided in this Article and Article 21, the governing body of any county or municipality may establish, administer, and enforce an air pollution control program by any of the following methods:

a. Establishing a program under the administration of the duly elected governing body of the county or municipality.

b. Appointing an air pollution control board consisting of not less than five nor more than seven members who shall serve for terms of six years each and until their successors are appointed and qualified. Two members shall be appointed for two-year terms, two shall be appointed for four-year terms, and the remaining member or members shall be appointed for six-year terms. Where the term "governing body" is referred to in this section, it shall include the air pollution control board. Such board shall have all the powers and authorities granted to any local air pollution control program. The board shall elect a chairman and shall meet at least quarterly or upon the call of the chairman or any two members of the board.

c. Appointing an air pollution control board as provided in this subdivision, and by appropriate written agreement designating the local health department or other department of county or municipal government as the administrative agent for the air pollution control board.

d. Designating, by appropriate written agreement, the local board of health and the local health department as the air pollution control board and agency.

(2a) Any board or body which approves permits or enforcement orders shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders under the Clean Air Act and any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers shall be adequately disclosed.

(3) If the Commission finds that the location, character or extent of particular concentrations of population, air contaminant sources, the geographic, topographic or meteorological considerations, or any combinations thereof, are such as to make impracticable the maintenance of appropriate levels of air quality without an area-wide air pollution control program, the Commission may determine the boundaries within which such program is necessary and require such area-wide program as the only acceptable alternative to direct State administration. Subject to the provisions of this section, each governing body of a county or municipality is hereby authorized and empowered to establish by contract, joint resolution, or other agreement with any other governing body of a county or municipality, upon approval by the Commission, an air pollution control region containing any part or all of the geographical area within the jurisdiction of those boards or governing bodies which are parties to such agreement, provided the counties involved in the region are contiguous or lie in a continuous boundary and comprise the total area contained in any region designated by the Commission for an area-wide program. The participating parties are authorized to appoint a regional air pollution control board which shall consist of at least five members who shall serve for terms of six years and until their successors are appointed and qualified. Two members shall be appointed for two-year terms, two shall be appointed for four-year terms and the remaining member or members shall be appointed for six-year terms. A participant's representation on the board shall be in relation to its population to the total population of the region based on the latest official United States census with each participant in the region having at least one representative; provided, that where the region is comprised of less than five counties, each participant will be entitled to appoint members in relation to its population to that of the region so as to provide a board of at least five members. Where the term "governing body" is used, it shall include the governing board of a region. The regional board is hereby authorized to exercise any and all of the powers provided in this section. The regional air pollution control board shall elect a chairman and shall meet at least quarterly or upon the call of the chairman or any two members of the board. In lieu of employing its own staff, the regional air pollution control board is authorized, through appropriate written agreement, to designate a local health department as its administrative agent.

(4) Each governing body is authorized to adopt any ordinances, resolutions, rules or regulations which are necessary to establish and maintain an air pollution control program and to prescribe and enforce air quality and emission control standards, a copy of which must be filed with the Commission and with the clerk of court of any county affected. Provisions may be made therein for the registration of air contaminant sources; for the requirement of a permit to do or carry out specified activities relating to the control of air pollution, including procedures for application, issuance, denial and revocation; for notification of violators or potential violators about requirements or conditions for compliance; for procedures to grant temporary permits or variances from requirements or standards; for the declaration of an emergency when it is found that a generalized condition of air pollution is causing imminent danger to the health or safety of the public and the issuance of an order to the responsible person or persons to reduce or discontinue immediately the emission of air contaminants; for notice and hearing procedures for persons aggrieved by any action or order of any authorized agent; for the establishment of an advisory council and for other administrative arrangements; and for other matters necessary to establish and maintain an air pollution control program.

(5) No permit required by section 305(e) of Title III (42 U.S.C. § 7429(e)) for a solid waste incineration unit combusting municipal waste shall be issued by a local air pollution control program that is administered by the governing body of a unit of local government that is responsible, in whole or in part, for the design, construction, or operation of the unit.

(d)(1) Violation of any ordinances, resolutions, rules or regulations duly adopted by a governing body are punishable as provided in G.S. 143-215.114B.

(1a) Each governing body, or its authorized agent, shall have the power to assess civil penalties under G.S. 143-215.114A. Any person assessed shall be notified of the assessment by registered or certified mail, and the notice shall specify the reasons for the assessment. If the person assessed fails to pay the amount of the assessment to the governing body or its authorized agent within 30 days after receipt of notice, or such longer period not to exceed 180 days as the governing body or its authorized agent may specify, the governing body may institute a civil action in the superior court of the county in which the violation occurred, to recover the amount of the assessment. If any action or failure to act for which a penalty may be assessed under this section is continuous, the governing body or its authorized agent may assess a penalty not to exceed ten thousand dollars ($10,000) per day for so long as the violation continues. In determining the amount of the penalty, the governing body or its authorized agent shall consider the degree and extent of harm caused by the violation, the cost of rectifying the damage, and the amount of money the violator saved by not having made the necessary expenditures to comply with the appropriate pollution control requirements.

(2) Each governing body, or its duly authorized agent, may institute a civil action in the superior court, brought in the name of the agency having jurisdiction, for injunctive relief to restrain any violation or immediately threatened violation of such ordinances, orders, rules, or regulations and for such other relief as the court shall deem proper. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this Article and Article 21 for any violation of same.

(d1)(1) The governing body responsible for each local air pollution control program shall require that the owner or operator of all air contaminant sources subject to the requirement to obtain a permit under Title V pay an annual fee, or the equivalent over some other period, sufficient to cover costs as provided in section 502(b)(3)(A) of Title V (42 U.S.C. § 7661a(b)(3)(A)) and G.S. 143-215.3(a)(1d). Fees collected pursuant to this subdivision shall be used solely to cover all reasonable direct and indirect costs required to develop and administer the Title V permit program.

(2) Each governing body is authorized to expend tax funds, nontax funds, or any other funds available to it to finance an air pollution control program and such expenditures are hereby declared to be for a public purpose and a necessary expense.

(d2)(1) Any final administrative decision rendered in an air pollution control program of such governing body shall be subject to judicial review as provided by Article 4 of Chapter 150B of the General Statutes, and "administrative agency" or "agency" as used therein shall mean and include for this purpose the governing body of any county or municipality, regional air pollution control governing board, and any agency created by them in connection with an air pollution control program.

(2) A local air pollution control program shall inform a permit applicant as to whether or not the application is complete within the time specified in the rules for action on the application. If a local air pollution program fails to act on an application for a permit required by Title V or this Article within the time periods specified by the Commission under G.S 143-215.108(d)(2), the failure to act on the application constitutes a final agency decision to deny the permit. A permit applicant, permittee, or other person aggrieved, as defined in G.S. 150B-2, may seek judicial review of a failure to act on the application as provided in G.S. 143-215.5 and Article 4 of Chapter 150B of the General Statutes. Notwithstanding the provisions of G.S. 150B-51, upon review of a failure to act on an application for a permit required by Title V or this Article, a court may either: (i) affirm the denial of the permit or (ii) remand the application to the local air pollution control program for action upon the application within a specified time.

(e)(1) If the Commission has reason to believe that a local air pollution control program certified and in force pursuant to the provisions of this section is inadequate to abate or control air pollution in the jurisdiction to which such program relates, or that such program is being administered in a manner inconsistent with the requirement of this Article, the Commission shall, upon due notice, conduct a hearing on the matter.

(2) If, after such hearing, the Commission determines that an existing local air pollution control program or one which has been certified by the Commission is inadequate to abate or control air pollution in the municipality, county, or municipalities or counties to which such program relates, or that such program is not accomplishing the purposes of this Article, it shall set forth in its findings the corrective measures necessary for continued certification and shall specify a reasonable period of time, not to exceed one year, in which such measures must be taken if certification is not to be rescinded.

(3) If the municipality, county, local board or commission or municipalities or counties fail to take such necessary corrective action within the time specified, the Commission shall rescind any certification as may have been issued for such program and shall administer within such

municipality, county, or municipalities or counties all of the regulatory provisions of this Article and Article 21. Such air pollution control program shall supersede all municipal, county or local laws, regulations, ordinances and requirements in the affected jurisdiction.

(4) If the Commission finds that the control of a particular class of air contaminant source because of its complexity or magnitude is beyond the reasonable capability of the local air pollution control authorities or may be more efficiently and economically performed at the State level, it may assume and retain jurisdiction over that class of air contaminant source. Classification pursuant to this subdivision may be either on the basis of the nature of the sources involved or on the basis of their relationship to the size of the communities in which they are located.

(5) Any municipality or county in which the Commission administers its air pollution control program pursuant to subdivision (3) of this subsection may, with the approval of the Commission, establish or resume a municipal, county, or local air pollution control program which meets the requirements for certification by the Commission.

(6) Repealed by Session Laws 1993, c. 400, s. 10.

(7) Any municipality, county, local board or commission or municipalities or counties or designated area of this State for which a local air pollution control program is established or proposed for establishment may make application for, receive, administer and expend federal grant funds for the control of air pollution or the development and administration of programs related to air pollution control; provided that any such application is first submitted to and approved by the Commission. The Commission shall approve any such application if it is consistent with this Article, Article 21 and other applicable requirements of law.

(8) Notwithstanding any other provision of this section, if the Commission determines that an air pollution source or combination of sources is operating in violation of the provisions of this Article and that the appropriate local authorities have not acted to abate such violation, the Commission, upon written notice to the appropriate local governing body, may act on behalf of the State to require any person causing or contributing to the pollution to cease immediately the emission of air pollutants causing or contributing to the violation or may require such other action as it shall deem necessary. (1973, c. 821, s. 6; c. 1262, s. 23; c. 1331, s. 3; 1979, c. 545, s. 7; 1987, c. 748, s. 1; c. 827, ss. 1, 154, 210; 1989, c. 135, s. 7; 1993, c. 400, s. 10; 1997-496, s. 6.)

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

## CASE NOTES

**Agency Decision Upheld.** — The trial court did not err in affirming the $ 5,000 fine imposed on the petitioner whose employee failed to use required vapor recovery equipment on his tanker truck while unloading fuel because the fine was not the product of an "arbitrary and capricious" decision by the Agency. Pisgah Oil Co. v. Western N.C. Reg'l Air Pollution Control Agency, 139 N.C. App. 402, 533 S.E.2d 290, 2000 N.C. App. LEXIS 897 (2000), cert. denied, 353 N.C. 268, 546 S.E.2d 110 (2000).

**Cited** in Donoho v. City of Asheville, 153 N.C. App. 110, 569 S.E.2d 19, 2002 N.C. App. LEXIS 1087 (2002).

**§ 143-215.113:** Repealed by Session Laws 1987, c. 827, s. 211.

**§ 143-215.114:** Recodified as §§ 143-215.114A through 143-215.114C.

### § 143-215.114A. Enforcement procedures: civil penalties.

(a) A civil penalty of not more than twenty-five thousand dollars ($25,000) may be assessed by the Secretary against any person who:

(1) Violates any classification, standard or limitation established pursuant to G.S. 143-215.107.

(2) Is required but fails to apply for or to secure a permit required by G.S. 143-215.108 or who violates or fails to act in accordance with the terms, conditions, or requirements of such permit.

(3) Violates or fails to act in accordance with the terms, conditions, or requirements of any special order or other appropriate document issued pursuant to G.S. 143-215.110.

(4) Fails to file, submit, or make available, as the case may be, any documents, data or reports required by this Article or Parts 1 or 7 of Article 21 of this Chapter.

(5) Violates a rule of the Commission or a local governing body implementing this Article or Parts 1 or 7 of Article 21.

(6) Violates the offenses set out in G.S. 143-215.114B.

(7) Violates the emissions limitations set out in G.S. 143-215.107D.

(b) If any action or failure to act for which a penalty may be assessed under this section is continuous, the Secretary may assess a penalty not to exceed twenty-five thousand dollars ($25,000) per day for so long as the violation continues.

(b1) The Secretary may assess a civil penalty of not more than twenty-five thousand dollars ($25,000) per day for a violation of the emissions limitations set out in G.S. 143-215.107D as provided in this subsection. If at the end of any calendar year, an investor-owned public utility has violated an emissions limitation set out in G.S. 143-215.107D, the violation shall be considered to be continuous from the day that the collective emissions first exceeded the emissions limitation set out in G.S. 143-215.107D through the end of the calendar year and the Secretary may assess a separate civil penalty for each day.

(c) In determining the amount of the penalty the Secretary shall consider the factors set out in G.S. 143B-282.1(b). The procedures set out in G.S. 143B-282.1 shall apply to civil penalty assessments that are presented to the Commission for final agency decision.

(d) The Secretary shall notify any person assessed a civil penalty of the assessment and the specific reasons therefor by registered or certified mail, or by any means authorized by G.S. 1A-1, Rule 4. Contested case petitions shall be filed within 30 days of receipt of the notice of assessment.

(e) Requests for remission of civil penalties shall be filed with the Secretary. Remission requests shall not be considered unless made within 30 days of receipt of the notice of assessment. Remission requests must be accompanied by a waiver of the right to a contested case hearing pursuant to Chapter 150B and a stipulation of the facts on which the assessment was based. Consistent with the limitations in G.S. 143B-282.1(c) and (d), remission requests may be resolved by the Secretary and the violator. If the Secretary and the violator are unable to resolve the request, the Secretary shall deliver remission requests and his recommended action to the Committee on Civil Penalty Remissions of the Environmental Management Commission appointed pursuant to G.S. 143B-282.1(c).

(f) If any civil penalty has not been paid within 30 days after notice of assessment has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment, unless the violator contests the assessment as provided in subdivision (4) of this subsection, or requests remission of the assessment in whole or in part as provided in subdivision (5) of this subsection. If any civil penalty has not been paid within 30 days after the final agency decision or court order has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment. Such civil actions must be filed within three years of the date the final agency decision or court order was served on the violator.

(g) Repealed by Session Laws 1996, Second Extra Session c. 18, s. 27.34(f).

(h) The clear proceeds of penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1973, c. 821, s. 6; c. 1262, s. 23; c. 1331, s. 3; 1975, c. 19, s. 53; c. 842, ss. 6, 7; 1977, c. 771, s. 4; 1979, c. 545, ss. 4-6; 1987, c. 748, s. 2; c. 827, ss. 154, 212; 1989, c. 135, s. 8; 1989 (Reg. Sess., 1990), c. 1036, s. 8; c. 1045, s. 4; 1991, c. 552, s. 4; c. 725, s. 7; 1991 (Reg. Sess., 1992), c. 890, s. 18; 1996, 2nd Ex. Sess., c. 18, s. 27.34(f); 1997-496, s. 7; 1998-215, s. 73; 2002-4, ss. 4, 5; 2002-165, s. 1.12; 2007-296, s. 1.)

**Editor's Note.** — The designations of subsections (e) to (g) were assigned by the Revisor of Statutes, the designations in Session Laws 1989 (Reg. Sess., 1990), c. 1036, s. 8 having been subdivisions (5) to (7).

This section, as amended by Session Laws 2007-296, s. 1, effective October 1, 2007, is applicable to offenses committed on or after October 1, 2007.

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note, "The Forty-Two Hundred Dollar Question: 'May State Agencies Have Discretion in Setting Civil Penalties Under the North Carolina Constitution?'," see 68 N.C.L. Rev. 1035 (1990).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

### CASE NOTES

**Open Burning.** — The trial court properly applied the whole record test, where it found that the North Carolina Department of Environment and Natural Resources and the Environmental Management Commission did not exceed their discretion and authority under G.S. 143-211(c), 143-215.107(a)(1), (3), and 143-215.114A(a)(1) in finding that the contractor had open burning piles within 1,000 feet from a dwelling. MW Clearing & Grading, Inc. v. N.C. Dep't of Env't & Natural Res., 171 N.C. App. 170, 614 S.E.2d 568, 2005 N.C. App. LEXIS 1210 (2005), cert. denied, 360 N.C. 65, 623 S.E.2d 585 (2005), rev'd in part, 360 N.C. 392, 628 S.E.2d 379 (2006) (as to finding violations rather than one).

**Cited** in Craven County Bd. of Educ. v. Boyles, 343 N.C. 87, 468 S.E.2d 50 (1996); Donoho v. City of Asheville, 153 N.C. App. 110, 569 S.E.2d 19, 2002 N.C. App. LEXIS 1087 (2002); N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

## § 143-215.114B. Enforcement procedures: criminal penalties.

(a) For purposes of this section, the term "person" shall mean, in addition to the definition contained in G.S. 143-212, any responsible corporate or public officer or employee; provided, however, that where a vote of the people is required to effectuate the intent and purpose of this Article by a county, city, town, or other political subdivision of the State, and the vote on the referendum is against the means or machinery for carrying said intent and purpose into effect, then, and only then, this section shall not apply to elected officials or to any responsible appointed officials or employees of such county, city, town, or political subdivision.

(b) No proceeding shall be brought or continued under this section for or on account of a violation by any person who has previously been convicted of a federal violation based upon the same set of facts.

(c) In proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information. Consistent with the principles of common law, the subjective mental state of defendants may be inferred from their conduct.

(d) For the purposes of the felony provisions of this section, a person's state of mind shall not be found "knowingly and willfully" or "knowingly" if the conduct that is the subject of the prosecution is the result of any of the following occurrences or circumstances:

(1) A natural disaster or other act of God which could not have been prevented or avoided by the exercise of due care or foresight.

(2) An act of third parties other than agents, employees, contractors, or subcontractors of the defendant.

(3) An act done in reliance on the written advice or emergency on-site direction of an employee of the Department. In emergencies, oral advice may be relied upon if written confirmation is delivered to the employee as soon as practicable after receiving and relying on the advice.

(4) An act causing no significant harm to the environment or risk to the public health, safety, or welfare and done in compliance with other conflicting environmental requirements or other constraints imposed in writing by environmental agencies or officials after written notice is delivered to all relevant agencies that the conflict exists and will cause a violation of the identified standard.

(5) Violations of permit limitations causing no significant harm to the environment or risk to the public health, safety, or welfare for which no enforcement action or civil penalty could have been imposed under any written civil enforcement guidelines in use by the Department at the time, including but not limited to, guidelines for the pretreatment permit civil penalties. This subdivision shall not be construed to require the Department to develop or use written civil enforcement guidelines.

(6) Occasional, inadvertent, short-term violations of permit limitations causing no significant harm to the environment or risk to the public health, safety, or welfare. If the violation occurs within 30 days of a prior violation or lasts for more than 24 hours, it is not an occasional, short-term violation.

(e) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other criminal offenses under State criminal offenses may apply to prosecutions brought under this section or other criminal statutes that refer to this section and shall be determined by the courts of this State according to the principles of common law as they may be applied in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(f) Any person who negligently violates any classification, standard or limitation established pursuant to G.S. 143-215.107 or by G.S. 143-215.107D any term, condition, or requirement of a permit issued pursuant to G.S. 143-215.108 or of a special order or other appropriate document issued pursuant to G.S. 143-215.110 or any rule of the Commission implementing any of the said section, shall be guilty of a Class 2 misdemeanor which may include a fine not to exceed fifteen thousand dollars ($15,000) per day of violation, provided that such fine shall not exceed a cumulative total of two hundred thousand dollars ($200,000) for each period of 30 days during which a violation continues.

(g) Any person who knowingly and willfully violates any classification, standard, or limitation established in the rules of the Commission pursuant to G.S. 143-215.107; the emissions limitations set out in G.S. 143-215.107D; any term, condition, or requirement of a permit issued pursuant to G.S. 143-215.108; or of a special order or other appropriate document issued pursuant to G.S. 143-215.110, shall be guilty of a Class H felony, which may include a fine not to exceed one hundred thousand dollars ($100,000) per day of violation, provided that this fine shall not exceed a cumulative total of five hundred thousand dollars ($500,000) for each period of 30 days during which a violation continues. For the purposes of this subsection, the phrase "knowingly and willfully" shall mean intentionally and consciously as the courts of this State, according to the principles of common law, interpret the phrase in the light of reason and experience.

(h)(1) Any person who knowingly violates any classification, standard, or limitation established in the rules of the Commission pursuant to G.S. 143-215.107; the emissions limitations set out in G.S. 143-215.107D; any term, condition, or requirement of a permit issued pursuant to G.S. 143-215.108; or of a special order or other appropriate document issued pursuant to G.S. 143-215.110 and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury shall be guilty of a Class C felony, which may include a fine not to exceed two hundred fifty thousand dollars ($250,000) per day of violation, provided that this fine shall not exceed a cumulative total of one million dollars ($1,000,000) for each period of 30 days during which a violation continues.

(2) For the purposes of this subsection, a person's state of mind is knowing with respect to:
  a. His conduct, if he is aware of the nature of his conduct;
  b. An existing circumstance, if he is aware or believes that the circumstance exists; or
  c. A result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(3) Under this subsection, in determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury:
  a. The person is responsible only for actual awareness or actual belief that he possessed; and
  b. Knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant.

(4) It is an affirmative defense to a prosecution under this subsection that the conduct charged was conduct consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of an occupation, a business, or a profession; or of medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent. The defendant may establish an affirmative defense under this subdivision by a preponderance of the evidence.

(i) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Article or Article 21, or a rule implementing this Article or Article 21; or who knowingly makes a false statement of a material fact in a rulemaking or contested case under this Article or Article 21; or who falsifies, tampers with, or knowingly renders inaccurate any recording or monitoring device or method required to be operated or maintained under this Article or Article 21 or rules of the Commission implementing this Article or Article 21, shall be guilty of a Class 2 misdemeanor which may include a fine not to exceed ten thousand dollars ($10,000).

(j) Repealed by Session Laws 1993, c. 539, s. 1320. (1973, c. 821, s. 6; c. 1262, s. 23; c. 1331, s. 3; 1975, c. 19, s. 53; c. 842, ss. 6, 7; 1977, c. 771, s. 4; 1979, c. 545, ss. 4-6; 1987, c. 748, s. 2; c. 827, ss. 154, 212; 1989, c. 135, s. 8; 1989 (Reg. Sess., 1990), c. 1004, s. 49; c. 1045, s. 5; 1993, c. 539, ss. 1026, 1027, 1318, 1319, 1320; 1994, Ex. Sess., c. 24, s. 14(c); 2002-4, ss. 6-8.)

**Legal Periodicals.** — For note, "The Forty-Two Hundred Dollar Question: 'May State Agencies Have Discretion in Setting Civil Penalties Under the North Carolina Constitution?'," see 68 N.C.L. Rev. 1035 (1990).

## § 143-215.114C. Enforcement procedures: injunctive relief.

Whenever the Department has reasonable cause to believe that any person has violated or is threatening to violate any of the provisions of this Article or Article 21 of this Chapter or a rule implementing this Article or Article 21 of this Chapter, the Department, either before or after the institution of any other action or proceeding authorized by this Article or Article 21 of this Chapter, may request the Attorney General to institute a civil action in the name of the State upon the relation of the Department for injunctive relief to restrain the violation or threatened violation and for such other and further relief in the premises as the court shall deem proper. The Attorney General may institute such action in the Superior Court of Wake County, or, in his discretion, in the superior court of the county in which the violation occurred or may occur. Upon a determination by the court that the alleged violation of the provisions of this Article or Article 21 of this Chapter or the regulation of the Commission has occurred or is threatened, the court shall grant the relief necessary to prevent or abate the violation or threatened violation. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from any penalty prescribed for violation of this Article or Article 21 of this Chapter. (1973, c. 821, s. 6; c. 1262, s. 23; c. 1331, s. 3; 1975, c. 19, s. 53; c. 842, ss. 6, 7; 1977, c. 771, s. 4; 1979, c. 545, ss. 4-6; 1987, c. 748, s. 2; c. 827, ss. 154, 212; 1989, c. 135, s. 8; 1989 (Reg. Sess., 1990), c. 1045, s. 6.)

**Legal Periodicals.** — For note, "The Forty-Two Hundred Dollar Question: 'May State Agencies Have Discretion in Setting Civil Penalties Under the North Carolina Constitution?'," see 68 N.C.L. Rev. 1035 (1990).

## ARTICLE 22.

### *State Ports Authority.*

**§§ 143-216 through 143-228.1:** Recodified as §§ 143B-452 through 143B-467 by Session Laws 1977, c. 198, s. 9.

## ARTICLE 23.

## *Armories.*

### § 143-229: Repealed by Session Laws 1975, c. 604, s. 1.

**Cross References.** — As to present provisions relating to armories, see G.S. 127A-1 et seq.

### §§ 143-230, 143-231: Repealed by Session Laws 1973, c. 620, s. 9.

### §§ 143-232 through 143-236.1: Repealed by Session Laws 1975, c. 604, s. 1.

## ARTICLE 23A.

## *Stadium Authority.*

### §§ 143-236.2 through 143-236.28: Repealed by Session Laws 1971, c. 882, s. 2.

## ARTICLE 24.

## *Wildlife Resources Commission.*

### § 143-237. Title.

This Article shall be known and may be cited as the North Carolina Wildlife Resources Law. (1947, c. 263, s. 1.)

**Cross References.** — As to the Motorboat Committee of the Wildlife Resources Commission and enforcement of the motorboat law by the Commission, see G.S. 75A-3.

**State Government Reorganization.** — The Wildlife Resources Commission was transferred to the Department of Natural and Economic Resources (now the Department of Environment and Natural Resources) by former G.S. 143A-118, enacted by Session Laws 1971, c. 864, and repealed by Session Laws 1973, c. 1262, s. 86. For present provisions as to the Department of Environment and Natural Resources, see G.S. 143B-275 et seq.

**Editor's Note.** — Session Laws 2009-449, s. 1(a) and (b), provides: "(a) The Department of Justice and the Wildlife Resources Commission may develop jointly a plan for the construction and operation of a firing range on land owned by the Wildlife Resources Commission. The plan may identify a tract of land in the Green River game land approved by the Wildlife Resources Commission for this purpose. The plan may provide for a firing range that can accommodate the needs of the criminal justice officers attending the Western Justice Academy, federal, State, and local agencies, community college law enforcement training, and the law enforcement officers of the Wildlife Resources Commission, as well as provide a facility for hunter safety classes supervised and conducted by the Wildlife Resources Commission. The plan may further provide for a public firing and archery range, open and accessible for public use, to be operated by the Wildlife Resources Commission. The Wildlife Resources Commission, in consultation with the Department of Justice, may present the plan developed pursuant to this section to the Chairs of the Senate and House of Representatives Appropriations Committees on or before April 1, 2010.

"(b) The Department of Justice and the Wildlife Resources Commission may use receipts and other non-General Fund sources totaling up to the sum of one million dollars ($1,000,000) to provide additional funding for any project resulting from the plan authorized by this section, in addition to any funds that may be authorized or appropriated for the project by the General Assembly."

**CASE NOTES**

**Cited** in State ex rel. N.C. Utils. Comm'n v. Story, 241 N.C. 103, 84 S.E.2d 386 (1954).

## § 143-238. Definitions.

As used in this Article unless the context clearly requires otherwise:

(1) The word "Commission" shall mean the North Carolina Wildlife Resources Commission.

(2) The word "Director" shall mean the Executive Director of the North Carolina Wildlife Resources Commission.

(3) The terms "wildlife resources" and "wildlife" shall be defined in accordance with the definitions in G.S. 113-129. (1947, c. 263, s. 2; 1965, c. 957, s. 12.)

## § 143-239. Statement of purpose.

The purpose of this Article is to create a separate State agency to be known as the North Carolina Wildlife Resources Commission, the function, purpose, and duty of which shall be to manage, restore, develop, cultivate, conserve, protect, and regulate the wildlife resources of the State of North Carolina, and to administer the laws relating to game, game and freshwater fishes, and other wildlife resources enacted by the General Assembly to the end that there may be provided a sound, constructive, comprehensive, continuing, and economical game, game fish, and wildlife program directed by qualified, competent, and representative citizens, who shall have knowledge of or training in the protection, restoration, proper use and management of wildlife resources. (1947, c. 263, s. 3; 1965, c. 957, s. 13.)

**Cross References.** — As to the Wildlife Endowment Fund, see G.S. 143-250.1.

## § 143-240. Creation of Wildlife Resources Commission; districts; qualifications of members.

(a) There is hereby created the Wildlife Resources Commission of the Department of Environment and Natural Resources which shall consist of 19 citizens of North Carolina who shall be appointed as is provided in G.S. 143-241.

Each member of the Commission shall be an experienced hunter, fisherman, farmer, or biologist, who shall be generally informed on wildlife conservation and restoration problems.

Members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5 or G.S. 138-6 as the case may be, which shall be paid from fees collected by the Wildlife Resources Commission.

(b) There are established the following geographical wildlife districts:

First district to be composed of the following counties: Bertie, Camden, Chowan, Currituck, Dare, Gates, Hertford, Hyde, Martin, Pasquotank, Perquimans, Tyrrell, Washington.

Second district to be composed of the following counties: Beaufort, Carteret, Craven, Duplin, Greene, Jones, Lenoir, New Hanover, Onslow, Pamlico, Pender, Pitt.

Third district to be composed of the following counties: Edgecombe, Franklin, Halifax, Johnston, Nash, Northampton, Vance, Wake, Warren, Wayne, Wilson.

Fourth district to be composed of the following counties: Bladen, Brunswick, Columbus, Cumberland, Harnett, Hoke, Robeson, Sampson, Scotland.

Fifth district to be composed of the following counties: Alamance, Caswell, Chatham, Durham, Granville, Guilford, Lee, Orange, Person, Randolph, Rockingham.

Sixth district to be composed of the following counties: Anson, Cabarrus, Davidson, Mecklenburg, Montgomery, Moore, Richmond, Rowan, Stanly, Union.

Seventh district to be composed of the following counties: Alexander, Alleghany, Ashe, Davie, Forsyth, Iredell, Stokes, Surry, Watauga, Wilkes, Yadkin.

Eighth district to be composed of the following counties: Avery, Burke, Caldwell, Catawba, Cleveland, Gaston, Lincoln, McDowell, Mitchell, Rutherford, Yancey.

Ninth district to be composed of the following counties: Buncombe, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Madison, Polk, Swain, Transylvania. (1947, c. 263, s. 4; 1961, c. 737, s. 11/2; 1965, c. 859, s. 2; 1971, c. 285; 1977, c. 771, s. 4; c. 906, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 79; 1989, c. 68, s. 1; c. 727, s. 218(112); 1993 (Reg. Sess., 1994), c. 684, s. 13; 1997-443, s. 11A.119(a); 2001-486, s. 2.11(a).)

**Editor's Note.** — Session Laws 1989 c. 68, which amended this section, in s. 4 provided: "This act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act."

## CASE NOTES

**Commission to Act by Resolution.** — The Wildlife Resources Commission, in the discharge of its important duties in the public interest, can act only by resolution passed in a legal meeting of its members sitting as a commission, which resolution should be recorded in its minutes, and will thus become the best evidence of the Commission's actions. State ex rel. N.C. Utils. Comm'n v. Story, 241 N.C. 103, 84 S.E.2d 386 (1954).

**Construction of Resolution Authorizing Director to Purchase Lands.** — A resolution of the Wildlife Resources Commission authorizing its director to negotiate for the purchase of certain lands and setting up a certain sum in its budget therefor, even if it was construed to authorize the director to actually purchase the lands designated, was not authorization to him to institute proceedings to condemn any part of the lands. Such resolution could not support a finding that an application for a certificate of public convenience and necessity of the acquisition of the land was filed by the Wildlife Resources Commission so as to confer jurisdiction on the Utilities Commission to issue the certificate. State ex rel. N.C. Utils. Comm'n v. Story, 241 N.C. 103, 84 S.E.2d 386 (1954).

## § 143-241. Appointment and terms of office of Commission members; filling of vacancies.

The members of the North Carolina Wildlife Resources Commission shall be appointed as follows:

The Governor shall appoint one member each from the first, fourth, and seventh wildlife districts to serve six-year terms;

The Governor shall appoint one member each from the second, fifth, and eighth wildlife districts to serve two-year terms;

The Governor shall appoint one member each from the third, sixth, and ninth wildlife districts to serve four-year terms;

The Governor shall also appoint two at-large members to serve four-year terms.

The General Assembly shall appoint eight members of the Commission to serve two-year terms, four upon the recommendation of the Speaker of the House, four upon the recommendation of the President Pro Tempore of the Senate, in accordance with G.S. 120-121. Of the members appointed upon the recommendation of the Speaker of the House and upon the recommendation of the President Pro Tempore of the Senate, at least one of each shall be a member of the political party to which the largest minority of the members of the General Assembly belongs.

Thereafter as the terms of office of the members of the Commission appointed by the Governor from the several wildlife districts expire, their successors shall be appointed for terms of six years each. As the terms of office of the members of the Commission appointed by the General Assembly expire, their successors shall be appointed for terms of two years each. All members appointed by the Governor serve at the pleasure of the Governor that appointed them and they may be removed by that Governor at any time. A successor to the appointing Governor may remove a Commission member only for cause as provided in G.S. 143B-13. Members appointed by the General Assembly serve at the pleasure of that body and may be removed by law at any time. In the event that a Commission member is removed, the member appointed to replace the removed member shall serve only for the unexpired term of the removed member. (1947, c. 263, s. 5; 1961, c. 737, s. 1; 1965, c. 859, s. 3; 1973, c. 825, s. 2; 1977, c. 906, s. 2; 1981 (Reg. Sess., 1982), c. 1191, s. 80; 1989, c. 68, s. 3; 1993 (Reg. Sess., 1994), c. 684, s. 14; 1995, c. 490, s. 64; 2001-486, s. 2.11(b).)

**Editor's Note.** — Session Laws 1989, c. 68, which amended this section, in s. 4 provided: "This act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act."

## § 143-242. Vacancies by death, resignation or otherwise.

Appointments to fill vacancies of gubernatorial appointees on the Commission occurring by reason of death, disability, resignation or otherwise shall be made by the Governor for the balance of the unexpired terms by appointment of a member from the State at large, or from the appropriate district in accordance with the procedure set out in G.S. 143-241. Appointments to fill vacancies of those members of the Commission appointed by the General Assembly shall be made under G.S. 120-122. The Governor shall have the power to remove any member of the Commission from office for misfeasance, malfeasance or nonfeasance. (1947, c. 263, s. 6; 1973, c. 825, s. 3; 1977, c. 906, s. 3; 1981 (Reg. Sess., 1982), c. 1191, s. 81.)

## § 143-243. Organization of the Commission; election of officers; Robert's Rules of Order.

The Commission shall hold at least two meetings annually, one in January and one in July, and seven members of the Commission shall constitute a quorum for the transaction of business. Additional meetings may be held at such other times within the State as may be deemed necessary for the efficient transaction of the business of the Commission. The Commission may hold additional or special meetings at any time at the call of the chairman or on call of any five members of the Commission. The Commission shall determine its own organization and methods of procedure in accordance with the provisions of this Article, and shall have an official seal, which shall be judicially noticed.

At the first scheduled meeting of the Commission after July 1, 1977, and on July 1 of each odd-numbered year thereafter, the Commission shall select from among its membership a chairman and a vice-chairman who shall serve for terms of two years or until their successors are elected and qualified. The Secretary of Environment and Natural Resources or his designee shall serve as secretary of the Commission.

The chairman shall guide and coordinate the official actions and official activities of the Commission in fulfilling its program responsibility for (i) the appointment and separation of the executive director of the Commission, (ii) organizing the personnel of the Commission, (iii) setting the statewide policy of the Commission, (iv) budgeting and planning the use of the Wildlife and Motorboat Funds, subject to the approval of the General Assembly, (v) holding public hearings, and (vi) adopting rules as authorized by law. The chairman shall report to and advise the Governor on the official actions and work of the Commission and on all wildlife conservation and boating safety matters that affect the interest of the people of the State.

Meetings of the Commission shall be conducted pursuant to Robert's Rules of Order. (1947, c. 263, s. 7; 1973, c. 825, s. 4; 1977, c. 771, s. 4; c. 906, s. 4; 1983, c. 717, ss. 71, 72; 1987, c. 827, s. 213; 1989, c. 727, s. 218(113); 1997-443, s. 11A.119(a); 1997-456, s. 27.)

**Editor's Note.** — Subdivisions (1) through (6) in the third paragraph were renumbered as subdivisions (i) through (vi) pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

## § 143-244. Location of offices.

The Board of Public Buildings and Grounds shall provide the Commission with offices in the city of Raleigh, North Carolina. (1947, c. 263, s. 8.)

**§ 143-245:** Repealed by Session Laws 1977, c. 906, s. 5.

## § 143-246. Executive Director; appointment, qualifications and duties.

The North Carolina Wildlife Resources Commission as soon as practicable after its organization shall select and appoint a competent person qualified as hereinafter set forth as Executive Director of the North Carolina Wildlife Resources Commission. The Executive Director shall be charged with the supervision of all activities under the jurisdiction of the Commission and shall serve as the chief administrative officer of the said Commission. Subject to the approval of the Commission and the Director of the Budget, he is hereby authorized to employ such clerical and other assistants as may be deemed necessary. The person selected as Executive Director shall have had training and experience in conservation, protection and management of wildlife resources. The salary of such Director shall be fixed by the Wildlife Resources Commission, in an amount at least equal to the salary of the Director of the Division of Marine Fisheries. The Director shall be allowed actual expenses incurred while on official duties away from resident headquarters. The salary and expenses of the Director shall be paid from the Wildlife Resources Fund subject to the provisions of the Executive Budget Act. The term of office of the Executive Director shall be at the pleasure of the Commission. Such bond shall be made as part of the blanket bond of State officers and employees provided for in G.S. 128-8. (1947, c. 263, s. 10; 1957, c. 541, s. 17; 1969, c. 844, s. 5; 1979, c. 830, s. 7; 1981, c. 884, s. 11; 1983, c. 717, s. 73; 1985, c. 479, s. 221; 1998-212, s. 28.19(a).)

## § 143-247. Transfer of powers, duties, jurisdiction, and responsibilities.

All duties, powers, jurisdiction, and responsibilities now vested by statute in and heretofore exercised by the Department of Conservation and Development, the Board of Conservation and Development, the Director of Conservation and Development, the Division of Game and Inland Fisheries, the Commissioner of Game and Inland Fisheries, or any predecessor organization, board, commission, commissioner or official relating to or pertaining to the wildlife resources of North Carolina, subject to the provisions of Subchapter IV of Chapter 113 of the General Statutes, are hereby transferred to and vested by law in the North Carolina Wildlife Resources Commission hereby created, subject to the provisions of this Article. The powers, duties, jurisdiction, and responsibilities hereby transferred shall be vested in the Commission immediately upon its organization under the provisions of this Article. Provided however, that no provision of this Article shall be construed as transferring to or conferring upon the North Carolina Wildlife Resources Commission, herein created, jurisdiction over the administration of any laws regulating the pollution of streams or public waters in North Carolina. (1947, c. 263, s. 11; 1965, c. 957, s. 14.)

## § 143-247.1. Commission may accept gifts.

The Wildlife Resources Commission is hereby authorized and empowered to accept gifts, donations or contributions from any source, which funds shall be held in a separate account and used solely for the purposes of wildlife conservation and management. Such funds shall be administered by the Wildlife Resources Commission and shall be used for wildlife conservation and management in a manner consistent with wildlife conservation management principles. (1971, c. 388.)

## § 143-247.2. Wildlife Conservation Account; emblems for those who donate to the Account.

(a) Account. — The Wildlife Conservation Account is established within the Wildlife Resources Fund and is subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. Revenue is credited to the Account from donations of income tax refunds, from other donations, from revenue derived from the sale of wildlife resources license plates, and from interest earned on the Account balance. The Commission may use revenue in the Account only for the following purposes:

(1) To manage, preserve, or protect wildlife species that are endangered, threatened, or of special concern and are included on the State's protected animal lists.

(2) To manage, preserve, or protect nongame wildlife species that are not on the State's protected animal lists.

(3) To administer and enforce nongame wildlife programs under the jurisdiction of the Commission.

(b) Emblems. — The Commission may issue and sell appropriate emblems by which to identify recipients of the emblems as contributors to the Wildlife Conservation Account. Emblems of different size, shape, type, or design may be used to recognize contributions in different amounts. The Commission may not issue an emblem for a contribution of less than five dollars ($5.00). (1975, c. 77; 1993, c. 257, s. 14; c. 543, s. 7; 1995, c. 509, s. 81; 2007-448, s. 1.)

## § 143-248. Transfer of lands, buildings, records, equipment, and other properties.

There is hereby transferred to the North Carolina Wildlife Resources Commission all lands, buildings, structures, records, reports, equipment, vehicles, supplies, materials, and other properties, and the possession and use thereof, which have heretofore been acquired or obtained and now remain in the possession of, or which are now and heretofore have been used or intended for use by the Department of Conservation and Development, the Director of Conservation and Development, the Division of Game and Inland Fisheries, and the Commission of Game and Inland Fisheries, and any predecessor organization or division or official of either, for the purpose of protecting, propagating, and developing game, fur-bearing animals, game fish, inland fisheries, and all other wildlife resources which heretofore have been used or held by them in connection with any program conducted for said purposes, whether said lands or properties were acquired, purchased, or obtained by deed, gift, grant, contract, or otherwise; the said lands and other properties hereby transferred, subject to the limitations hereinafter set forth to the said Wildlife Resources Commission shall be held and used by it subject to the provisions of this Article and other provisions of law in furtherance of the intents, purposes, and provisions of this Article and other provisions of law in such manner and for such purposes as may be determined by the Commission. In the event that there shall arise any conflict in the transfer of any properties or functions as herein provided, the Governor of the State is hereby authorized and empowered to issue such executive order, or orders, as may be necessary clarifying and making certain the issue, or issues, thus arising: Provided, further, nothing herein contained shall be construed to transfer any of the State parks or State forests to the North Carolina Wildlife Resources Commission: Provided, further, title to the property transferred by virtue of the provisions of this Article shall be held by the State of North Carolina for the use and benefit of the North Carolina Wildlife Resources Commission and the use, control and sale of any of such property shall be governed by the general law of the State affecting such matters. (1947, c. 263, s. 12; 1965, c. 957, s. 15.)

### CASE NOTES

**Cited** in Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

## § 143-249. Transfer of personnel.

Upon July 1, 1947, the Division of Game and Inland Fisheries of the North Carolina Department of Conservation and Development shall cease to exist and all employees of said Division shall continue as employees of the Commission at their option or until further action by the Commission. (1947, c. 263, s. 13.)

## § 143-250. Wildlife Resources Fund.

All moneys in the game and fish fund or any similar State fund when this Article becomes effective shall be credited forthwith to a special fund in the office of the State Treasurer, and the State Treasurer shall deposit all such moneys in said special fund, which shall be known as the Wildlife Resources Fund.

All unexpended appropriations made to the Department of Conservation and Development, the Board of Conservation and Development, the Division of Game and Inland Fisheries or to any other State agency for any purpose pertaining to wildlife and wildlife resources shall also be transferred to the Wildlife Resources Fund.

Except as otherwise specifically provided by law, all moneys derived from hunting, fishing, trapping, and related license fees, exclusive of commercial fishing license fees, including the income received and accruing from the investment of license revenues, and all funds thereafter received from whatever sources shall be deposited to the credit of the Wildlife Resources Fund and made available to the Commission until expended subject to the provisions of this Article. License revenues include the proceeds from the sale of hunting, fishing, trapping, and related licenses, from the sale, lease, rental, or other granting of rights to real or personal property acquired or produced with license revenues, and from federal aid project reimbursements to the extent that license revenues originally funded the project for which the reimbursement is being made. For purposes of this section, real property includes lands, buildings, minerals, energy resources, timber, grazing rights, and animal products. Personal property includes equipment, vehicles, machines, tools, and annual crops. The Wildlife Resources Fund herein created shall be subject to the provisions of the State Budget Act, Chapter 143C of the General Statutes of North Carolina as amended, and the provisions of the General Statutes of North Carolina as amended, and the provisions of the Personnel Act, Chapter 143, Article 2 of the General Statutes of North Carolina as amended.

All moneys credited to the Wildlife Resources Fund shall be made available to carry out the intent and purposes of this Article in accordance with plans approved by the North Carolina Wildlife Resources Commission, and all such funds are hereby appropriated, reserved, set aside and made available until expended, for the enforcement and administration of this Article, Chapter 75A, Article 1, and Chapter 113, Subchapter IV of the General Statutes of North Carolina. The Wildlife Resources Commission shall report to the Joint Legislative Commission on Governmental Operations before expending from the Wildlife Resources Fund more than the amount authorized in the budget enacted by the General Assembly for the fiscal period.

In the event any uncertainty should arise as to the funds to be turned over to the North Carolina Wildlife Resources Commission the Governor shall have full power and authority to determine the matter and his recommendation shall be final and binding to all parties concerned. (1947, c. 263, s. 14; 1965, c. 957, s. 16; 1981, c. 482, s. 2; 1982 (Reg. Sess., 1982), c. 1182, s. 1; 1987, c. 816; 1991, c. 689, s. 167(a); 2006-203, s. 92.)

**Editor's Note.** — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 12.4(b), provides: "The State Treasurer shall transfer a sum equal to the sum of funds disbursed pursuant to subsection (a) of this section [up to one million dollars ($1,000,000)] from the Marine Resources Fund to the Wildlife Resources Fund on July 1, 2010."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 92, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "State Budget Act, Chapter 143C" for "Executive Budget Act, Chapter 143, Article 1" near the end of the third paragraph.

## § 143-250.1. Wildlife Endowment Fund.

(a) Recognizing the inestimable importance to the State and its people of conserving the wildlife resources of North Carolina, and for the purpose of providing the opportunity for citizens and residents of the State to invest in the future of its wildlife resources, there is created the North Carolina Wildlife Endowment Fund, the income and principal of which shall be used only for the purpose of supporting wildlife conservation programs of the State in accordance with this section. This fund shall also be known as the Eddie Bridges Fund.

(b) There is created the Board of Trustees of the Wildlife Endowment Fund of the Wildlife Resources Commission, with full authority over the administration of the Wildlife Endowment Fund, whose ex officio chairman, vice-chairman, and members shall be the chairman, vice-chairman, and members of the Wildlife Resources Commission. The State Treasurer shall be the custodian of the Wildlife Endowment Fund and shall invest its assets in accordance with the provisions of G.S. 147-69.2 and 147-69.3.

(c) The assets of the Wildlife Endowment Fund shall be derived from the following:

(1) The proceeds of any gifts, grants and contributions to the State which are specifically designated for inclusion in the fund;

(2) The proceeds from the sale of lifetime sportsman combination licenses issued pursuant to G.S. 113-270.1D;

(3) The proceeds from the sale of lifetime hunting and lifetime fishing licenses pursuant to G.S. 113-270.2(c)(2) and G.S. 113-271(d)(3);

(4) The proceeds of lifetime subscriptions to the magazine Wildlife in North Carolina at such rates as may be established from time to time by the Wildlife Resources Commission;

(5) Any amount in excess of the statutory fee for a particular lifetime license or lifetime subscription shall become an asset of the fund and shall qualify as a tax exempt donation to the State;

(5a) The proceeds from the sale of lifetime combination hunting and fishing licenses for disabled residents pursuant to G.S. 113-270.1C(b)(4);

(6) Such other sources as may be specified by law.

(d) The Wildlife Endowment Fund is declared to constitute a special trust derived from a contractual relationship between the State and the members of the public whose investments contribute to the fund. In recognition of such special trust, the following limitations and restrictions are placed on expenditures from the funds:

(1) Any limitations or restrictions specified by the donors on the uses of the income derived from gifts, grants and voluntary contributions shall be respected but shall not be binding.

(2) No expenditures or disbursements from the income from the proceeds derived from the sale of Infant Lifetime Sportsman or Youth Lifetime Sportsman Licenses pursuant to G.S. 113-270.1D(b)(1) or (2) shall be made for any purpose until the respective holders of such licenses attain the age of 16 years. The State Treasurer, as custodian of the fund, shall determine actuarially from time to time the amount of income within the fund which remains encumbered by and which is free of this restriction. For such purpose, the executive director shall cause deposits of proceeds from Infant Lifetime Sportsman Licenses to be distinguished and deposits of proceeds from Youth Lifetime Sportsman Licenses to be accompanied by information as to the ages of the license recipients.

(3) No expenditure or disbursement shall be made from the principal of the Wildlife Endowment Fund except as otherwise provided by law.

(4) The income received and accruing from the investments of the Wildlife Endowment Fund must be spent only in furthering the conservation of wildlife resources and the efficient operation of the North Carolina Wildlife Resources Commission in accomplishing the purposes of the agency as set forth in G.S. 143-239.

(e) The Board of Trustees of the Wildlife Endowment Fund may accumulate the investment income of the fund until the income, in the sole judgment of the trustees, can provide a significant supplement to the budget of the Wildlife Resources Commission. After that time the trustees, in their sole discretion and authority, may direct expenditures from the income of the fund for the purposes set out in division (4) of subsection (d).

(f) Expenditure of the income derived from the Wildlife Endowment Fund shall be made through the State budget accounts of the Wildlife Resources Commission in accordance with the provisions of the Executive Budget Act. The Wildlife Endowment Fund is subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes.

(g) The Wildlife Endowment Fund and the income therefrom shall not take the place of State appropriations or agency receipts placed in the Wildlife Resources Fund, or any part thereof, but any portion of the income of the Wildlife Endowment Fund available for the purpose set out in division (4) of subsection (d) shall be used to supplement other income of and appropriations to the Wildlife Resources Commission to the end that the Commission may improve and increase its services and become more useful to a greater number of people.

(h) In the event of a future dissolution of the Wildlife Resources Commission, such State agency as shall succeed to its budgetary authority shall, ex officio, assume the trusteeship of the Wildlife Endowment Fund and shall be bound by all the limitations and restrictions placed by this section on expenditures from the fund. No repeal or modification of this section or of G.S. 143-239 shall alter the fundamental purposes to which the Wildlife Endowment Fund may be applied. No future dissolution of the Wildlife Resources Commission or substitution of any agency in its stead shall invalidate any lifetime license issued in accordance with G.S. 113-270.1D(b), 113-270.2(c)(2), or 113-271(d)(3). (1981, c. 482, s. 1; 1993, c. 257, s. 15; 1993 (Reg. Sess., 1994), c. 684, ss. 10-12; 1997-326, s. 4.)

**Editor's Note.** — Session Laws 2005-455, s. 2.9, provides: "G.S. 113-174.2(d), as enacted by Section 1.4 of this act, provides that the holders of certain lifetime licenses purchased prior to January 1, 2006, are exempt from the license requirement for engaging in recreational fishing in coastal fishing waters. The General Assembly finds that, because the holders of these lifetime licenses will be authorized to take marine resources from the coastal fishing waters of the State, it is appropriate that a portion of the revenues derived from the sale of these lifetime licenses should be transferred to the Marine Resources Endowment Fund so that the endowment investment income generated by the transferred license revenues will be used to manage, protect, restore, develop, cultivate, conserve, and enhance the marine resources of the State. The General Assembly specifically finds that this transfer of funds is consistent with the overall spirit, intent, and purpose underlying the creation of the Wildlife Endowment Fund and the Marine Resources Endowment Fund. Therefore, in accordance with G.S. 143-250.1(d)(3), the State Treasurer shall transfer the sum of three million four hundred thousand dollars ($3,400,000) from the Wildlife Endowment Fund to the Marine Resources Endowment Fund. This transfer shall be made in five equal installments of six hundred eighty thousand dollars ($680,000) on the first day of March in 2006, 2007, 2008, 2009, and 2010."

Session Laws 2005-455, ss. 10(a) and (b), provide: "(a) The Wildlife Resources Commission may disburse up to one million dollars ($1,000,000) from the Wildlife Resources Fund to implement this act.

"(b) The State Treasurer shall transfer a sum equal to the sum of funds disbursed pursuant to subsection (a) of this section from the Marine Resources Fund to the Wildlife Resources Fund on July 1, 2010."

## § 143-251. Cooperative agreements.

In furtherance of the purposes of this Article the Commission is hereby authorized and empowered to enter into cooperative agreements pertaining to the management and development of the wildlife resources with federal, State, and other agencies, or governmental subdivisions. (1947, c. 263, s. 15.)

## § 143-252. Article subject to Chapter 113.

Nothing in this Article shall be construed to affect the jurisdictional division between the North Carolina Wildlife Resources Commission and the Department of Environment and Natural Resources contained in Subchapter IV of Chapter 113 of the General Statutes, or in any way to alter or abridge the powers and duties of the two agencies conferred in that Subchapter. (1947, c. 263, s. 16; 1965, c. 957, s. 17; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 166; 1997-443, s. 11A.119(a).)

## § 143-253. Jurisdictional questions.

In the event of any questions arising between the Department of Environment and Natural Resources and the North Carolina Wildlife Resources Commission as to any duty or responsibility or authority imposed upon either of said bodies by law, or in case of any conflicting rules or administrative practices adopted by said bodies, such questions or matters shall be determined by the Governor and his determination shall be binding on each of said bodies. (1947, c. 263, s. 17; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 167; 1997-443, s. 11A.119(a).)

**§ 143-254:** Repealed by Session Laws 1987, c. 827, s. 214.

**§ 143-254.1:** Repealed by Session Laws 1979, c. 830, s. 8.

**Cross References.** — For statute covering the subject matter of the repealed section, see G.S. 113-307.1(c).

## § 143-254.2. Enforcement of local laws.

(a) It shall be the duty and responsibility of the North Carolina Wildlife Resources Commission to enforce all local acts heretofore or hereinafter enacted respecting game animals, fur-bearing animals and birds, including local acts which prohibit or restrict hunting from, to or across public roads and highways and including local acts which prohibit or restrict the taking of specified animals or birds.

Provided, however, that the provisions of this section shall not apply on the lands of the Eastern Band of Cherokee Indians.

(b) The provisions of this section shall not be construed to require the hiring of additional personnel by the North Carolina Wildlife Resources Commission. (1977, c. 120, ss. 1-3.)

## § 143-254.5. Disclosure of personal identifying information.

Social security numbers and identifying information obtained by the Commission shall be treated as provided in G.S. 132-1.10. For purposes of this section, "identifying information" also includes a person's mailing address, residence address, date of birth, and telephone number. (2005-455, s. 1.17; 2006-255, s. 11.1.)

## ARTICLE 25.

## *National Park, Parkway and Forests Development Commission.*

### §§ 143-255 through 143-257: Repealed by Session Laws 1973, c. 1262, s. 86.

**Cross References.** — As to the North Carolina National Park, Parkway and Forests Development Council, see G.S. 143B-324.1 through 143B-324.3.

### § 143-258: Repealed by Session Laws 2002-165, s. 1.8, effective October 23, 2002.

### §§ 143-259, 143-260: Repealed by Session Laws 1973, c. 1262, s. 86.

**Cross References.** — As to the North Carolina National Park, Parkway and Forests Development Council, see G.S. 143B-324.1 through 143B-324.3.

## ARTICLE 25A.

## *Historic Sites Commission; Historic and Archeological Sites.*

### §§ 143-260.1 through 143-260.5: Repealed by Session Laws 1955, c. 543, s. 5.

## ARTICLE 25B.

## *State Nature and Historic Preserve Dedication Act.*

### § 143-260.6. Short title.

This Article shall be known and may be cited as the State Nature and Historic Preserve Dedication Act. (1973, c. 443, s. 1.)

**National Heritage Area Designation Commission.** — Session Laws 2001-491, ss. 18.1 to 18.10, creates the National Heritage Area Designation Commission. The Commission is directed to seek designation as a National Heritage Area of the 23 county mountain region of North Carolina comprised of the counties designated to be served by the Western North Carolina Regional Economic Development Commission under G.S. 158-8.1: Alleghany, Ashe, Avery, Burke, Buncombe, Caldwell, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Madison, McDowell, Mitchell, Polk, Rutherford, Swain, Transylvania, Watauga, Wilkes, and Yancey. In ss. 18.1 and 18.2 the General Assembly makes the following findings:

"Section 18.1. The General Assembly finds that the following physical and cultural features in the mountain region of Western North Carolina are of national significance:

"(1) The Great Smoky Mountains National Park is the most visited national park in America.

"(2) The Blue Ridge Parkway is the nation's longest scenic highway.

"(3) The Joyce Kilmer Memorial Forest is the last remaining stand of virgin timber in the eastern United States.

"(4) The Linville Gorge wilderness area is the first wilderness in the eastern United States and the deepest gorge east of the Mississippi River.

"(5) Mount Mitchell is the highest mountain in the eastern United States.

"(6) The New River is the second oldest river in the world and was designated as an American Heritage River in 1998.

"(7) Fontana Dam is the highest dam in eastern America that was built by the Tennessee Valley Authority and is known as one of the country's greatest engineering feats in history.

"(8) Grandfather Mountain is the oldest mountain in the eastern United States, was designated as an International Biosphere Reserve by the United Nations, and is the only mountain that is privately owned.

"(9) The Cherokee Indian Qualla Boundary is the home of the Eastern Band of the Cherokee Indians, and the Trail of Tears is a National Heritage Trail.

"(10) Roan Mountain is the world's largest natural Catawba rhododendron garden.

"(11) The Appalachian Trail is the longest national hiking trail in the United States.

"(12) Whiteside Mountain has the highest cliffs of perpendicular bare rock east of the Rockies.

"(13) The Nantahala River is the most popular white-water rafting river in America.

"(14) The Biltmore Estate is America's largest private residence.

"(15) The Cradle of Forestry in America National Historic Site is the first forestry school in America.

"(16) The Cherohala Skyway is a National Scenic Byway.

"(17) The Carl Sandburg Home is a National Historic Site.

"Section 18.2. The General Assembly further finds that:

"(1) The National Park Service's definition of a National Heritage Area is a place designated by Congress where natural, cultural, historic, and scenic resources combine to form a cohesive, nationally distinctive landscape arising from patterns of human activity shaped by geography. These patterns make National Heritage Areas representative of the national experience through the physical features that remain and the traditions that have evolved in them. Continued use of the National Heritage Area by people whose traditions helped to shape the landscape enhances their significance.

"(2) Designation by the United States Congress of the North Carolina Appalachian Heritage Area, the 23-county mountain region of Western North Carolina, as a National Heritage Area would recognize the nationally distinctive landscape of this area and the role of this distinctive landscape in defining the collective American cultural landscape. The natural, cultural, historic, and recreation resources in this 23-county region combine to form a cohesive, nationally distinctive landscape arising from patterns of human activity shaped by geography. These patterns make the mountain region of Western North Carolina representative of the national experience through the physical features that remain and the traditions that have evolved in the area. Continued use of this area by people whose traditions helped to shape the landscape enhances its significance.

"(3) Since 1916, the National Park Service has been the federal agency responsible for preserving nationally significant natural and historic resources for present and future generations.

"(4) The National Park Service provides technical expertise to assist in all stages of the process for seeking designation as a National Heritage Area.

"(5) Congress has designated 18 National Heritage Areas.

"(6) Residents, business interests, nonprofit organizations, and governments within the proposed National Heritage Area are interested and committed to completing the suitability and feasibility study that must be completed prior to Congress's designating a National Heritage Area.

"(7) The National Heritage Area designation by the United States Congress for the 23-county mountain region of Western North Carolina would help to preserve and celebrate the uniqueness of this area and its defining landscape in North Carolina and offers the potential to ensure key educational and inspirational opportunities in perpetuity, without compromising traditional local control over, and use of, the landscape."

**Editor's Note.** — Session Laws 2001-491, s. 18.9, provides that notwithstanding G.S. 158-8.1, the Western North Carolina Regional Economic Development Commission shall provide administrative and funding support to the National Heritage Area Designation Commission.

Session Laws 2001-491, s. 18.10, provides: "Notwithstanding G.S. 158-8.1, the Western North Carolina Regional Economic Development Commission shall develop a regional heritage tourism plan and shall present the plan to the 2002 Regular Session of the 2001 General Assembly no later than May 1, 2002."

## § 143-260.7. Purpose.

It is the purpose of this Article to prescribe the conditions and procedures under which properties may be specially dedicated for the purposes enumerated by Article XIV, Sec. 5 of the North Carolina Constitution ("Conservation of Natural Resources"), accepted by the General Assembly for said purposes, and thereby constituted part of the State Nature and Historic Preserve. (1973, c. 443, s. 2.)

## § 143-260.8. Procedures.

(a) Within the meaning of this section:

(1) "Local governing body" means, as the case may be, the board of commissioners of a county, the city council (or equivalent legislative body) of a city, or the board of aldermen or board of commissioners (or equivalent legislative body) of a town.

(2) "Local government" means a county, city or town.

(3) "Properties" include any properties or interest in properties acquired by purchase or gift.

(b) The Council of State may petition the General Assembly to enact a law pursuant to Article XIV, Sec. 5 of the North Carolina Constitution, accepting any properties owned by the State of North Carolina (or proposed for gift to or purchase by the State) and designated in the petition for inclusion in the State Nature and Historic Preserve.

(c) The governing body of any local government, or any combination of two or more such bodies may petition the General Assembly to enact a law pursuant to Article XIV, Sec. 5 of the North Carolina Constitution, accepting any properties owned by the local government (or proposed for gift to or purchase by the local government) and designated in the petition for inclusion in the State Nature and Historic Preserve.

(d) The petition referred to in subsections (a) and (b) of this section shall identify the properties sought to be included in the Preserve. The General Assembly may then enact a law to accept the designated properties in the Preserve and enactment of the law by the General Assembly shall constitute the special dedication and acceptance of the designated properties in the State Nature and Historic Preserve contemplated by Article XIV, Sec. 5 of the North Carolina Constitution.

(e) In order to provide accessible information to the public concerning the State Nature and Historic Preserve, every law accepting or removing properties in the Preserve shall be codified in the General Statutes. A certified copy of every law accepting or removing properties in the Preserve shall be transmitted by the Secretary of State to the register of deeds in each county wherein these properties, or any part of them, are located, for filing and indexing in the grantor index.

(f) This Article shall constitute an exclusive procedure only for placing properties in the State Nature and Historic Preserve, and shall not preclude the dedication of properties by other means for purposes identical or similar to those enumerated by Article XIV, Sec. 5 of the North Carolina Constitution.

(g) It is the intent of this Article to complement any applicable provisions of federal and State law and regulations relating to dedication or acceptance of properties for purposes similar to those enumerated by Article XIV, Sec. 5 of the North Carolina Constitution. The Council of State is hereby authorized to adopt rules and regulations to implement the provisions of this Article, including rules and regulations consistent with this Article to comport with applicable federal and State law and regulations. A copy of this Article, and of any rules affecting properties owned by local governments shall be filed by the

Council of State with the chairman of the local governing body of every county, city and town within 30 days after ratification. (1973, c. 443, s. 3; 1999-268, s. 6; 2003-234, s. 3.)

**Tracts of Land Removed from State Nature and Historic Preserve.** — Session Laws 2003-234, s. 2, provides: "The following tracts of land are removed from the State Nature and Historic Preserve pursuant to Section 5 of Article XIV of the Constitution of North Carolina:

"(1) The portion of that certain tract or parcel of land at Crowders Mountain State Park in Cleveland County, Number Four Township, described in Deed Book 1286, Page 85, and containing 1.64 acres as shown on the drawing prepared by the Division of Parks and Recreation entitled 'Property to be Excepted Crowders Mountain State Park' dated 14 April 2003 and filed in the State Property Office.

"(2) The portion of those certain tracts or parcels of land at South Mountains State Park in Burke County, Lower Creek Township, described in Deed Book 925, Page 1284, and Deed Book 870, Page 1729 required for the right-of-way and easements for the relocation of SR 1904 within the Park and shown on the drawing prepared by Suttles Surveying P.A. entitled "Survey of the Proposed Centerline of the New Road Alignment for the State of North Carolina" bearing the preparer's file name 12455D.dwg, dated 10 April 2003 and filed in the State Property Office.

"(3) The portion of that certain tract or parcel of land at South Mountains State Park in Burke County, Morganton Township, described in Deed Book 28, Page 607, Deed Book 28, Page 467, and Plat Book 3, Page 78, and containing 0.33 acres as shown on the drawing prepared by Hawkins Land Surveying entitled 'Subdivision for Trustees of Walker Top Baptist Church' dated 26 September 2001 and filed with the State Property Office.

"(4) The portion of that certain tract or parcel of land at Eno River State Park in Durham County, Durham Outside Township, described in Deed Book 435, Page 673, and Plat Book 87, Page 66, containing 11,000 square feet and being the portion of Lot No. 2 shown as the existing scenic easement hereby removed on the drawing prepared by Sear-Brown entitled 'Recombination Plat Eno Forest Subdivision' bearing the preparer's file name 00-208-07.dwg, and filed with State Property Office."

Session Laws 2003-234, s. 4, provides: "In accordance with G.S. 143-260.8(e), the Secretary of State is directed to forward a certified copy of this act to the register of deeds of each county in which any portion of the property dedicated and accepted or removed by this act as part of the State Nature and Historic Preserve is located."

**Editor's Note.** — Session Laws 1999-268, s. 6, amended this section, effective upon passage of the constitutional amendment set out in Session Laws 1999-268, s. 3. The constitutional amendment was approved by the voters at the general election on November 5, 2002, and the results were certified by the State Board of Elections on November 19, 2002.

The preamble to Session Laws 2003-234, provides: "Whereas, Section 5 of Article XIV of the Constitution of North Carolina authorizes the dedication of State and local government properties as part of the State Nature and Historic Preserve upon acceptance by a law enacted by a three-fifths vote of the members of each house of the General Assembly and provides for removal of properties from the State Nature and Historic Preserve by a law enacted by a three-fifths vote of the members of each house of the General Assembly; and

"Whereas, the General Assembly enacted the State Nature and Historic Preserve Dedication Act, Chapter 443 of the 1973 Session Laws, to prescribe the conditions and procedures under which properties may be specifically dedicated for the purposes set out in Section 5 of Article XIV of the Constitution of North Carolina; and

"Whereas, over 6,700 acres have been added to the State Parks System since the last dedication and acceptance of properties as part of the State Nature and Historic Preserve pursuant to a petition of the Council of State dated 3 April 2001, and

"Whereas, in accordance with G.S. 143-260.8, on 6 May 2003 the Council of State voted to petition the General Assembly to enact a law pursuant to Section 5 of Article XIV of the Constitution of North Carolina to dedicate and accept properties added to the State Parks System and designated in the petition for inclusion as parts of the State Nature and Historic Preserve; and

"Whereas, as a part of its petition of 6 May 2003 the Council of State also requested the General Assembly to remove certain properties from the State Nature and Historic Preserve; and

"Whereas, G.S. 113-44.14 provides for additions to, and deletions from, the State Parks System upon authorization by the General Assembly; Now, therefore,

"The General Assembly of North Carolina enacts:"

## § 143-260.9. Dedication shall not affect maintenance and improvement of existing structures or facilities.

The dedication of property to the State Nature and Historic Preserve shall not prevent the administering State agency or local governing body from carrying out normal maintenance and improvement of existing structures or facilities that are appropriate to, and consistent with, the purpose for which the property in question was obtained by the State agency or local governing body. (1973, c. 443, s. 4.)

### OPINIONS OF ATTORNEY GENERAL

**Flowage Easement Allowed Following Dedication.** — Dedication of Umstead State Park to the State Nature and Historic Preserve as authorized by Article XIV, G.S. 5, Constitution of North Carolina, does not require a vote of three-fifths of the members of each House of the General Assembly before a flowage easement may be granted to Wake County for flood control purposes. See opinion of Attorney General to Mr. Charles L. Holliday, State Building Division, 55 N.C.A.G. 105 (1986).

## § 143-260.10. Components of State Nature and Historic Preserve.

The following are components of the State Nature and Historic Preserve accepted by the North Carolina General Assembly pursuant to G.S. 143-260.8:

(1) All lands and waters within the boundaries of the following units of the State Parks System as of May 5, 2009: Baldhead Island State Natural Area, Bay Tree Lake State Park, Bear Paw State Natural Area, Beech Creek Bog State Natural Area, Bullhead Mountain State Natural Area, Bushy Lake State Natural Area, Carolina Beach State Park, Carvers Creek State Park, Cliffs of the Neuse State Park, Chowan Swamp State Natural Area, Deep River State Trail, Dismal Swamp State Park, Elk Knob State Park, Fort Fisher State Recreation Area, Fort Macon State Park, Goose Creek State Park, Gorges State Park, Haw River State Park, Hammocks Beach State Park, Jones Lake State Park, Lake Norman State Park, Lea Island State Natural Area, Lower Haw River State Natural Area, Lumber River State Park, Mayo River State Park, Medoc Mountain State Park, Merchants Millpond State Park, Mitchells Millpond State Natural Area, Mount Mitchell State Park, Occoneechee Mountain State Natural Area, Pettigrew State Park, Pilot Mountain State Park, Pineola Bog State Natural Area, Raven Rock State Park, Run Hill State Natural Area, Sandy Run Savannas State Natural Area, Singletary Lake State Park, Sugar Mountain State Natural Area, Theodore Roosevelt State Natural Area, and Weymouth Woods-Sandhills Nature Preserve.

(2) All lands and waters within the boundaries of William B. Umstead State Park as of May 5, 2009, with the exception of Tract Number 65, containing 22.93140 acres as shown on a survey prepared by John S. Lawrence (RLS) and Bennie R. Smith (RLS), entitled "Property of The State of North Carolina William B. Umstead State Park", dated January 14, 1977 and filed in the State Property Office, which was removed from the State Nature and Historic Preserve by Chapter 450, Section 1 of the 1985 Session Laws. The tract excluded from the State Nature and Historic Preserve under this subdivision is deleted from the State Parks System in accordance with G.S. 113-44.14. The State

of North Carolina may only exchange this land for other land for the expansion of William B. Umstead State Park or sell and use the proceeds for that purpose. The State of North Carolina may not otherwise sell or exchange this land.

(3) Repealed by Session Laws 1999-268, s. 2.

(4) All lands within the boundaries of Morrow Mountain State Park as of May 5, 2009, with the exception of the following tract: That certain tract or parcel of land at Morrow Mountain State Park in Stanly County, North Albemarle Township, containing 0.303 acres, more or less, as surveyed and platted by Thomas W. Harris R.L.S., on a map dated August 27, 1988, and filed in the State Property Office, reference to which is hereby made for a more complete description.

(5) Repealed by Session Laws 1999-268, s. 2.

(6) All land within the boundaries of Crowders Mountain State Park as of May 5, 2009, with the exception of the following tracts. The tracts excluded from the State Nature and Historic Preserve under this subdivision are deleted from the State Parks System in accordance with G.S. 113-44.14. The State of North Carolina may only exchange this land for other land for the expansion of Crowders Mountain State Park or sell this land and use the proceeds for that purpose. The State may not otherwise sell or exchange this land.

a. The portion of that certain tract or parcel of land at Crowders Mountain State Park in Gaston County, Crowders Mountain Township, described in Deed Book 1939, page 800, and containing 757.28 square feet and as shown in a survey by Tanner and McConnaughey, P.A. dated July 22, 1988 and filed in the State Property Office.

b. The portion of that certain tract or parcel of land at Crowders Mountain State Park in Gaston County, east of and including the right-of-way along and across Old Peach Orchard Road, as shown in a survey by the City of Gastonia, File No. 400-194, dated November 23, 1998, and filed in the State Property Office.

c. The portion of that certain tract or parcel of land at Crowders Mountain State Park in Cleveland County, described in Deed Book 1286, Page No. 85, located on the north side of SR 2245 (Bethlehem Road) and containing 14,964 square feet as shown on the survey entitled "Survey for Crowders Mountain State Park, Deed Book 1103-107, Township 4 Kings Mountain, Cleveland County, N.C." by David W. Dickson, P.A. dated February 28, 2008.

(7) All lands owned in fee simple by the State within the boundaries of New River State Park as of May 5, 2009.

(8) All lands and waters within the boundaries of Stone Mountain State Park as of May 5, 2009, with the exception of the following tracts: The portion of that certain tract or parcel of land at Stone Mountain State Park in Wilkes County, Traphill Township, described as parcel 33-02 in Deed Book 633-193, and more particularly described as all of the land in this parcel lying to the west of the eastern edge of the Air Bellows Road, as shown on the National Park Service Land Status Map 33 dated March 24, 1981 and filed in the State Property Office, containing approximately 72 acres. The tract excluded from the State Nature and Historic Preserve under this subdivision is deleted from the State Parks System in accordance with G.S. 113-44.14.

(9) All lands and waters located within the boundaries of the following State Historic Sites as of May 5, 2009: Alamance Battleground, Charles B. Aycock Birthplace, Historic Bath, Bennett Place, Bentonville Battleground, Brunswick Town/Fort Anderson, C.S.S.

Neuse and Governor Caswell Memorial, Charlotte Hawkins Brown Memorial, Duke Homestead, Historic Edenton, Fort Dobbs, Fort Fisher, Historic Halifax, Horne Creek Living Historical Farm, House in the Horseshoe, North Carolina Transportation Museum, James K. Polk Memorial, Reed Gold Mine, Somerset Place, Stagville, State Capitol, Town Creek Indian Mound, Tryon Palace Historic Sites & Gardens, Zebulon B. Vance Birthplace, and Thomas Wolfe Memorial.

(10), (11) Repealed by Session Laws 2001-217, s. 2, effective June 15, 2001.

(12) All lands and waters located within the boundaries of Hanging Rock State Park as of May 5, 2009, with the exception of the following tract: The portion of that tract or property at Hanging Rock State Park in Stokes County, Danbury Township, described in Deed Book 360, Page 160, for a 30-foot wide right-of-way beginning approximately 183 feet south of SR 1001 and extending in a southerly direction approximately 1,479 feet to the southwest corner of the Bobby Joe Lankford tract and more particularly shown on a survey entitled, "J. Spot Taylor Heirs Survey, Danbury Township, Stokes County, N.C.", by Grinski Surveying Company, dated June 1985, and filed in the State Property Office. The tract excluded from the State Nature and Historic Preserve under this subdivision is deleted from the State Parks System in accordance with G.S. 113-44.14.

(13) All lands and waters located within the boundaries of South Mountains State Park as of May 5, 2009, with the exception of the following tracts. The tracts excluded from the State Nature and Historic Preserve under this subdivision are deleted from the State Parks System in accordance with G.S. 113-44.14.

a, b. Repealed by Session Laws 2007-307, s. 1, effective July 28, 2007.

c. The portions of land at South Mountains State Park that lie south of the centerline of the CCC road as shown on the drawing entitled "Land Trade between South Mountains State Park and Adjacent Game Lands along CCC Road" prepared by the Division of Parks and Recreation, dated March 15, 1999, and filed in the State Property Office and that lie within: (i) the tract or property in Burke County, Lower Fork Township, described in Deed Book 495, Page 501; (ii) the tract or property in Burke County, Lower Fork and Upper Fork Townships, described in Deed Book 715, Page 719; or, (iii) within the tracts or property in Burke County, Upper Fork Township, described in Deed Book 860, Page 341, and Deed Book 884, Page 1640. The State of North Carolina may only exchange this land for other land for the expansion of South Mountains State Park or sell this land and use the proceeds for that purpose. The State may not otherwise sell or exchange this land.

d. Repealed by Session Laws 2007-307, s. 1, effective July 28, 2007.

(14) Repealed by Session Laws 2003-234, s. 1, effective June 19, 2003.

(15) All lands and waters within the boundaries of Jockey's Ridge State Park as of May 5, 2009, with the exception of the following tracts: The portion of those certain tracts or parcels of land at Jockey's Ridge State Park in Dare County, Nags Head Township, described in Deed Book 227, Page 499, and Deed Book 227, Page 501, and containing 33,901 square feet as shown on the survey prepared by Styons Surveying Services entitled "Raw Water Well Site 13 Jockey's Ridge State Park" dated March 7, 2001, and filed in the State Property Office; the portion of that certain tract or parcel of land at Jockey's Ridge State Park in Dare County, Nags Head Township, described in

Deed Book 222, Page 726, and containing 42,909 square feet as shown on the survey prepared by Styons Surveying Services entitled "Raw Water Well Site 14 Jockey's Ridge State Park" dated March 7, 2001, and filed in the State Property Office; and the portion of that certain tract or parcel of land at Jockey's Ridge State Park in Dare County, Nags Head Township, described in Deed Book 224, Page 790, and Deed Book 224, Page 794, and containing 34,471 square feet as shown on the survey prepared by Styons Surveying Services entitled "Raw Water Well Site 15 Jockey's Ridge State Park" dated March 7, 2001, and filed in the State Property Office.

(16) All lands and waters located within the boundaries of Mount Jefferson State Natural Area as of May 5, 2009. With respect to the communications tower site on the top of Mount Jefferson and located on that certain tract or parcel of land at Mount Jefferson State Natural Area in Ashe County, West Jefferson Township, described in Deed Book F-3, Page 94, the State may provide space at the communications tower site to State public safety and emergency management agencies for the placement of antennas, repeaters, and other communications devices for public communications purposes. Notwithstanding G.S. 146-29.2, the State may lease space at the communications tower site to local governments in Ashe County for the placement of antennas, repeaters, and other communications devices for public communications purposes. State agencies and local governments that are authorized to place communications devices at the communications tower site pursuant to this subdivision may also locate at or near the communications tower site communications equipment that is necessary for the proper operation of the communications devices. The use of the communications tower site pursuant to this subdivision is authorized by the General Assembly as a purpose other than the public purposes specified in Article XIV, Section 5, of the North Carolina Constitution, Article 25B of Chapter 143 of the General Statutes, and Article 2C of Chapter 113 of the General Statutes.

(17) All lands and waters within the Eno River State Park as of May 5, 2009, with the exception of the following tracts:

a. The portion of that certain tract or parcel of land at Eno River State Park in Durham County, Durham Outside Township, described in Deed Book 435, Page 673, and Plat Book 87, Page 66, containing 11,000 square feet and being the portion of Lot No. 2 shown as the existing scenic easement hereby removed on the drawing prepared by Sear-Brown entitled "Recombination Plat Eno Forest Subdivision" bearing the preparer's file name 00-208-07.dwg, and filed with State Property Office. The tract excluded from the State Nature and Historic Preserve under this subdivision is deleted from the State Parks System pursuant to G.S. 113-44.14. The State of North Carolina may only exchange this land for other land for the expansion of Eno River State Park or sell this land and use the proceeds for that purpose. The State may not otherwise sell or exchange this land.

b. The portion of that certain tract or parcel of land at Eno River State Park in Orange County, described in Deed Book 3878, Page 461, and Plat Book 98, Page 11, containing 5,313 square feet and required for the permanent easements for bridge replacement project B-4216 on SR 1002 (St. Mary's Road), as shown in the drawing entitled "Preliminary Plans, Project Reference No. B-4216" prepared for North Carolina Department of Transportation by Mulkey Engineers and Consultants dated March 10, 2009, and filed with the State Property Office. The tracts excluded from the State Nature and Historic Preserve under this section are deleted from the State Parks System pursuant to G.S. 113-44.14. The State of North Carolina may only exchange this land for other land for the expansion of Eno River State Park or sell this land and use the proceeds for that purpose. The State may not otherwise sell or exchange this land.

(18) All land and waters within the boundaries of Hemlock Bluffs State Natural Area as of May 5, 2009, with the exception of the following tracts: The portion of that certain tract or parcel of land at Hemlock Bluffs State Natural Area in Wake County, Swift Creek Township, described in Deed Book 2461, Page 037, containing 2,025 square feet and being the portion of this tract shown as proposed R/W on the drawing prepared by Titan Atlantic Group entitled "Right of Way Acquisition Map for Town of Cary Widening of Kildaire Farm Road (SR 1300) from Autumgate Drive to Palace Green" sheet 1 of 3 bearing the preparer's file name Town of Cary Case File No. TOC 01-37, dated 26 September 2003, and filed with the State Property Office; and the portion of those certain tracts or parcels of land at Hemlock Bluffs State Natural Area in Wake County, Swift Creek Township, described in Deed Book 4670, Page 420, containing 24,092 square feet and being the portion of these tracts shown as proposed R/W on the drawing prepared by Titan Atlantic Group entitled "Right of Way Acquisition Map for Town of Cary Widening of Kildaire Farm Road (SR 1300) from Autumgate Drive to Palace Green" sheet 3 of 3 bearing the preparer's file name Town of Cary Case File No. TOC 01-37, dated 26 September 2003, and filed with the State Property Office. The tracts excluded from the State Nature and Historic Preserve under this subdivision are deleted from the State Parks System pursuant to G.S. 113-44.14. The State of North Carolina may only exchange this land for other land for the expansion of Hemlock Bluffs State Natural Area or sell this land and use the proceeds for that purpose. The State may not otherwise sell or exchange this land.

(19) All lands and waters within the boundaries of Lake James State Park as of May 5, 2009, with the exception of the following tracts:

a. The portion of that certain tract or parcel of land at Lake James State Park containing 13.85 acres, and being 100 feet to the east and 150 feet to the west of a centerline shown on a survey by Witherspoon Surveying PLLC, dated February 9, 2007, and filed in the State Property Office. The State of North Carolina may grant a temporary easement to Duke Energy Corporation across this tract to facilitate the Catawba Dam Embankment Seismic Stability Improvements Project. The grant of the easement within Lake James State Park to Duke Energy Corporation under this sub-subdivision constitutes authorization by the General Assembly that the described tract of land may be used for a purpose other than the public purposes specified in Article XIV, Section 5, of the North Carolina Constitution, Article 25B of Chapter 143 of the General Statutes, and Article 2C of Chapter 113 of the General Statutes. The State of North Carolina may use the proceeds from the easement only for the expansion or improvement of Lake James State Park or another State park. The State may not otherwise sell or exchange this land.

b. The portion of that certain tract or parcel of land at Lake James State Park in McDowell County, Nebo Township, described in

Deed Book 377, Page 423, and also shown as Tract B on the plat of survey prepared by Kenneth D. Suttles, RLS, dated December 4, 1987, entitled "Lake James State Park," Sheet 1 of 2, recorded in Plat Book 4, Page 275 of the McDowell County Registry, for a 40-foot right-of-way beginning at the southwest corner of Tract B and continuing along the southern boundary 86 38′ 51″ E for 400 feet to the now or former John D. Walker property. The State of North Carolina may grant an easement across this tract to extinguish prescriptive easements on Tract B to improve management of the State park property. The State may not otherwise sell or exchange this land. The easement excluded from the State Nature and Historic Preserve under this subdivision is deleted from the State Parks System pursuant to G.S. 113-44.14.

(20) All lands and waters within the boundaries of Lake Waccamaw State Park as of May 5, 2009, with the exception of the following tracts: The portions of that certain tract or parcel of land at Lake Waccamaw State Park in Columbus County described in Deed Book 835, Page 590, containing 48,210 square feet and being the portion of this tract shown as new R/W and permanent utility easement on drawing prepared by State of North Carolina Department of Transportation entitled "Map of Proposed Right of Way Property of State of North Carolina (Parks and Recreation) Columbus County" for Tip B-3830 on SR 1947 (Bella Coola Road) done by John E. Kaukola, PLS No. 3999 and compiled 1-18-2008, and filed with the State Property Office. The tracts excluded from the State Nature and Historic Preserve under this section are deleted from`the State Parks System pursuant to G.S. 113-44.14. The State of North Carolina may only exchange this land for other land for the expansion of Lake Waccamaw State Park or sell this land and use the proceeds for that purpose. The State may not otherwise sell or exchange this land.

(21) All lands and waters within the boundaries of Chimney Rock State Park as of May 5, 2009, with the exception of the following tract: The portion of that certain tract or parcel of land at Chimney Rock State Park in Rutherford County being a portion of Parcel 2 as described in Deed Book 933, Page 598, containing 346 square feet and being shown as proposed right-of-way for bridge replacement project B-4258 on U.S. 64 over the Broad River on drawing prepared by Kimley-Horn and Associates for the North Carolina Department of Transportation and revised October 26, 2007, and filed with the State Property Office. The tracts excluded from the State Nature and Historic Preserve under this section are deleted from the State Parks System pursuant to G.S. 113-44.14. The State of North Carolina may only exchange this land for other land for the expansion of Chimney Rock State Park or sell this land and use the proceeds for that purpose. The State may not otherwise sell or exchange this land.

(22) All State-owned land and waters within the boundaries of the Mountains-to-Sea Trail as of May 5, 2009, with the exception of the following tract: The portion of that certain tract or parcel in Johnston County described in Deed Book 3634, Page 278, containing 4.72 acres and being described as proposed easement area for Piedmont Natural Gas Company transmission line on drawing entitled "Easement Survey Prepared for Piedmont Natural Gas Company, Line 142, Easement to be Acquired from the State of North Carolina" by McKim & Creed and dated July 31, 2008, and revised March 11, 2009. The State of North Carolina may grant an easement to Piedmont Natural Gas Company across this tract to facilitate the transmission of

natural gas. The grant of the easement within the Mountains-to-Sea Trail to Piedmont Natural Gas Company under this section constitutes authorization by the General Assembly that the described tract of land may be used for a purpose other than the public purposes specified in Section 5 of Article XIV of the North Carolina Constitution, Article 25B of Chapter 143 of the General Statutes, and Article 2C of Chapter 113 of the General Statutes. The State of North Carolina may use the proceeds from the easement only for the expansion or improvement of the Mountains-to-Sea Trail or another State park. The State may not otherwise sell or exchange this land. (1979, c. 498; 1989, Joint Res. 23; c. 146, s. 1; 1989 (Reg. Sess., 1990), c. 1004, s. 30; 1999-268, s. 2; 2001-217, s. 2; 2002-149, s. 1; 2003-234, s. 1; 2004-25, s. 2; 2007-307, s. 1; 2008-11, s. 1; 2009-503, s. 1.)

**Tracts of Land Removed from State Nature and Historic Preserve.** — Session Laws 2003-234, s. 2, provides: "The following tracts of land are removed from the State Nature and Historic Preserve pursuant to Section 5 of Article XIV of the Constitution of North Carolina:

"(1) The portion of that certain tract or parcel of land at Crowders Mountain State Park in Cleveland County, Number Four Township, described in Deed Book 1286, Page 85, and containing 1.64 acres as shown on the drawing prepared by the Division of Parks and Recreation entitled 'Property to be Excepted Crowders Mountain State Park' dated 14 April 2003 and filed in the State Property Office.

"(2) The portion of those certain tracts or parcels of land at South Mountains State Park in Burke County, Lower Creek Township, described in Deed Book 925, Page 1284, and Deed Book 870, Page 1729 required for the right-of-way and easements for the relocation of SR 1904 within the Park and shown on the drawing prepared by Suttles Surveying P.A. entitled "Survey of the Proposed Centerline of the New Road Alignment for the State of North Carolina" bearing the preparer's file name 12455D.dwg, dated 10 April 2003 and filed in the State Property Office.

"(3) The portion of that certain tract or parcel of land at South Mountains State Park in Burke County, Morganton Township, described in Deed Book 28, Page 607, Deed Book 28, Page 467, and Plat Book 3, Page 78, and containing 0.33 acres as shown on the drawing prepared by Hawkins Land Surveying entitled 'Subdivision for Trustees of Walker Top Baptist Church' dated 26 September 2001 and filed with the State Property Office.

"(4) The portion of that certain tract or parcel of land at Eno River State Park in Durham County, Durham Outside Township, described in Deed Book 435, Page 673, and Plat Book 87, Page 66, containing 11,000 square feet and being the portion of Lot No. 2 shown as the existing scenic easement hereby removed on the drawing prepared by Sear-Brown entitled 'Recombination Plat Eno Forest Subdivision' bearing the preparer's file name 00-208-07.dwg, and filed with State Property Office."

Session Laws 2003-234, s. 4, provides: "In accordance with G.S. 143-260.8(e), the Secretary of State is directed to forward a certified copy of this act to the register of deeds of each county in which any portion of the property dedicated and accepted or removed by this act as part of the State Nature and Historic Preserve is located."

Session Laws 2004-25, s. 1, provides: "The following tracts of land are removed from the State Nature and Historic Preserve pursuant to Section 5 of Article XIV of the Constitution of North Carolina: The portion of that certain tract or parcel of land at Hemlock Bluffs State Natural Area in Wake County, Swift Creek Township, described in Deed Book 2461, Page 037, containing 2,025 square feet and being the portion of this tract shown as proposed R/W on the drawing prepared by Titan Atlantic Group entitled 'Right of Way Acquisition Map for Town of Cary Widening of Kildaire Farm Road (SR 1300) from Autumgate Drive to Palace Green' sheet 1 of 3 bearing the preparer's file name Town of Cary Case File No. TOC 01-37, dated 26 September 2003, and filed with the State Property Office; and the portion of those certain tracts or parcels of land at Hemlock Bluffs State Natural Area in Wake County, Swift Creek Township, described in Deed Book 4670, Page 420, containing 24,092 square feet and being the portion of these tracts shown as proposed R/W on the drawing prepared by Titan Atlantic Group entitled 'Right of Way Acquisition Map for Town of Cary Widening of Kildaire Farm Road (SR 1300) from Autumgate Drive to Palace Green' sheet 3 of 3 bearing the preparer's file name Town of Cary Case File No. TOC 01-37, dated 26 September 2003, and filed with the State Property Office."

Session Laws 2004-25, s. 4, provides: "In accordance with G.S. 143-260.8(e), the Secretary of State is directed to forward a certified copy of this act to the register of deeds of each county in which any portion of the property removed from the State Nature and Historic

Preserve by this act is located."

**Editor's Note.** — The preamble to Session Laws 2003-234, provides: "Whereas, Section 5 of Article XIV of the Constitution of North Carolina authorizes the dedication of State and local government properties as part of the State Nature and Historic Preserve upon acceptance by a law enacted by a three-fifths vote of the members of each house of the General Assembly and provides for removal of properties from the State Nature and Historic Preserve by a law enacted by a three-fifths vote of the members of each house of the General Assembly; and

"Whereas, the General Assembly enacted the State Nature and Historic Preserve Dedication Act, Chapter 443 of the 1973 Session Laws, to prescribe the conditions and procedures under which properties may be specifically dedicated for the purposes set out in Section 5 of Article XIV of the Constitution of North Carolina; and

"Whereas, over 6,700 acres have been added to the State Parks System since the last dedication and acceptance of properties as part of the State Nature and Historic Preserve pursuant to a petition of the Council of State dated 3 April 2001, and

"Whereas, in accordance with G.S. 143-260.8, on 6 May 2003 the Council of State voted to petition the General Assembly to enact a law pursuant to Section 5 of Article XIV of the Constitution of North Carolina to dedicate and accept properties added to the State Parks System and designated in the petition for inclusion as parts of the State Nature and Historic Preserve; and

"Whereas, as a part of its petition of 6 May 2003 the Council of State also requested the General Assembly to remove certain properties from the State Nature and Historic Preserve; and

"Whereas, G.S. 113-44.14 provides for additions to, and deletions from, the State Parks System upon authorization by the General Assembly; Now, therefore,

"The General Assembly of North Carolina enacts:"

Session Laws 2004-25, provides: "Whereas, Section 5 of Article XIV of the Constitution of North Carolina authorizes the dedication of State and local government properties as part of the State Nature and Historic Preserve upon acceptance by a law enacted by a three-fifths vote of the members of each house of the General Assembly and provides for removal of properties from the State Nature and Historic Preserve by a law enacted by a three-fifths vote of the members of each house of the General Assembly; and

"Whereas, the General Assembly enacted the State Nature and Historic Preserve Dedication Act, Chapter 443 of the 1973 Session Laws, to prescribe the conditions and procedures under which properties may be specifically dedicated for the purposes set out in Section 5 of Article XIV of the Constitution of North Carolina; and

"Whereas, G.S. 113-44.14 provides for additions to, and deletions from, the State Parks System upon authorization by the General Assembly; Now, therefore,

"The General Assembly of North Carolina enacts:"

Session Laws 2007-307, provides in its preamble: "Whereas, Section 5 of Article XIV of the Constitution of North Carolina authorizes the dedication of State and local government properties as part of the State Nature and Historic Preserve upon acceptance by a law enacted by a three-fifths vote of the members of each house of the General Assembly and provides for removal of properties from the State Nature and Historic Preserve by a law enacted by a three-fifths vote of the members of each house of the General Assembly; and

"Whereas, the General Assembly enacted the State Nature and Historic Preserve Dedication Act, Chapter 443 of the 1973 Session Laws, to prescribe the conditions and procedures under which properties may be specifically dedicated for the purposes set out in Section 5 of Article XIV of the Constitution of North Carolina; and

"Whereas, over 20,350 acres have been added to the State Parks System since the last dedication and acceptance of properties as part of the State Nature and Historic Preserve pursuant to a petition of the Council of State dated 1 May 2007; and

"Whereas, in accordance with G.S. 143-260.8, on 1 May 2007 the Council of State voted to petition the General Assembly to enact a law pursuant to Section 5 of Article XIV of the Constitution of North Carolina to dedicate and accept properties added to the State Parks System and designated in the petition for inclusion as parts of the State Nature and Historic Preserve; and

"Whereas, as a part of its petition of 1 May 2007, the Council of State also requested the General Assembly to remove certain properties from the State Nature and Historic Preserve; and Whereas, G.S. 113-44.14 provides for additions to, and deletions from, the State Parks System upon authorization by the General Assembly; Now, therefore,"

The preamble to Session Laws 2009-503, provides: "Whereas, Section 5 of Article XIV of the North Carolina Constitution authorizes the dedication of State and local government properties as part of the State Nature and Historic Preserve upon acceptance by a law enacted by a three-fifths vote of the members of each house of the General Assembly and provides for removal of properties from the State Nature and Historic Preserve by a law enacted by a three-fifths vote of the members of each house of the General Assembly; and

"Whereas, the General Assembly enacted the State Nature and Historic Preserve Dedication Act, Chapter 443 of the 1973 Session Laws, to prescribe the conditions and procedures under which properties may be specifically dedicated for the purposes set out in Section 5 of Article XIV of the North Carolina Constitution; and

"Whereas, more than 18,000 acres have been added to the State Parks System since the last dedication and acceptance of properties as part of the State Nature and Historic Preserve pursuant to a petition of the Council of State dated May 1, 2007; and

"Whereas, in accordance with G.S. 143-260.8, on May 5, 2009, the Council of State voted to petition the General Assembly to enact a law pursuant to Section 5 of Article XIV of the North Carolina Constitution to dedicate and accept properties added to the State Parks System and designated in the petition for inclusion as parts of the State Nature and Historic Preserve; and

"Whereas, as a part of its petition of May 5, 2009, the Council of State also requested the General Assembly to remove certain properties from the State Nature and Historic Preserve; and

"Whereas, G.S. 113-44.14 provides for additions to, and deletions from, the State Parks System upon authorization by the General Assembly; Now, therefore, The General Assembly of North Carolina enacts: "

**Effect of Amendments.** — Session Laws 2008-11, s. 1, effective June 25, 2008, deleted "Lake Waccamaw State Park" preceding "Lea Island State Natural Area" in subdivision (1); and added subdivision (20).

Session Laws 2009-503, s. 1, effective August 26, 2009, substituted "May 5, 2009" for "1 May 2007" throughout the section; in subdivision (1), inserted "Bear Paw State Natural Area", "Deep River State Trail", "Pineola Bog State Natural Area" and "Sugar Mountain State Natural Area", deleted "Chimney Rock State Park" following "Carvers Creek State Park", and deleted "Mountain Bog State Natural Area" following "Mount Mitchell State Park"; and added subdivisions (6)c., (17)b., (21) and (22).

**§§ 143-260.10A, 143-260.10B:** Repealed by Session Laws 1989, c. 146, ss. 3, 4.

## § 143-260.10C. Removal of land in Hemlock Bluffs from the State Nature and Historic Preserve.

Notwithstanding the provisions of G.S. 143-260.10(1), the tract identified as a portion of the property legally described in Deed Book 3135, Page 937, Wake County Registry, containing 14.4 acres, as shown on a survey prepared by A. Roger Barnes (RLS) and entitled "Proposed Exchange of 14.4 Acres From the State of North Carolina to the Town of Cary," dated August 19, 1988, is removed from the State Nature and Historic Preserve.

The State of North Carolina may only exchange this land for other land to expand Hemlock Bluffs Natural Area or sell the land and use the proceeds for that purpose. The State of North Carolina may not otherwise sell or exchange this land.

The removal of the portion of Hemlock Bluffs under this section achieves the requirements and purposes of Article 2C of Chapter 113 of the General Statutes and constitutes a deletion from the State Parks System as required by G.S. 113-44.14. (1989, c. 384, s. 1.)

## § 143-260.10D. Removal of land at Hammocks Beach State Park from the State Nature and Historic Preserve.

Notwithstanding the provisions of G.S. 143-260.10(1), the tract identified as a portion of the property legally described in Deed Book 414, Page 607, Onslow County Registry, containing 0.063 acres; beginning at a point located S 25°19′50″ W, 60.86 feet, thence S 02°10′40″ E, 33.61 feet from the southeast corner of above reference property, proceeding from said beginning point S 02°10′40″ E, 32.73 feet, thence S 69°12′45″ W, 176.47 feet to a point, thence N 59°47′25″ E, 189.47 feet to the point of beginning; as shown on a survey prepared by John P. McLean Engineering Associates and entitled "Exhibit Map Showing Land Swap Between N.C. Park Service and Hammocks Point" dated June 29, 1990, is removed from the State Nature and Historic Preserve.

The State of North Carolina may only exchange this land for other land for inclusion in Hammocks Beach State Park or sell the land and use the proceeds for that purpose. The State of North Carolina may not otherwise sell or exchange this land.

The removal of the portion of Hammocks Beach State Park under this section achieves the requirements and purposes of Article 2C of Chapter 113 of the General Statutes and constitutes a deletion from the State Parks System as required by G.S. 113-44.14. (1991, c. 318, s. 1.)

## § 143-260.10E. Utility easement at William B. Umstead State Park.

(a) The State of North Carolina may grant a utility easement to Carolina Power and Light Company across a tract of land within William B. Umstead State Park. The easement shall be 100 feet wide, extending 50 feet on each side of the following-described survey line: Lying and being in Leesville township, Wake County, North Carolina; BEGINNING at point B2 as shown on the Drawing hereinafter referred to, the point B2 being located in a southern property line of Raleigh Durham Airport Authority (formerly Continental Mortgage Investors) and a northern property line of the State of North Carolina; the point B2 also being located North 87 degrees 01 minute 31 seconds West 834.04 feet from a concrete monument making a southeastern corner of Raleigh Durham Airport Authority (formerly Continental Mortgage Investors); and runs thence South 02 degrees 01 minute 53 seconds East 3508.00 feet to point A2 on the Drawing, the location of Point A2 having North Carolina Coordinates Y=773, 193.769 and X=2,069,162.420, the Point A2 being located at the terminus of Carolina Power and Light Company's existing 100 foot wide right-of-way strip, as shown and described on Carolina Power and Light Company Drawing No. RW-A-5246, dated September 1977, which Drawing also shows the respective complementing sidelines going to make up the easement.

(b) The State of North Carolina may only use the proceeds from the easement described in subsection (a) of this section to acquire property at any State park.

(c) The grant of the easement within William B. Umstead State Park to Carolina Power and Light Company under this section constitutes authorization by the General Assembly that the described tract of land may be used for a utility easement, which is a purpose other than the public purposes as specified in Article XIV, Section 5, of the Constitution, Article 25B of Chapter 143 of the General Statutes, and Article 2C of Chapter 113 of the General Statutes. (1991 (Reg. Sess., 1992), c. 907, s. 1.)

## § 143-260.10F. Road right-of-way; Pilot Mountain State Park.

(a) Notwithstanding the provisions of G.S. 143-260.10, the State of North Carolina may convey a road right-of-way to the Department of Transportation across lands within Pilot Mountain State Park. The right-of-way for the road shall begin 71.9 feet S 70° 41′12″ E of park corner number 94 as shown on the June 1, 1968, Pilot Mountain State Park survey by Southern Mapping & Engineering Company. From point of beginning N 70° 41′ 12″ W for 71.9 feet, then following the centerline of the existing road SR 2068 N 02° 31′ 21″ E for 24.13 feet, then N 25° 17′ 28″ E for 225.06 feet, then N 35° 31′48″ E for 139.35

feet, then with the northern boundary of the park S 55° 48′ 51″ E for 30.0 feet, then along new right-of-way line for approximately 350 feet as shown on Department of Transportation Plat of SR 2068, Shoals Road — McKinney Cut, Surry County, W.O. 6.742488 dated August 28, 1992, to point of beginning. The area of this right-of-way is approximately 17,850 square feet.

(b) The property described in subsection (a) of this section is removed from the State Nature and Historic Preserve and deleted from the State Parks System.

(c) The State shall only use the proceeds from this right-of-way to acquire lands for the expansion of Pilot Mountain State Park. (1993, c. 457, s. 1.)

### § 143-260.10G. Removal of land in Crowders Mountain State Park from the State Nature and Historic Preserve.

(a) Notwithstanding the provisions of G.S. 143-260.10(6), the portion of that certain tract or parcel of property at Crowders Mountain State Park in Gaston County, Crowders Mountain Township, described in Deed Book 1240, Page 451, and containing 225 square feet and as shown in a survey by R&W Engineering and Surveying entitled “Conveyance of 0.0052 acres owned by Crowders Mountain State Park, Gaston Co., NC” and dated January 18, 1995, is removed from the State Nature and Historic Preserve.

(b) The property described in subsection (a) of the section is deleted from the State Parks System pursuant to G.S. 113-44.14.

(c) The State may only exchange this property for other property for the expansion of Crowders Mountain State Park or sell this land and use the proceeds for that purpose. The State shall not otherwise sell or exchange this land. (1995, c. 131, s. 1.)

## Article 26.

## *State Education Commission.*

### § 143-261. Appointment and membership; duties.

The Governor of North Carolina is hereby authorized to appoint a commission to be known as the State Education Commission, consisting of 18 members, six of whom shall be selected from educational groups within the State, and 12 of whom shall be selected from the agricultural, business, industrial, and professional life of the State. It shall be the duty of this Commission to study all educational problems to the end that a sound overall educational program may be developed in North Carolina, and to report their findings and make recommendations to the Governor and the General Assembly of 1949. (1947, c. 724, s. 1.)

#### CASE NOTES

**Cited** in Wetzel v. Edwards, 635 F.2d 283 (4th Cir. 1980).

### § 143-262. Organization meeting; election of officers; status of members.

After their appointment, the Commission shall meet in the office of the Governor of North Carolina not later than the fifteenth of May, 1947, and upon the recommendation of the Governor, elect a chairman and a full-time executive secretary. The secretary may or may not be a member of the Commission. Membership on the Commission herein authorized shall not constitute public office but shall be considered as a commissioner for a special purpose; and the Governor may appoint as ex officio member, or members, on said Commission any public official without violating the provisions of Article XIV, Sec. 7, of the State Constitution. (1947, c. 724, s. 2.)

**Editor's Note.** — The reference in this section to Art. XIV, § 7, of the State Constitution is to that section in the Constitution of 1868. For present provisions as to dual office holding, see N.C. Const., Art. VI, § 9.

## § 143-263. Comprehensive study of education problems.

This Commission shall make a comprehensive study of organization, administration, finance, teacher education, supervision, curriculum, standardization, consolidation, transportation, buildings, personnel, a merit rating system for teachers, vocational education, and any other problems related to the overall educational program of the State. (1947, c. 724, s. 3.)

## § 143-264. Per diem and travel allowances.

Each member of the Commission shall be entitled to per diem and travel the same as is paid to the State Board of Education, when attending any meeting of the Commission or while engaged in the performance of any duties of the Commission. (1947, c. 724, s. 4.)

## § 143-265. Salary of executive secretary.

The Commission is authorized to set the salary of a full-time executive secretary, with the approval of the Director of the Budget. (1947, c. 724, s. 5.)

## § 143-266. Powers of executive secretary.

The executive secretary of the Commission shall have the authority and power to subpoena witnesses and compel their attendance to testify and/or produce records at any hearing before the Commission, or any committee thereof, under the same provisions of the law as now apply to attendance of witnesses before legislative committees. (1947, c. 724, s. 6.)

## Article 27.

### *Settlement of Affairs of Certain Inoperative Boards and Agencies.*

## § 143-267. Release and payment of funds to State Treasurer; delivery of other assets to Secretary of Administration.

Whenever the statutes creating, or granting authority to, any licensing, regulatory, or examining board or agency have been or are hereafter repealed, or declared unconstitutional or invalid by the Supreme Court of North

Carolina, every officer or other person responsible for or having control or custody of any funds, records, equipment or any other assets held or owned by any such board or agency which was theretofore authorized by any such statute to exercise licensing or regulatory powers or conduct examinations in respect to the right to practice any profession or engage in any trade, business, craft or calling, shall forthwith release and deliver all such funds to the State Treasurer of North Carolina, and shall forthwith release and deliver all other assets of every nature whatsoever to the Secretary of Administration for the State of North Carolina. (1949, c. 740, s. 1; 1975, c. 879, s. 46.)

### § 143-268. Official records turned over to Department of Cultural Resources; conversion of other assets into cash; allocation of assets to State agency or department.

The Secretary of Administration shall receive all such assets so delivered and, after they have served their purpose in the liquidation of the affairs of such board or agency, shall turn over all official records of such board or agency to the Department of Cultural Resources to be held pursuant to the statutes relating to such Department. The Secretary of Administration shall proceed to convert all other such assets into cash by public sale to the highest bidder, and shall deposit the net proceeds of any such sale with the State Treasurer: Provided, that the Secretary of Administration, in his discretion, may allocate to any State agency or department, the whole or any part of such assets, the sale of which is not required to discharge the obligations of the board or agency being liquidated. (1949, c. 740, s. 2; 1973, c. 476, s. 48; 1975, c. 879, s. 46.)

### § 143-269. Deposit of funds by State Treasurer.

The State Treasurer shall receive all funds delivered to him under this Article and shall deposit the same in a special fund for the account of the board or agency whose affairs are being liquidated, to be held and applied as hereinafter provided. (1949, c. 740, s. 3.)

### § 143-270. Statement of claims against board or agency; time limitation on presentation.

Any person having any claim or cause of action against any board or agency whose affairs are being liquidated under this Article, may present a verified statement of the same to the Secretary of Administration, who shall investigate and approve or disapprove such claim; any claim not presented to the Secretary of Administration within one year from the time such board or agency becomes inoperative by law shall be barred, and no claim shall be approved or paid which is barred by any statute of limitation or any statutory prohibition in respect to the payment of any claim, or the refund of any deposit, dues, assessment, or examination or license fee. (1949, c. 740, s. 4; 1975, c. 879, s. 46.)

#### CASE NOTES

**Cited** in Wysong & Miles Co. v. Employers of Wausau, 4 F. Supp. 2d 421 (M.D.N.C. 1998).

### § 143-271. Claims certified to State Treasurer; payment; escheat of balance to University of North Carolina.

The Secretary of Administration shall certify to the State Treasurer a schedule of all claims approved or disapproved, and after one year from the time at which the board or agency became inoperative under the law, the State Treasurer shall, out of the funds in his hands for the account of such board or agency, pay all approved claims in full, or if such funds are insufficient for full payment, then he shall equally prorate said claims and make partial payment insofar as funds are available. Should any balance remain in the hands of the Treasurer after the payment of all approved claims, such balance shall escheat and be paid over to the University of North Carolina, to be held in accordance with the statutes governing escheats. (1949, c. 740, s. 5; 1975, c. 879, s. 46.)

### § 143-272. Audit of affairs of board or agency; payment for audit and other expenses.

Irrespective of the provisions of G.S. 143-271 of this Article, the State Treasurer is specifically authorized, in his discretion, to cause an audit to be made of the affairs of any such board or agency, and to immediately pay the cost of such audit, together with the expenses of transferring records and assets, and other necessary costs of liquidation, out of the first funds coming into his hands for the account of such board or agency. (1949, c. 740, s. 6.)

## Article 28.

## *Communication Study Commission.*

### §§ 143-273 through 143-278: Expired.

## Article 29.

## *Commission to Study the Care of the Aged and Handicapped.*

### § 143-279. Establishment and designation of Commission.

A Commission is hereby established for the study of the problems relating to the care of the aged with especial reference to those failing mentally and the intellectually or physically handicapped of all ages and this Commission shall be known as "the Commission for the Study of Problems of the Care of the Aged and Intellectually or Physically Handicapped." (1949, c. 1211, s. 1.)

### § 143-280. Membership.

The Commission shall consist of three members from the Department of Health and Human Services, one member from the boards of county commissioners, one county superintendent of social services, one local health director, one clerk of the superior court. (1949, c. 1211, s. 2; 1957, c. 1357, s. 12; 1963, c. 1166, s. 10; 1969, c. 982; 1973, c. 476, ss. 128, 133, 138; 1997-443, s. 11A.95.)

### § 143-281. Appointment and removal of members.

The Governor shall appoint the members of this Commission, and may remove any member; he shall not be required to give any reason for the removal of any member. (1949, c. 1211, s. 3.)

### § 143-282. Duties of Commission; recommendations.

This Commission shall study the problems relating to the care of the aged with especial reference to those failing mentally and shall inquire into the methods of meeting and handling this problem in other states. It shall make a similar study of the problem of the care of the feebleminded, with especial attention to the custodial care of intellectually handicapped persons not teachable or trainable. It shall make a study of the problems relating to the care of the physically handicapped with a special reference to those whose physical handicap renders them incapable of self-support and shall inquire into the methods of meeting and handling this problem in other states.

It shall make recommendations to the Governor offering plans for dealing with the problem of the care needed for this group, and means of clarification of the responsibility of the State and respective counties. (1949, c. 1211, s. 4.)

### § 143-283. Compensation.

The members of the Commission shall receive for each day in actual performance of duties under this Article, a per diem of seven dollars ($7.00), and necessary travel and subsistence expenses, to be paid out of the contingency and emergency fund. (1949, c. 1211, s. 5.)

## ARTICLE 29A.

## *Governor's Council on Employment of the Handicapped.*

### § 143-283.1. Short title.

This Article may be cited as "The Governor's Council on Employment of the Handicapped Act." (1961, c. 981; 1973, c. 476, s. 179.)

### § 143-283.2. Purpose of Article; cooperation with President's Committee.

The purpose of this Article is to carry on a continuing program to promote the employment of the physically, mentally, emotionally, and otherwise handicapped citizens of North Carolina by creating statewide interest in the rehabilitation and employment of the handicapped, and by obtaining and maintaining cooperation with all public and private groups and individuals in this field. The Governor's Council shall work in close cooperation with the President's Committee on Employment of the Physically Handicapped to more effectively carry out the purpose of this Article, and with State and federal agencies having responsibilities for employment and rehabilitation of the handicapped. (1961, c. 981; 1973, c. 476, s. 179.)

### § 143-283.3. Celebration of National Employ the Physically Handicapped Week.

The Governor's Council shall, by proclamation, designate the first full week in October of each year as "National Employ the Physically Handicapped Week." The committee shall promote and encourage the holding of appropriate ceremonies throughout the State during said week, the purpose of which ceremonies shall be to enlist public support for and interest in the employment of the physically handicapped. The Governor shall, in his proclamation designating National Employ the Physically Handicapped Week, invite the mayors of all cities, heads of other instrumentalities of government, leaders of industry and business, educational and religious groups, labor, veterans, women, farm, scientific and professional, and all other organizations and individuals having an interest to participate in said ceremonies. (1961, c. 981; 1973, c. 476, s. 179.)

**§§ 143-283.4 through 143-283.6:** Repealed by Session Laws 1973, c. 476, s. 179.

**§ 143-283.7:** Repealed by Session Laws 1991, c. 45, s. 25.

### § 143-283.8. Governor's Council nonpartisan and nonprofit.

The Governor's Council shall be nonpartisan, nonprofit, and shall not be used for the dissemination of partisan principles, nor for the promotion of the candidacy of any person seeking public office or preferment. (1961, c. 981; 1973, c. 476, s. 179.)

**§§ 143-283.9, 143-283.10:** Repealed by Session Laws 1973, c. 476, s. 179.

## Article 29B.

## *Governor's Coordinating Council on Aging.*

**§§ 143-283.11 through 143-283.23:** Repealed by Session Laws 1973, c. 476, s. 173.

**Cross References.** — For provisions as to the Governor's Advisory Council on Aging, see G.S. 143B-180 and 143B-181.

## Article 29C.

## *Youth Councils Act.*

**§§ 143-283.24 through 143-283.30:** Repealed by Session Laws 1975, c. 879, s. 30.

**Cross References.** — For present provisions as to youth councils, see G.S. 143B-385 through 143B-388.

**§ 143-283.31:** Repealed by Session Laws 1973, c. 797, s. 1.

**§ 143-283.32:** Repealed by Session Laws 1975, c. 879, s. 30.

**§§ 143-283.33 through 143-283.40:** Reserved for future codification purposes.

## ARTICLE 29D.

## *Manpower Council.*

**§§ 143-283.41 through 143-283.48:** Repealed by Session Laws 1975, c. 879, s. 42.

## ARTICLE 30.

## *Nutbush Conservation Area.*

**§§ 143-284 through 143-286:** Repealed by Session Laws 1973, c. 1262, s. 76.

### § 143-286.1. Nutbush Conservation Area.

The Department of Environment and Natural Resources is hereby authorized to enter into lease agreements with the proper agencies of the federal government covering the marginal land area of the John H. Kerr Reservoir or so much thereof as may be necessary or desirable in order to develop said area for park purposes and to carry on a program of conservation, forestry development and wildlife protection. The area so obtained shall be known as the Nutbush Conservation Area. The Department of Environment and Natural Resources is hereby authorized to control and develop the area so leased and to enter into sublease agreements on terms as may be authorized in the original lease agreement. All proceeds obtained from any sublease agreement shall be used exclusively for the further development of the Nutbush Conservation Area. (1953, c. 1312, s. 4; 1963, c. 612, s. 2; 1973, c. 1262, ss. 28, 76; 1977, c. 771, s. 4; 1989, c. 727, s. 218(114); 1997-443, s. 11A.119(a).)

**§§ 143-287, 143-288:** Repealed by Session Laws 1973, c. 1262, s. 76.

### § 143-289. Contributions from certain counties and municipalities authorized; other grants or donations.

The boards of county commissioners of the Counties of Granville, Vance and Warren and the municipalities within these counties are authorized and empowered in their discretion to make annual contributions to the Department of Environment and Natural Resources for the purpose of defraying the necessary expenses of operation and the Department of Environment and Natural Resources is authorized and empowered to accept grants or donations from any interested citizens or from any State or federal agency. (1951, c. 444, s. 6; 1973, c. 1262, s. 76; 1977, c. 771, s. 4; 1989, c. 727, s. 218(115); 1997-443, s. 11A.119(a).)

**§§ 143-290, 143-290.1:** Repealed by Session Laws 1973, c. 1262, s. 76.

## ARTICLE 31.

## *Tort Claims against State Departments and Agencies.*

### § 143-291. Industrial Commission constituted a court to hear and determine claims; damages; liability insurance in lieu of obligation under Article.

(a) The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. If the Commission finds that there was negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority that was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages that the claimant is entitled to be paid, including medical and other expenses, and by appropriate order direct the payment of damages as provided in subsection (a1) of this section, but in no event shall the amount of damages awarded exceed the amounts authorized in G.S. 143-299.2 cumulatively to all claimants on account of injury and damage to any one person arising out of a single occurrence. Community colleges and technical colleges shall be deemed State agencies for purposes of this Article. The fact that a claim may be brought under more than one Article under this Chapter shall not increase the foregoing maximum liability of the State.

(a1) The unit of State government that employed the employee at the time the cause of action arose shall pay the first one hundred fifty thousand dollars ($150,000) of liability, and the balance of any payment owed shall be paid in accordance with G.S. 143-299.4.

(b) If a State agency, otherwise authorized to purchase insurance, purchases a policy of commercial liability insurance providing coverage in an amount at least equal to the limits of the State Tort Claims Act, such insurance coverage shall be in lieu of the State's obligation for payment under this Article.

(c) The North Carolina High School Athletic Association, Inc., is a State agency for purposes of this Article, and its liability in tort shall be only under this Article. This subsection does not extend to any independent contractor of the Association. The Association shall be obligated for payments under this Article, through the purchase of commercial insurance or otherwise, in lieu of any responsibility of the State or The University of North Carolina for this payment. The Association shall be similarly obligated to reimburse or have reimbursed the Department of Justice for any expenses in defending any claim against the Association under this Article.

(d) Liability in tort of the State Health Plan for Teachers and State Employees for noncertifications as defined under G.S. 58-50-61 shall be only under this Article. (1951, c. 1059, s. 1; 1953, c. 1314; 1955, c. 400, s. 1; c. 1102, s. 1; c. 1361; 1957, c. 65, s. 11; 1965, c. 256, s. 1; 1967, c. 1206, s. 1; 1971, c. 893, s. 1; 1973, c. 507, s. 5; c. 1225, s. 1; 1977, c. 464, s. 34; c. 529, ss. 1, 2; 1979, c. 1053, s. 1; 1987, c. 684, s. 1; 1987 (Reg. Sess., 1988), c. 1087, s. 1; 1993 (Reg.

Sess., 1994), c. 769, s. 19.33(a); c. 777, s. 5(a); 2000-67, ss. 7A(a), 7A(b); 2001-446, s. 5(f); 2007-323, s. 28.22A(o); 2007-345, s. 12.)

**Cross References.** — For similar provision, see Session Laws 1949, c. 1138. For the State Employee Federal Remedy Restoration Act, waiving the sovereign immunity of the State for certain purposes, see G.S. 143-300.35. As to applicability of Article 31 of Chapter 143 to negligent acts committed by officers, etc., of the State acting pursuant to G.S. 130A-475 et seq., relating to terrorist incidents, see G.S. 130A-478.

**Editor's Note.** — Session Laws 2001-446, s. 8 provides: "Nothing in this act obligates the General Assembly to appropriate funds to implement this act."

Session Laws 2007-323, s. 28.22A(n), provides: "If on July 1, 2008, there are State employees or retired employees that are enrolled in the Teachers' and State Employees' Comprehensive Major Medical Plan (indemnity plan) on June 30, 2008, and that have not elected one of the optional PPO benefit plans available under the State Health Plan for Teachers and State Employees, then the Plan shall enroll those employees or retired employees in the Standard PPO Option, or its equivalent, effective July 1, 2008."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2007-323, s. 28.22A(o), as amended by Session Laws 2007-345, s. 12, effective July 1, 2008, substituted "State Health Plan for Teachers and State Employees" for "Teachers' and State Employees' Comprehensive Major Medical Plan" in subsection (d).

**Legal Periodicals.** — For comment on this Article, see 29 N.C.L. Rev. 416 (1951).

For note on the right of subrogation under the provisions of this Article, see 32 N.C.L. Rev. 242 (1954).

For comment on the construction of this Article, see 33 N.C.L. Rev. 613 (1955).

For note on the distinction between intentional and negligent conduct under this Article, see 35 N.C.L. Rev. 564 (1957).

For note on the distinction between nonfeasance and misfeasance under this Article, see 36 N.C.L. Rev. 352 (1958).

For note on judicial abrogation of the doctrine of municipal immunity to tort liability, see 41 N.C.L. Rev. 290 (1963).

For article on recent developments in North Carolina tort law, see 48 N.C.L. Rev. 791 (1970).

For note on tort liability of municipal corporations operating public hospitals in this State, see 54 N.C.L. Rev. 1114 (1976).

For note on abrogation of contractual sovereign immunity, see 12 Wake Forest L. Rev. 1082 (1976).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

For survey of 1977 law on torts, see 56 N.C.L. Rev. 1136 (1978).

For note analyzing the civil liability of law enforcement officers in the use of deadly force in North Carolina, see 4 Campbell L. Rev. 391 (1982).

For comment on the need for reform in North Carolina of local government sovereign immunity, see 18 Wake Forest L. Rev. 43 (1982).

For comment, "The Battle at Little Big Horn Has Moved to Raleigh — Is this Custer's Last Stand Against Tort Reform?," see 10 Campbell L. Rev. 439 (1988).

For article, "Liability for Discretionary Decisions of State Officers and Employees Under the North Carolina Tort Claims Act: A Critical Analysis of Hochheiser v. North Carolina Dep't of Transp.," see 18 N.C. Cent. L.J. 143 (1989).

For note, see "North Carolina's New AIDS Discrimination Protection: Who Do They Think They're Fooling?," see 12 Campbell L. Rev. 475 (1990).

For note, "Municipal Liability for Negligent Inspections in Sinning v. Clark — A 'Hollow' Victory for the Public Duty Doctrine," see 18 Campbell L. Rev. 241 (1996).

For a survey of 1996 developments in the law regarding prisoner rights, see 75 N.C.L. Rev. 2428 (1997).

For note, "Taking One For the Team: Davidson v. University of North Carolina and the Duty of Care Owed by Universities to Their Student-Athletes," see 27 Wake Forest L. Rev. 589 (2002).

For article, "Local Governments and the Public Duty Doctrine after Wood v. Guilford," see 81 N.C.L. Rev. 2291 (2003).

For comment, "'Inevitable Inequities:' The Public Duty Doctrine and Sovereign Immunity in North Carolina," see 28 Campbell L. Rev. 271 (2006).

## CASE NOTES

I. In General.
II. Procedure.

### I. IN GENERAL.

***Editor's Note.** — Many of the cases cited below were decided under this section as it read prior to its amendment by Session Laws 1977, c. 529, effective July 1, 1979, which substituted reference to "negligence" for the previous reference to a "negligent act" in the second sentence. These cases should therefore be consulted with care.*

**Legislative Intent to Enlarge Rights and Remedies.** — The obvious intention of the General Assembly in enacting the Tort Claims Act was to enlarge the rights and remedies of a person injured by the actionable negligence of an employee of a State agency while acting in the course of his employment. Wirth v. Bracey, 258 N.C. 505, 128 S.E.2d 810 (1963).

**Substitution of "Negligence" for "Negligent Act" as Enlargement of Rights Under Section.** — The second 1977 amendment, effective July 1, 1979, substituting the phrase "arose as a result of the negligence" for "arose as a result of a negligent act" in the second sentence obviously enlarges the rights of persons seeking to recover for injuries resulting from State employees' negligence. Watson v. North Carolina Dep't of Cor., 47 N.C. App. 718, 268 S.E.2d 546, cert. denied, 301 N.C. 238, 283 S.E.2d 135 (1980).

**Procedural Rules.** — Regarding the procedural rules governing proceedings under the North Carolina Tort Claims Act, G.S. 143-291 et seq., the North Carolina Industrial Commission is authorized under G.S. 143-300 to adopt such rules and regulations as may, in the discretion of the Commission, be necessary to carry out the purpose and intent of the Tort Claims Act. However, the North Carolina Rules of Civil Procedure apply in tort claims before the Commission, to the extent that such rules are not inconsistent with the Tort Claims Act, in which case the Tort Claims Act controls. Pate v. N.C. DOT, 176 N.C. App. 530, 626 S.E.2d 661, 2006 N.C. App. LEXIS 528 (2006), cert. denied, 360 N.C. 535, 633 S.E.2d 819 (2006).

**Res Judicata.** — Decision and order of the North Carolina Industrial Commission was affirmed because the property owners' negligence claim against a state agency was not barred under the doctrine of res judicata due to a prior inverse condemnation ruling against the property owners in a civil action. The negligence claim brought by the owners was not the same claim as the inverse condemnation claim that the owners brought in the civil action. Pate v. N.C. DOT, 176 N.C. App. 530, 626 S.E.2d 661, 2006 N.C. App. LEXIS 528 (2006), cert. denied, 360 N.C. 535, 633 S.E.2d 819 (2006).

Accident victims' claim against the State of North Carolina in the N.C. Industrial Commission did not constitute another action pending between the same parties for the same cause as an action subsequently filed in superior court against the administratrix for a deceased National Guard member; thus, administratrix could not assert the defense of res judicata in the common law negligence claim in the superior court because the Commission's decision did not meet the requirement for res judicata that the causes of action be identical. Gregory v. Penland, 179 N.C. App. 505, 634 S.E.2d 625, 2006 N.C. App. LEXIS 1981 (2006).

**The effect of the Tort Claims Act was twofold.** First, the State partially waived its sovereign immunity by consenting to direct suits brought as a result of negligent acts committed by its employees in the course of their employment. Second, it provided that the forum for such direct actions would be the Industrial Commission, rather than the State courts. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982).

The Tort Claims Act waived the sovereign immunity of the State in those instances in which injury is caused by the negligence of a State employee and the injured person is not guilty of contributory negligence, giving the injured party the same right to sue as any other litigant. Guthrie v. North Carolina State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983).

It is a fundamental rule of law that the State is immune from suit unless it expressly consents to be sued. By enactment of the Tort Claims Act, G.S. 143-291 et seq., the General Assembly partially waived the sovereign immunity of the State to the extent that it consented that the State could be sued for injuries proximately caused by the negligence of a State employee acting within the scope of his employment. Zimmer v. North Carolina Dep't of Transp., 87 N.C. App. 132, 360 S.E.2d 115 (1987).

**The effect and purpose of the 1977 amendment to this section** was to extend the State's liability to include the negligent omissions and failures to act of its employees. Phillips v. North Carolina Dep't of Transp., 80 N.C. App. 135, 341 S.E.2d 339 (1986).

State's tort liability was greatly enlarged by the 1977 amendment to this section and the State is no longer limited to responsibility for the negligent acts of its employees. Phillips v. North Carolina Dep't of Transp., 80 N.C. App. 135, 341 S.E.2d 339 (1986).

**The Tort Claims Act must be strictly construed.** Northwestern Distribs., Inc. v. North Carolina Dep't of Transp., 41 N.C. App. 548, 255 S.E.2d 203, cert. denied, 298 N.C. 567, 261 S.E.2d 123 (1979).

Acts permitting suit, being in derogation of the sovereign right of immunity, are to be strictly construed. Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

**And Its Terms Must Be Strictly Adhered to.** — Since the Tort Claims Act is in derogation of sovereign immunity it must be strictly construed and its terms must be strictly adhered to. Etheridge v. Graham, 14 N.C. App. 551, 188 S.E.2d 551 (1972); Watson v. North Carolina Dep't of Cor., 47 N.C. App. 718, 268 S.E.2d 546, cert. denied, 301 N.C. 239, 283 S.E.2d 135 (1980).

The State Tort Claims Act is in derogation of the sovereign immunity from liability for torts; hence, the sounder view is that the Act should be strictly construed, and certainly the Act must be followed as written. Floyd v. North Carolina State Hwy. & Pub. Works Comm'n, 241 N.C. 461, 85 S.E.2d 703 (1955); Bailey v. North Carolina Dep't of Mental Health, 2 N.C. App. 645, 163 S.E.2d 652 (1968).

**The wording in the statute is clear, certain and intelligible.** Alliance Co. v. State Hosp., 241 N.C. 329, 85 S.E.2d 386 (1955).

**Negligence Claim Against State Jail Inspection Agency Not Barred By Public Duty Doctrine.** — Public duty doctrine did not apply to bar a negligence suit brought by multiple plaintiffs against the North Carolina Department of Health and Human Services (DHHS), after four inmates were killed and one inmate was seriously injured as a result of a jailhouse fire. Plaintiffs' complaint, which alleged that the inspector for DHHS was negligent in his inspection of the jail and that DHHS failed to properly train the inspector to perform his duties as an inspector of county jails, was not barred under the public duty doctrine because DHHS' duty to inspect was for the purpose of protecting the inmates and not for protection of the public generally or, even if the public duty doctrine did apply, plaintiffs fell within the special relationship exception to that doctrine of custodian/prisoner, therefore, the motion to dismiss filed by DHHS was properly denied. Multiple Claimants v. N.C. HHS, Div. of Facility & Detention Servs., 176 N.C. App. 278, 626 S.E.2d 666, 2006 N.C. App. LEXIS 530 (2006), modified and aff'd, 361 N.C. 372, 646 S.E.2d 356 (2007) as to special relationships.

**And Its Scope May Not Be Enlarged by Liberal Construction.** — The legislative intent and purpose in enacting the State Tort Claims Act must be ascertained from the wording of the statute, and the rule of liberal construction cannot be applied to enlarge its scope beyond the meaning of its plain and unambiguous terms. Alliance Co. v. State Hosp., 241 N.C. 329, 85 S.E.2d 386 (1955).

**The State Tort Claims Act will be construed to effectuate its purpose** to waive the sovereign immunity of the State in those instances in which injury is inflicted through the negligence of a State employee and the injured person is not guilty of contributory negligence, giving the injured party the same right to sue as any other litigant. Lyon & Sons v. State Bd. of Educ., 238 N.C. 24, 76 S.E.2d 553 (1953).

**Construction with Other Provisions.** — The jurisdictional provisions of G.S. 153A-435(b) control whenever they conflict with the jurisdictional provisions of G.S. 143-291(a). Meyer v. Walls, 122 N.C. App. 507, 471 S.E.2d 422 (1996), aff'd in part and rev'd in part, 347 N.C. 97, 489 S.E.2d 880 (1997).

Decision and order of the North Carolina Industrial Commission was affirmed because the North Carolina Tort Claims Act, G.S. 143-291 et seq., governed the property owners' negligence claim against a state agency, rather than G.S. 136-111. The statute addressed actions seeking damages for condemnation, while the North Carolina Tort Claims Act governed negligence claims. Pate v. N.C. DOT, 176 N.C. App. 530, 626 S.E.2d 661, 2006 N.C. App. LEXIS 528 (2006), cert. denied, 360 N.C. 535, 633 S.E.2d 819 (2006).

Costs and attorney fees were awarded to a property owner in error as, when read by themselves, G.S. 143-291 and G.S. 143-291.1 did not grant the North Carolina Industrial Commission the authority to award attorney fees; when read together with G.S. 6-21.1, the Commission had jurisdiction and authority to award attorney fees in a North Carolina Tort Claims Act case, but the owner's damages far exceeded the statutory maximum of $10,000. Watts v. N.C. Dep't of Env't & Natural Res., 182 N.C. App. 178, 641 S.E.2d 811, 2007 N.C. App. LEXIS 595 (2007), aff'd in part, modified in part, 362 N.C. 487, 666 S.E.2d 752 (2008).

**Retroactive Effect of Statute.** — The Tort Claims Act, Session Laws 1951, c. 1059, incorporated in this section, was made retroactive as to certain persons named therein. MacFarlane v. North Carolina Wildlife Resources Comm'n, 244 N.C. 385, 93 S.E.2d 557 (1956).

**The provisions of the Tort Claims Act have been modified and superceded** by the provisions of G.S. 1A-a, Rule 14(c); plaintiffs may now bring direct claims against the State in accordance with Rule 14(a) once the State has been made a third-party defendant in a tort action, and such claims do not have to be made before the North Carolina Industrial Commission. Batts v. Batts, 160 N.C. App. 554, 586 S.E.2d 550, 2003 N.C. App. LEXIS 1837 (2003), cert. denied, 358 N.C. 153, 592 S.E.2d 553 (2004).

**Article Provides Only Remedy Against State for Property Damage.** — The owner of property cannot maintain an action against the State or any agency thereof in tort for damages to property, except as provided in this Article. Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963).

The State may be sued in tort only as authorized in the Tort Claims Act. Guthrie v. North Carolina State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983).

**Thus, Property Owner Cannot Maintain Action Against State to Restrain Tort.** — A property owner cannot maintain an action against the State to restrain the commission of a tort. Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963).

**Property Damage Where Truck Wrongfully Seized.** — Ample, competent evidence supported the Industrial Commission's reversal of a hearing commissioner where defendant erroneously seized plaintiff's truck and failed to install or have anti-freeze installed, although advised by plaintiff to do so, and where this failure proximately caused the engine block to crack. McGee v. North Carolina Dep't of Revenue, 135 N.C. App. 319, 520 S.E.2d 84 (1999).

**Only Claims Against State Agencies Authorized.** — The only claim authorized by the Tort Claims Act is a claim against a State agency. Wirth v. Bracey, 258 N.C. 505, 128 S.E.2d 810 (1963); Mason v. North Carolina State Hwy. Comm'n, 7 N.C. App. 644, 173 S.E.2d 515 (1970).

The Tort Claims Act embraces claims only against State agencies. Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).

Where disbarred attorney brought claims against the Disciplinary Hearing Commission and individual members thereon, the Industrial Commission properly dismissed all claims against the individual defendants, because the Tort Claims Act embraces only claims against State agencies. Frazier v. Murray, 135 N.C. App. 43, 519 S.E.2d 525 (1999).

Pursuant to G.S. 143-291(a), the North Carolina State Tort Claims Act only applies to state actors, not municipal employees. Seaton v. Owens, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 22298 (M.D.N.C. Dec. 8, 2003).

**Public Duty Doctrine Applied to Claim Against Disciplinary Hearing Commission.** — Disbarred attorney's claim against the Disciplinary Hearing Commission for negligent infliction of emotional distress in the performance of its duties came under the public duty doctrine, since the Commission was acting within its statutory authority, under G.S. 84-28.1, when it held plaintiff in criminal contempt. Frazier v. Murray, 135 N.C. App. 43, 519 S.E.2d 525 (1999).

**Under the Tort Claims Act, jurisdiction is vested in the Industrial Commission to hear claims against the State** for personal injuries sustained by any person as a result of the negligence of a State employee while acting within the scope of his employment. Guthrie v. North Carolina State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983).

Under the North Carolina Tort Claims Act, G.S. 143-291 et seq., jurisdiction is vested in the North Carolina Industrial Commission to hear claims against the State of North Carolina for personal injuries sustained by any person as a result of the negligence of a state employee while acting within the scope of his employment. Norman v. N.C. DOT, 161 N.C. App. 211, 588 S.E.2d 42, 2003 N.C. App. LEXIS 2043 (2003), review dismissed, review denied, 358 N.C. 235, 595 S.E.2d 153 (2004), cert. denied, 358 N.C. 545, 599 S.E.2d 404 (2004).

**North Carolina Industrial Commission Does Not Resolve Factual Issues.** — In a North Carolina Tort Claims Act, G.S. 143-291 et seq., case, the North Carolina Industrial Commission's duty in addressing a summary judgment motion is limited to determining the existence of genuine issues of material fact and stops short of resolving such issues without an evidentiary hearing; as stated by the North Carolina Supreme Court, generally if a review of the record leads the appellate court to conclude that the trial tribunal was resolving material issues of fact rather than deciding whether they existed, the entry of summary judgment is held erroneous. Norman v. N.C. DOT, 161 N.C. App. 211, 588 S.E.2d 42, 2003 N.C. App. LEXIS 2043 (2003), review dismissed, review denied, 358 N.C. 235, 595 S.E.2d 153 (2004), cert. denied, 358 N.C. 545, 599 S.E.2d 404 (2004).

**Scope of Judicial Review on Appeal.** — When reviewing a decision of the North Carolina Industrial Commission under the North Carolina Tort Claims Act, G.S. 143-291 et seq., following an evidentiary hearing, the appellate court addresses two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision; with respect to findings of fact, the existence of contrary evidence is irrelevant if there was also competent evidence to support the Commission's findings. Norman v. N.C. DOT, 161 N.C. App. 211, 588 S.E.2d 42, 2003 N.C. App. LEXIS 2043 (2003), review dismissed, review denied, 358 N.C. 235, 595 S.E.2d 153 (2004), cert. denied, 358 N.C. 545, 599 S.E.2d 404 (2004).

**Sheriffs Are Local Officers.** — In providing for the organization of local governments, the N.C. Constitution does not make sheriffs state rather than local officers; therefore, Industrial Commission did not have jurisdiction to hear claims of negligence against county sheriffs. Hull v. Oldham, 104 N.C. App. 29, 407 S.E.2d 611, cert. denied, 330 N.C. 441, 412 S.E.2d 72 (1991).

**Board of Transportation Is Agency of State.** — The North Carolina State Highway Commission (now Department of Transportation) is an agency of the State. Davis v. North Carolina State Hwy. Comm'n, 271 N.C. 405, 156 S.E.2d 685 (1967).

**Which Was Immune to Liability for Negligence of Employees Prior to Enactment of this Article.** — Prior to the enactment of the Tort Claims Act, the Highway Commission (now Department of Transportation), as an agency or instrumentality of the State, enjoyed immunity to liability for injury or loss caused by the negligence of its employees. Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).

**And Is Now Liable in Tort Only as Provided in Tort Claims Act.** — Except as provided in the Tort Claims Act, the State Highway Commission (now Department of Transportation) is not subject to suit in tort. Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

No action or other proceeding may be maintained against the State Highway Commission (now Department of Transportation) to recover damages for death or other injury caused by its negligence or other tort, except insofar as that right is conferred by the Tort Claims Act. Ayscue v. North Carolina State Hwy. Comm'n, 270 N.C. 100, 153 S.E.2d 823 (1967).

The North Carolina State Highway Commission (now Department of Transportation) is not subject to suit except in the manner provided by statute. It may be sued in tort only as authorized in the Tort Claims Act. Davis v. North Carolina State Hwy. Comm'n, 271 N.C. 405, 156 S.E.2d 685 (1967).

**Commissioner of DMV Immune as a Public Official.** — Where the court determined that defendant, as Commissioner of the DMV was a public official and therefore immune from liability for mere negligence, a crossclaim which alleged nothing more than negligence failed to state a claim for which relief could be granted. Columbus County Auto Auction, Inc. v. Aycock Auction Co., 90 N.C. App. 439, 368 S.E.2d 888 (1988).

**Waiver of Immunity Not Dependent upon Exercise of Discretion.** — By enactment of the Tort Claims Act, the State has specifically waived immunity from tort claims falling within the act without regard to whether the function out of which a claim arises is a governmental function or a proprietary function. The waiver of immunity is not dependent upon whether the alleged negligent act involves the exercise of discretion. Zimmer v. North Carolina Dep't of Transp., 87 N.C. App. 132, 360 S.E.2d 115 (1987).

The Tort Claims Act, G.S. 143-291 et seq., does not create an exception for negligent performance of duties involving discretion; thus, the selection of suitable highway detour routes by department of transportation employees was not a discretionary governmental function immune from suit. Zimmer v. North Carolina Dep't of Transp., 87 N.C. App. 132, 360 S.E.2d 115 (1987).

**Findings of Fact Conclusive.** — Findings of fact made by a Deputy Commissioner in a procedure under the Tort Claims Act which are not appealed are conclusive, and under the doctrine of collateral estoppel may not be relitigated in subsequent proceedings under 42 U.S.C. § 1983 in federal court. Solomon v. Dixon, 724 F. Supp. 1193 (E.D.N.C. 1989), aff'd, 904 F.2d 701 (4th Cir. 1990).

**Power of Industrial Commission to Pass on Claims Against Board of Transportation.** — The Tort Claims Act empowers the Industrial Commission to pass upon tort claims against the Highway Commission (now Department of Transportation) which arose as a result of a negligent act of an agent of the State while acting within the scope of his employment by the State. Davis v. North Carolina State Hwy. Comm'n, 271 N.C. 405, 156 S.E.2d 685 (1967).

**North Carolina State Ports Authority is an agency of the State** of North Carolina under the Tort Claims Act; its liability, if any, must be determined by the Industrial Commission. Guthrie v. North Carolina State Ports Auth., 56 N.C. App. 68, 286 S.E.2d 823, aff'd, 307 N.C. 522, 299 S.E.2d 618 (1983).

As an agency of the State, the State Ports Authority is clothed with immunity from actions based on its alleged negligence from whatever source except to the extent that such immunity has been waived, and that the State, by virtue of the enactment of State Tort Claims Act, has specifically and explicitly waived that immunity as to tort claims falling within the ambit of that act without regard to the nature of the function out of which they arise. Guthrie v. North Carolina State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983).

The language of the State Tort Claims Act and G.S. 143B-454(1), vesting the Ports Authority with authority to sue or be sued, when read together, evidence a legislative intent that the Authority be authorized to sue as plaintiff in its own name in the courts of the State but contemplates that all tort claims against the Authority for money damages will be pursued under the State Tort Claims Act. Guthrie v. North Carolina State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983).

**Superior court had no jurisdiction over an action for damages against the Department of Agriculture** based on the failure of the Commissioner of Agriculture to require a soybean dealer to obtain a permit and to furnish bond, since jurisdiction of tort claims against a State agency has been vested in the Industrial Commission. Etheridge v. Graham, 14 N.C. App. 551, 188 S.E.2d 551 (1972).

Since the Tort Claims Act provides that tort actions against the State, its departments, institutions, and agencies must be brought before the Industrial Commission, the superior and district courts of this State have no jurisdiction over a tort claim against the State, or its agencies, and in this case, the North Carolina State Ports Authority, an agency of the State. Guthrie v. North Carolina State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983).

**Superior Court lacked jurisdiction over suit against state university by former students** because the Tort Claims Act, G.S. 143-291 et seq., was not a waiver of sovereign immunity to the extent of insurance coverage; the language concerning insurance was more consistent with a designation of the source of payment than with a designation of the forum for adjudication. Wood v. N.C. State Univ., 147 N.C. App. 336, 556 S.E.2d 38, 2001 N.C. App. LEXIS 1175 (2001), cert. denied, 355 N.C. 292, 561 S.E.2d 887 (2002).

**This Article has no application with respect to acts of employees of city or county administrative units.** McBride v. North Carolina State Bd. of Educ., 257 N.C. 152, 125 S.E.2d 393 (1962).

**Such as County and City Boards of Education.** — The Tort Claims Act does not include local units such as county and city boards of education. Turner v. Gastonia City Bd. of Educ., 250 N.C. 456, 109 S.E.2d 211 (1959). But see § 143-300.1.

**As to liability of a college or university for a criminal attack** by a third person upon its students, see Brown v. North Carolina Wesleyan College, Inc., 65 N.C. App. 579, 309 S.E.2d 701 (1983).

**Liability of University for Injury to Student.** — A university has an affirmative duty of care toward a student athlete, such as a cheerleader, who is a member of a school-sponsored, intercollegiate team, especially where a special relationship exists between the parties and the university exerts a considerable degree of control over the athletes. Davidson v. University of N.C. at Chapel Hill, 142 N.C. App. 544, 543 S.E.2d 920, 2001 N.C. App. LEXIS 182 (2001), cert. denied, 353 N.C. 724, 550 S.E.2d 771 (2001), cert. denied, 353 N.C. 724, 550 S.E.2d 771 (2001).

**Waiver of Immunity by University.** — University's motion to dismiss an employee's state law claims against it pursuant to Fed. R. Civ. P. 12(b)(1) was granted because the university, as a state agency, enjoyed the protection of Eleventh Amendment immunity from liabilities that had to be paid from public funds; therefore, because North Carolina had not explicitly waived immunity from state court proceedings with regard to torts by state employees under G.S. 143-291, the university did not waive its immunity through removal to federal court, nor did the university waive its immunity under G.S. 153A-435(a) by purchasing liability insurance since there was not a plain and unmistakable mandate from the General Assembly to waive immunity in these circumstances. Alston v. N.C. A&T State Univ., 304 F. Supp. 2d 774, 2004 U.S. Dist. LEXIS 1725 (M.D.N.C. 2004).

**County's Claim Against State Agencies in Pollution Matter Within Scope of Tort Claims Act.** — Complaint by county (sued by landowner for pollution) against Department of Human Resources and Department of Natural Resources and Human Development, alleging that injuries resulted from negligence by officers, employees or agents while acting within course of employment, fell within scope of Tort Claims Act. Haas v. Caldwell Sys., 98 N.C. App. 679, 392 S.E.2d 110 (1990).

**Claim Against Department of Human Resources for Negligence of County Director of Social Services.** — In an action alleging that a foster child was negligently placed in a home by the Durham County Department of Social Services, the Department of Human Resources would be liable for the negligent acts of its agents, the Durham County Director of Social Services and his subordinates, since the Department of Human Resources, through the Social Services Commission, had the right to control the manner in which the county director was to execute his obligation to place children in foster homes. Vaughn v. North Carolina Dep't of Human Resources, 296 N.C. 683, 252 S.E.2d 792 (1979).

**County Agencies.** — An action against a county agency which directly affects the rights of the county is in fact an action against the county. Meyer v. Walls, 347 N.C. 97, 489 S.E.2d 880 (1997).

The Tort Claims Act does not apply to county agencies, regardless of whether the county agencies are acting as an agent of the state. Wood v. Guilford County, 143 N.C. App. 507, 546 S.E.2d 641, 2001 N.C. App. LEXIS 307 (2001).

**County Department of Social Services.** — Since County Department of Social Services was not a state agency, the Tort Claims act did not apply to claim against the Department. Meyer v. Walls, 347 N.C. 97, 489 S.E.2d 880 (1997).

**Action Against Commission or Board Action Against State.** — An action against a commission or board created by statute as an agency of the State where the interest or rights of the State are directly affected is in fact an action against the state. Meyer v. Walls, 347 N.C. 97, 489 S.E.2d 880 (1997).

**The statutory waiver of sovereign immunity must be strictly construed;** therefore, the Tort Claims Act applies only to actions against state departments, institutions, and agencies and does not apply to claims against officers, employees, involuntary servants, and agents of the State. Meyer v. Walls, 347 N.C. 97, 489 S.E.2d 880 (1997).

**Negligent Acts of Social Services.** — The North Carolina Department of Human Services may be liable for the negligent acts of the County Director of Social Services and his staff with respect to the delivery of child protective services so as to confer jurisdiction on the Industrial Commission to hear and decide the merits of the claim pursuant to the provisions of the Tort Claims Act. Gammons v. North Carolina Dep't of Human Resources, 344 N.C. 51, 472 S.E.2d 722 (1996).

The Industrial Commission had jurisdiction to hear and determine a claim alleging that a foster child was negligently placed in a home by the Durham County Department of Social Services. Vaughn v. North Carolina Dep't of Human Resources, 296 N.C. 683, 252 S.E.2d 792 (1979).

**Recovery Must Be Based on Negligent Act of Employee, etc.** — Before an award of damages can be made under the Tort Claims Act, there must be a finding of a negligent act by an officer, employee, servant or agent of the State. Taylor v. Stonewall Jackson Manual Training & Indus. School, 5 N.C. App. 188, 167 S.E.2d 787 (1969).

The State Tort Claims Act authorizes the Industrial Commission to entertain claims arising as a result of a negligent act of any officer, employee, involuntary servant, or agent of the State while acting within the scope of his office, employment, service, agency, or authority under circumstances where the State, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. Guthrie v. North Carolina State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983).

**While Acting Within Scope of Employment.** — Recovery, if any, under the Tort Claims Act, must be based upon the actionable negligence of an employee of a State agency while acting within the scope of his employment. Wirth v. Bracey, 258 N.C. 505, 128 S.E.2d 810 (1963); Mason v. North Carolina State Hwy. Comm'n, 7 N.C. App. 644, 173 S.E.2d 515 (1970).

Recovery against a State agency must be based upon actionable negligence of an employee of such agency while acting in the scope of his employment. Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).

Basically, a claim, to be recognizable within the purview of the Tort Claims Act, must arise as a result of a negligent act of a State employee while acting within the scope of his employment. Alliance Co. v. State Hosp., 241 N.C. 329, 85 S.E.2d 386 (1955).

**Such That Defendant Would Be Liable If It Were a Private Person.** — The Industrial Commission is to determine whether a claim brought under the Tort Claims Act arose as the result of a negligent act of an employee of the State under such circumstances that if the defendant were a private person there would be liability. Brooks v. University of N.C., 2 N.C. App. 157, 162 S.E.2d 616 (1968).

The legal limitation on the right to allow a claim under this section is limited to the same category with respect to tort claims against the agency covered as if such agency were a private person and such private person would be liable under the laws of North Carolina. Branch Banking & Trust Co. v. Wilson County Bd. of Educ., 251 N.C. 603, 111 S.E.2d 844 (1960).

The trial court lacked jurisdiction to hear an employee's Tort Claims Act action against the Department of Transportation arising from the employee's injury while working as a seaman on a ferry boat; the employee argued that the claim was in effect based on the federal Jones Act, 46 U.S.C.S. 688 (2001), and the State had not waived its sovereign immunity to the Jones act, because the Tort Claims Act specifically codified and automatically raised the defense of contributory negligence in each claim, while the Jones Act applied the standard of comparative negligence, and thus, an employer who would be liable to a partially negligent claimant under the Jones Act would not be liable to the same claimant in accordance with the laws of North Carolina, and because the Tort Claims Act expressly stated that the State could be liable only in circumstances where the State, if a private person, would be liable to the claimant in accordance with the laws of North Carolina, G.S. 143-291(a). Midgett v. N.C. DOT, 152 N.C. App. 666, 568 S.E.2d 643, 2002 N.C. App. LEXIS 979 (2002), cert. denied, 356 N.C. 438, 572 S.E.2d 786 (2002).

**Public Officer.** — The director of County Department of Social Services was a public officer for purposes of sovereign immunity. Meyer v. Walls, 122 N.C. App. 507, 471 S.E.2d 422 (1996), aff'd in part and rev'd in part, 347 N.C. 97, 489 S.E.2d 880 (1997).

As long as a public officer lawfully exercises the judgment and discretion with that which is invested by virtue of the office, keeps within the scope of the official authority, and acts without malice or corruption, the officer is protected from liability. Collins v. North Carolina Parole Comm'n, 344 N.C. 179, 473 S.E.2d 1 (1996).

**Negligence is determined by the same rules as those applicable to private parties** in proceedings under this Act. Bolkhir v. North

Carolina State Univ., 321 N.C. 706, 365 S.E.2d 898 (1988).

**Negligent Act of State Employee Must Be Proximate Cause of Injury.** — In order for a person to recover under the State Tort Claims Act, it must be shown that a negligent act of a state employee, acting in the course of his or her employment, proximately caused the injuries or damages asserted. While it is not required that the state employee's negligence be the sole proximate cause of the injury complained of, it must be a proximate cause. Register v. Administrative Office of Courts, 70 N.C. App. 763, 321 S.E.2d 24 (1984).

**But Negligent Acts Need Not Be Sole Proximate Cause of Injury.** — It was not the intent of the Legislature to limit liability under the Tort Claims Act to situations where the negligence of an employee was the sole proximate cause of the injury or damages inflicted. Branch Banking & Trust Co. v. Wilson County Bd. of Educ., 251 N.C. 603, 111 S.E.2d 844 (1960).

**Recovery May Not Be Had for Intentional Injuries.** — No recovery could be had for the intentional shooting of plaintiff's decedent by a State highway patrolman, since the Tort Claims Act does not permit recovery for wrongful and intentional injuries, but limits recovery to negligent acts. Jenkins v. North Carolina Dep't of Motor Vehicles, 244 N.C. 560, 94 S.E.2d 577 (1956).

Injuries intentionally inflicted by employees of a State agency are not compensable under the North Carolina Tort Claims Act. Davis v. North Carolina State Hwy. Comm'n, 271 N.C. 405, 156 S.E.2d 685 (1967); Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968); Braswell v. North Carolina A & T State Univ., 5 N.C. App. 1, 168 S.E.2d 24 (1969).

Since injuries intentionally inflicted by employees of a State agency are not compensable under the Tort Claims Act, the Industrial Commission correctly dismissed claims of false imprisonment and intentional infliction of emotional distress against the Disciplinary Hearing Commission. Frazier v. Murray, 135 N.C. App. 43, 519 S.E.2d 525 (1999).

**Nor for Negligent Failure to Act.** — The Tort Claims Act permits recovery only for the negligent acts of State employees, but does not permit recovery for their negligent failure to act. Brooks v. University of N.C., 2 N.C. App. 157, 162 S.E.2d 616 (1968).

Under the State Tort Claims Act, recovery is permitted for injuries resulting from a negligent act, but not those resulting from a negligent omission on the part of State employees. Mackey v. North Carolina State Hwy. Comm'n, 4 N.C. App. 630, 167 S.E.2d 524 (1969); Watson v. North Carolina Dep't of Cor., 47 N.C. App. 718, 268 S.E.2d 546, cert. denied, 301 N.C. 239, 283 S.E.2d 135 (1980).

The Tort Claims Act is applicable only to negligent acts of State employees and is not applicable to negligent omissions. Etheridge v. Graham, 14 N.C. App. 551, 188 S.E.2d 551 (1972).

The Tort Claims Act permits recovery only for negligent acts of employees of the Highway Commission (now Department of Transportation), not for their negligent omissions or failures to act. Ayscue v. North Carolina State Hwy. Comm'n, 270 N.C. 100, 153 S.E.2d 823 (1967).

The Highway Commission (now Department of Transportation) is an agency of the State and is not liable for the negligent omissions of its employees even under the provisions of the Tort Claims Act. Midgett v. North Carolina State Hwy. Comm'n, 265 N.C. 373, 144 S.E.2d 121 (1965).

The intent of the legislature was to permit recovery under the Tort Claims Act only for the negligent acts of State employees, for the things done by them, not for the things left undone. Flynn v. North Carolina State Hwy. & Pub. Works Comm'n, 244 N.C. 617, 94 S.E.2d 571 (1956).

An omission or failure to act will not support a tort claim. Wrape v. North Carolina State Hwy. Comm'n, 263 N.C. 499, 139 S.E.2d 570 (1965).

Recovery may be had against the state under the Tort Claims Act for injuries resulting from negligent action but not for negligent omissions; however, an undertaking negligently implemented is an actionable negligent action. Isenhour v. Hutto, 129 N.C. App. 596, 501 S.E.2d 78 (1998), aff'd in part and rev'd in part on other grounds, 350 N.C. 601, 517 S.E.2d 121 (1999).

**Hence the requirement of the statute is not met by showing negligence,** for negligence may consist of an act or an omission. Failure to act is not an act. Mackey v. North Carolina State Hwy. Comm'n, 4 N.C. App. 630, 167 S.E.2d 524 (1969); Watson v. North Carolina Dep't of Cor., 47 N.C. App. 718, 268 S.E.2d 546, cert. denied, 301 N.C. 239, 283 S.E.2d 135 (1980).

**But one who undertakes to do something and does it negligently commits a negligent act,** not a negligent omission. Mackey v. North Carolina State Hwy. Comm'n, 4 N.C. App. 630, 167 S.E.2d 524 (1969).

**For case distinguishing between ordinary negligence and wanton and willful negligence,** see Braswell v. North Carolina A & T State Univ., 5 N.C. App. 1, 168 S.E.2d 24 (1969).

**Negligent planning or negligent execution of plans may give rise to a tort claim.** Wrape v. North Carolina State Hwy. Comm'n, 263 N.C. 499, 139 S.E.2d 570 (1965).

**Neither intentional misrepresentation**

**nor conspiracy to defraud is negligence.** Davis v. North Carolina State Hwy. Comm'n, 271 N.C. 405, 156 S.E.2d 685 (1967).

**False Representation and False Inducement.** — A claim against the State and its agents for damages for the intentional torts of false representation and fraudulent inducement was barred by the doctrine of sovereign immunity since suits against the State, its agencies and its officers for alleged tortious acts can be maintained only to the extent authorized by the Tort Claims Act, and intentional torts are not compensable under the act. Wojsko v. State, 47 N.C. App. 605, 267 S.E.2d 708, cert. denied and appeal dismissed, 301 N.C. 238, 283 S.E.2d 136 (1980).

**Failure to Remove Gravel from Road.** — The failure of the State Highway Commission (now Department of Transportation) employees to remove gravel from a road cannot be the basis for an award under the Tort Claims Act. Ayscue v. North Carolina State Hwy. Comm'n, 270 N.C. 100, 153 S.E.2d 823 (1967).

**Failure to Repair Hole in Highway.** — Recovery could not be had for injuries in a wreck resulting from the negligent failure or omission of the responsible employees of the Highway Commission (now Department of Transportation) to repair a hole in a State highway. Flynn v. North Carolina State Hwy. & Pub. Works Comm'n, 244 N.C. 617, 94 S.E.2d 571 (1956).

**Failure to Erect Guardrail.** — The Department of Transportation's intentional, discretionary decision not to erect a guardrail at the site of fatal accident was not so clearly unreasonable as to amount to oppressive and manifest abuse so as to invoke the jurisdiction of the judiciary or the Industrial Commission to review the discretionary policy-making decisions of the Department, nor was it a breach of any duty imposed upon it. Thus, the Department was not negligent in any respect within the meaning of the Tort Claims Act, and no act or omission upon the part of defendant was the proximate cause of the accident and the deaths of plaintiff's decedents. Hochheiser v. North Carolina Dep't of Transp., 82 N.C. App. 712, 348 S.E.2d 140 (1986), aff'd, 321 N.C. 117, 361 S.E.2d 562 (1987).

**Failure to Post Adequate Signage on Railroad Crossing.** — North Carolina Department of Transportation was liable under the Tort Claims Act, G.S. 143-291 et seq., for failing to post adequate signage at a railroad crossing that was difficult to cross for low vehicles due to the grade of the road, because it had a duty to put up signs to warn of the risk, pursuant to G.S. 136-18(5), and it instead chose to direct trucks on an alternate route after finding that signs often went unheeded; despite the alternate route recommendation, the Department had a duty to warn drivers of the crossing, the failure to post such warnings was a breach of its duty and was the proximate cause of a truck driver's tractor-trailer getting stuck on the crossing and thereafter hit by a train, and there was no contributory negligence by the truck driver who bypassed the alternate route because there were no weight limit or other warning signs posted pursuant to G.S. 20-116(h). Smith v. N.C. DOT, 156 N.C. App. 92, 576 S.E.2d 345, 2003 N.C. App. LEXIS 83 (2003).

**Traffic Accident Caused by Water on Highway.** — Administrator's wrongful death claim against the state department of transportation arising from a fatal traffic accident caused by water on a highway was properly dismissed where the administrator's evidence failed to establish the department's standard of care, and failed to show that any failure by the department proximately caused the accident. Drewry v. N.C. DOT, 168 N.C. App. 332, 607 S.E.2d 342, 2005 N.C. App. LEXIS 262 (2005), cert. denied, 359 N.C. 410, 612 S.E.2d 318 (2005).

**Silting of Pond.** — The owner of a pond may not recover under the State Tort Claims Act for damage to the pond resulting from silt washed down from a fill necessarily incident to the improvement of a highway, the improvement having been made in accordance with plans and specifications, and there being no contention that the plans and specifications were faulty or negligently formulated. However, in the absence of negligent acts, the owner of property is entitled to compensation if the construction of a highway amounts to a taking of his property. Wrape v. North Carolina State Hwy. Comm'n, 263 N.C. 499, 139 S.E.2d 570 (1965).

**Switching Glass Door for Screen Door.** — In action brought by plaintiff as guardian ad litem for his injured son for injuries suffered when the child pushed through a glass panel installed by defendant's employee on storm door of an apartment rented by plaintiff, the Commission could find and conclude that the replacement of the screen panel with glass by defendant's employee was not reasonably prudent conduct under the circumstances presented, as defendant's employee had actual knowledge that plaintiff's children habitually opened the door in question by pushing forcefully on the middle panel, and the Court of Appeals erred in reversing the Commission's resolution of the question. Bolkhir v. North Carolina State Univ., 321 N.C. 706, 365 S.E.2d 898 (1988).

**Plate Glass Window.** — Safety manager was not responsible for the kind of glass which was installed in the building in the 1960's and neither knew nor should have known of the danger to plaintiff; therefore, assuming that plaintiff was an invitee, plaintiff's injuries from walking through the plate glass window were not due to any negligence on the part of defendant's safety manager. Ambrose v. University of North Carolina, 118 N.C. App. 659, 456 S.E.2d 342 (1995).

**Issuance of Identification Card in Plaintiff's Name to Someone Else.** — Where plaintiff suffered personal injury proximately caused by a Division of Motor Vehicles employee who, in the course of his employment, issued a special identification card in her name to another person, no language in the statute prohibited plaintiff from bringing the action against the State. Talbot v. North Carolina Dep't of Transp., 95 N.C. App. 446, 382 S.E.2d 447 (1989).

**Negligent Use of Excessive Force in Restraint of Plaintiff.** — Where Commission found that defendant's agents, in negligently using more force than was necessary to restrain plaintiff, beat plaintiff about the head, neck and wrist with a blackjack and other weapons, resulting in contusions to his neck and wrist, continued intermittent pain and weakness in his right wrist, numbness in his right hand, and inability to perform some tasks in his work as an upholsterer, award of $9,000 for pain and suffering and partial disability under the Tort Claims Act was not excessive. Jackson v. North Carolina Dep't of Crime Control & Pub. Safety, 97 N.C. App. 425, 388 S.E.2d 770, cert. denied, 326 N.C. 596, 393 S.E.2d 878 (1990).

Where the Commission found as a fact that although defendant's agents intended to violently restrain plaintiff, they did not intend to use excessive force, but that in fact they did, the Commission's conclusion that defendant's agents were negligent in using more force than was necessary, thus injuring plaintiff, was supported by the findings. Jackson v. North Carolina Dep't of Crime Control & Pub. Safety, 97 N.C. App. 425, 388 S.E.2d 770 (1990), cert. denied, 326 N.C. 596, 393 S.E.2d 878 (1990).

**Negligence of Trooper Causing Automobile Accident.** — Where trooper was speeding to try to find a possible drunk driver and struck plaintiff's car as she crossed the highway, the deputy commissioner's finding that the collision would have been avoided had the trooper managed to steer more to the left, when taken into account with the particular circumstances of the accident, mandated the conclusion that the trooper was negligent as a matter of law by failing to slow down when he saw plaintiff's vehicle positioning itself to pull out into his lane of travel. Minks v. North Carolina Hwy. Patrol, 116 N.C. App. 710, 449 S.E.2d 483 (1994).

**School Board Properly Held Liable.** — Commission did not err under G.S. 143-291(a) in finding that school bus driver was negligent in failing to stop the bus and break up a fight, rather than returning to the school, as the driver did not meet the driver's duty to follow the applicable rules of safety, there was a safe place to pull over, the beating could have been prevented if the bus had been stopped, and the driver's testimony that the driver would have acted in the same manner even if the incident occurred 10 miles from the school showed a disregard of established rules. Simmons v. Columbus County Bd. of Educ., 171 N.C. App. 725, 615 S.E.2d 69, 2005 N.C. App. LEXIS 1317 (2005).

**Acts by Parole Commission.** — Where parole commission granted prisoner parole based on findings of most recent psychological evaluation, commission was immune from action of surviving spouse of victim killed by parolee because parole commission acted within the scope of their official duties in making such decision. Collins v. North Carolina Parole Comm'n, 344 N.C. 179, 473 S.E.2d 1 (1996).

**Medical Negligence.** — Evidence held sufficient to support claim of negligence in that doctor and nurse at state psychiatric hospital violated the applicable standards of practice by placing plaintiff in seclusion and restraints after he threw his dinner tray against a wall, and by failing to release him within the first three hours of his seclusion and restraint. Alt v. John Umstead Hosp., 125 N.C. App. 193, 479 S.E.2d 800 (1997).

Patient's claim against a hospital and a state department was denied because the patient failed to prove that the hospital staff had notice of alleged threats by other patients against the patient, presented no evidence of negligent conduct by any hospital employee, and failed to show the level of care that the hospital owed to the patient; additionally, the patient's claim was barred by contributory negligence because the patient provoked the attack and failed to notify hospital staff members of any alleged threats. Thornton v. F.J. Cherry Hosp., 183 N.C. App. 177, 644 S.E.2d 369, 2007 N.C. App. LEXIS 1047 (2007).

**Claimant Must Be Free of Contributory Negligence.** — The Tort Claims Act does not authorize recovery unless the claimant is free from contributory negligence. Huff v. Northampton County Bd. of Educ., 259 N.C. 75, 130 S.E.2d 26 (1963).

In order for claimant to prevail in a proceeding under the State Tort Claims Act, he must show not only injury resulting from negligence of a designated State employee, but also that claimant was not guilty of contributory negligence. Floyd v. North Carolina State Hwy. & Pub. Works Comm'n, 241 N.C. 461, 85 S.E.2d 703 (1955).

The State may prescribe such terms and conditions as it sees fit, subject to constitutional limitations, in waiving its governmental immunity to suit for negligence, and the State Tort Claims Act permits recovery against the State only for such injuries as are proximately caused by negligence of a State employee while acting within the scope of his employment when there is no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted. Alliance Co. v. State Hosp., 241 N.C. 329, 85 S.E.2d 386 (1955).

**For case holding plaintiff contributorily negligent as a matter of law,** see Braswell v. North Carolina A & T State Univ., 5 N.C. App. 1, 168 S.E.2d 24 (1969).

**Claimant Held Free of Contributory Negligence.** — North Carolina Industrial Commission did not err in holding that an injured person was not contributorily negligent in that: (1) the injured party's attention was focused on the stop sign to the right side of the tracks and that she was slowing to obey that stop sign when she was struck by a train; (2) the evidence conflicted as to whether the train issued a signal audible from 1,500 feet of the highway crossing and whether the approaching train was plainly visible to invoke G.S. 20-142.1(a)(3); (3) a passenger in another driver's car's testimony was sufficient to support the Commission's finding that the injured party had slowed down in an attempt to obey the stop sign; and (4) a field support engineer with DOT testified that the stop sign was confusing. Norman v. N.C. DOT, 161 N.C. App. 211, 588 S.E.2d 42, 2003 N.C. App. LEXIS 2043 (2003), review dismissed, review denied, 358 N.C. 235, 595 S.E.2d 153 (2004), cert. denied, 358 N.C. 545, 599 S.E.2d 404 (2004).

**Negligence, etc., Determined Under Same Rules as Apply to Private Litigation.** — Negligence, contributory negligence and proximate cause, as well as the applicability of the doctrine of respondeat superior, are to be determined under the same rules as those applicable to litigation between private individuals. Barney v. North Carolina State Hwy. Comm'n, 282 N.C. 278, 192 S.E.2d 273 (1972).

**And Both Industrial Commission and Court Are Bound by Law of Negligence.** — The legislature intended that the Industrial Commission on the original hearing and the superior court (now the Court of Appeals) on the hearing on appeal should each be bound by the law of negligence, both substantive and adjective, as such common-law rules and doctrines appear in the numerous decisions of the Supreme Court, subject only to the limitations stipulated in the Act. MacFarlane v. North Carolina Wildlife Resources Comm'n, 244 N.C. 385, 93 S.E.2d 557 (1956).

**Meaning of "Employee".** — The word "employee," as used in the State Tort Claims Act, must be given its ordinary meaning in construing the statute. Alliance Co. v. State Hosp., 241 N.C. 329, 85 S.E.2d 386 (1955).

The word "employee" means one who works for wages or salary in the service of an employer. Alliance Co. v. State Hosp., 241 N.C. 329, 85 S.E.2d 386 (1955).

**Public Employee.** — The Supervisor of the Adult Protective Services Unit of, and a social worker for Department of Social Services were found to be public employees, not public officers. Meyer v. Walls, 122 N.C. App. 507, 471 S.E.2d 422 (1996), aff'd in part and rev'd in part, 347 N.C. 97, 489 S.E.2d 880 (1997).

**A prisoner detained at a State penal institution was not an employee of the State** within the meaning of the State Tort Claims Act, and the State could not be held liable under that statute for negligent injury inflicted by such prisoner while his services were made use of. Alliance Co. v. State Hosp., 241 N.C. 329, 85 S.E.2d 386 (1955).

**Nor Was a School Maintenance Worker.** — A person employed by a city board of education to do maintenance work in the city school grounds was not an employee of the State, and demurrer of the State Board of Education was properly sustained in proceedings against it under this section to recover for the negligence of such employee in the discharge of his duties. Turner v. Gastonia City Bd. of Educ., 250 N.C. 456, 109 S.E.2d 211 (1959).

**Employee Is Personally Liable for Own Negligence.** — An employee of the Highway Commission (now Department of Transportation) is personally liable for his own actionable negligence. Wirth v. Bracey, 258 N.C. 505, 128 S.E.2d 810 (1963); Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).

Recovery against the county board of education pursuant to the Tort Claims Act did not bar plaintiff's claims against the individual bus driver who caused the wreck, or plaintiff's uninsured motorist/underinsured motorist (UM/UIM) carrier for damages in excess of the maximum recovery allowable under the Tort Claims Act. Oakley v. Thomas, 112 N.C. App. 130, 434 S.E.2d 663 (1993).

**And Claims Against Both Agency and Employee Are Not Inconsistent.** — There is no inconsistency in respect of plaintiff's claims against the Highway Commission (now Department of Transportation) and actions against an employee since both are grounded on the actionable negligence of the employee and are cumulative and consistent. Wirth v. Bracey, 258 N.C. 505, 128 S.E.2d 810 (1963).

**But recovery against the negligent employee must be by common-law action.** Wirth v. Bracey, 258 N.C. 505, 128 S.E.2d 810 (1963); Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968); Mason v. North Carolina State Hwy. Comm'n, 7 N.C. App. 644, 173 S.E.2d 515 (1970).

**Plaintiff Held Precluded from Further Recovery Due to Settlement in Action Against Employee.** — Where a person injured by the alleged negligence of a State employee while engaged in the discharge of his duties as such brought suit against the employee before the passage of the Tort Claims Act, and a compromise was effected in the suit whereby the employee or his insurer paid the plaintiff $9,715.00 and the plaintiff released the employee and his insurer from all claims arising out of the accident, a subsequent action by the plaintiff against the State under the Tort Claims Act was properly dismissed, because (1) plaintiff had recovered from the employee an amount in excess of the maximum he could be awarded against the State, which was then $8,000, and (2) plaintiff had released the employee, the active tort-feasor, from further liability. MacFarlane v. North Carolina Wildlife Resources Comm'n, 244 N.C. 385, 93 S.E.2d 557 (1956), wherein the plaintiff had been named in the Tort Claims Act as one whose claim should be heard and determined by the Industrial Commission, and the amount of his claim had been listed in the Act as $25,000.

**Failure to Challenge Public Purpose of Actions.** — In consolidated action brought by property owners as a result of the disposal of waste materials from a highway project, where no party challenged the trial court's conclusion that the acts of the defendants in disposing of the waste materials from the project were not for a public purpose, neither the plaintiffs nor the other defendants could maintain an action against the Department of Transportation arising from those acts. Clark v. Asheville Contracting Co., 316 N.C. 475, 342 S.E.2d 832 (1986).

**State cannot be an absolute insurer of the safety of everyone committed to its custody.** Taylor v. Stonewall Jackson Manual Training & Indus. School, 5 N.C. App. 188, 167 S.E.2d 787 (1969).

North Carolina Department of Health and Human Services (DHHS) could not be held liable under the doctrine of respondeat superior for a foster father's conduct and the North Carolina Industrial Commission correctly ruled that it did not have jurisdiction to hear a claim which a guardian ad litem filed against DHHS in behalf of a foster child after the child was injured by the child's foster father. Creel v. N.C. Dep't of Health & Human Servs., 152 N.C. App. 200, 566 S.E.2d 832, 2002 N.C. App. LEXIS 900 (2002), cert. denied, 357 N.C. 163, 580 S.E.2d 363 (2003).

**As to the right of a prisoner or his estate to maintain an action under this section, in light of § 97-13,** see Lawson v. North Carolina State Hwy. & Pub. Works Comm'n, 248 N.C. 276, 103 S.E.2d 366 (1958); Ivey v. North Carolina Prison Dep't, 252 N.C. 615, 114 S.E.2d 812 (1960).

**Damages Within Discretion of Commission.** — The amount of damages to be awarded is a matter which this section leaves to the discretion of the Commission. Brown v. Charlotte-Mecklenburg Bd. of Educ., 269 N.C. 667, 153 S.E.2d 335 (1967).

**Post-judgment interest not authorized.** — Absent a specific statutory provision authorizing the accrual of interest on damage awards under this section, the State Tort Claims Act, no post-judgment interest can accrue to a tort claims award thereunder. Myers v. Department of Crime Control & Pub. Safety, 67 N.C. App. 553, 313 S.E.2d 276 (1984).

Claimant awarded $60,000 in his action against the Department of Crime Control and Public Safety under this section, the State Tort Claims Act, was not entitled to post-judgment interest on the award pending appeal. Myers v. Department of Crime Control & Pub. Safety, 67 N.C. App. 553, 313 S.E.2d 276 (1984).

**Post-Judgment Interest Not Authorized.** — Plaintiff was not entitled to pre- or post-judgment interest under G.S. 24-5 for his claim against the State under the Tort Claims Act. McGee v. North Carolina Dep't of Revenue, 135 N.C. App. 319, 520 S.E.2d 84 (1999).

**The Commission has jurisdiction and authority to award attorney's fees** pursuant to G.S. 6-21.1 for actions brought under the Tort Claims Act. Karp v. University of N.C., 88 N.C. App. 282, 362 S.E.2d 825 (1987), aff'd, 323 N.C. 473, 373 S.E.2d 430 (1988).

**The right of subrogation exists under the provisions of this Article** against State departments and agencies. Lyon & Sons v. North Carolina State Bd. of Educ., 238 N.C. 24, 76 S.E.2d 553 (1953).

**Public Duty Doctrine Applicable to Tort Claims Act Actions.** — The public duty doctrine, by barring negligence actions against a governmental entity absent a "special relationship" or a "special duty" to a particular individual, applies to claims brought under the Tort Claims Act. Stone v. North Carolina Dep't of Labor, 347 N.C. 473, 495 S.E.2d 711 (1998).

Public duty doctrine applies to negligence claims filed under the North Carolina Tort Claims Act, G.S. 143-291 et seq., against North Carolina Department of Environment and Natural Resources (NCDENR) for alleged mismanagement of forest fires; G.S. 113-51, 113-52, 113-54, and 113-55, which set forth the powers and duties of NCDENR and appointed state forest rangers, are designed to protect the citizens of North Carolina as a whole. Myers v. McGrady, 360 N.C. 460, 628 S.E.2d 761, 2006 N.C. LEXIS 47 (2006).

**Claim Barred by Public Duty Doctrine.** — A claim against the Department of Labor under the Tort Claims Act based on the failure of a Department employee to enforce compliance with regulations regarding go-kart seat belts did not fall within the "special relationship" or "special duty" exceptions to the public duty doctrine and the claim was barred. Hunt ex rel. Hasty v. North Carolina Dep't of Labor, 125 N.C. App. 293, 480 S.E.2d 413 (1997), rev'd, 348 N.C. 192, 499 S.E.2d 747 (1998).

Denial of the motion to dismiss and for judgment on the pleadings filed by the North Carolina Division of Forest Resources (NCDFR), a division of the North Carolina Department of Environment and Natural Resources (NCDENR), was reversed as the public duty doctrine applied to negligence claims filed under the North Carolina Tort Claims Act, G.S. 143-291 et seq., against NCDENR for the alleged mismanagement of forest fires; as G.S. 113-51, 113-52, 113-54, and 113-55, which set forth the powers and duties of NCDENR and appointed state forest rangers, were designed to protect the citizens of North Carolina as a whole, NCDENR did not owe a specific duty to the administratrix of a decedent killed in a car accident allegedly due to a forest ranger's negligence in managing a forest fire or to the other drivers and owners of cars involved in the accident and their negligence complaints failed to state a claim. Myers v. McGrady, 360 N.C. 460, 628 S.E.2d 761, 2006 N.C. LEXIS 47 (2006).

**Collateral Estoppel.** — North Carolina Tort Claims Act did not confer jurisdiction in the N.C. Industrial Commission over a gross negligence claim against a deceased National Guard member as the Act did not confer jurisdiction in the Industrial Commission over a claim against an employee of a state agency; thus, the Commission's finding that the decedent was not grossly negligent could not have been the basis for a collateral estoppel defense in a subsequent common law negligence action brought against the administratrix for the decedent as the Commission had no jurisdiction to make any finding regarding the decedent. Gregory v. Penland, 179 N.C. App. 505, 634 S.E.2d 625, 2006 N.C. App. LEXIS 1981 (2006).

**State Subdivisions Held Entitled to Sovereign Immunity**. — In a former employee's lawsuit alleging discrimination based on race and disability, as subdivisions of the State of North Carolina, an employer (the North Carolina Zoological Park) and its parent agency (the North Carolina Department of Environment and Natural Resources) were entitled to sovereign immunity, from the employee's claims for negligent and intentional infliction of emotional distress; thus, the court dismissed those claims. McInnis v. N.C. Dep't of Env't & Natural Res., 223 F. Supp. 2d 758, 2002 U.S. Dist. LEXIS 19182 (M.D.N.C. 2002).

**North Carolina Industrial Commission erred in granting partial summary judgment** to an injured party and in failing to remand the case to a deputy commissioner for an evidentiary hearing once the Commission determined that genuine issues of material fact remained as to whether the North Carolina Department of Transportation negligently erected a confusing stop sign at a railroad intersection. Norman v. N.C. DOT, 161 N.C. App. 211, 588 S.E.2d 42, 2003 N.C. App. LEXIS 2043 (2003), review dismissed, review denied, 358 N.C. 235, 595 S.E.2d 153 (2004), cert. denied, 358 N.C. 545, 599 S.E.2d 404 (2004).

**State Agency Held Not Liable.** — North Carolina Industrial Commission's denial of an injured person's negligence claim under the North Carolina Tort Claims Act for an incident involving a tree falling on the injured person at a zoo was affirmed since the evidence supported the commission's findings that the state employees named by the injured person were not negligent. Cherney v. N.C. Zoological Park, 166 N.C. App. 684, 603 S.E.2d 842, 2004 N.C. App. LEXIS 2029 (2004).

**Effect of Premature Appeal on Jurisdiction.** — Decision and order of the North Carolina Industrial Commission was affirmed because a deputy commissioner of the Commission did not lack jurisdiction to hear the property owners' negligence claim after a state agency filed its notice of appeal regarding the state agency's summary judgment motion before a hearing as the state agency could not file an appeal before the commissioner made a ruling. Pate v. N.C. DOT, 176 N.C. App. 530, 626 S.E.2d 661, 2006 N.C. App. LEXIS 528 (2006), cert. denied, 360 N.C. 535, 633 S.E.2d 819 (2006).

**Applied** in Greene v. Mitchell County Bd. of Educ., 237 N.C. 336, 75 S.E.2d 129 (1953); Gould v. North Carolina State Hwy. & Pub. Works Comm'n, 245 N.C. 350, 95 S.E.2d 910 (1957); Gordon v. North Carolina State Hwy. & Pub. Works Comm'n, 250 N.C. 645, 109 S.E.2d 376 (1959); Gay v. Wake County Bd. of Educ., 254 N.C. 622, 119 S.E.2d 460 (1961); Burlington Indus., Inc. v. State Hwy. Comm'n, 262 N.C. 620, 138 S.E.2d 281 (1964); Bateman v. Elizabeth City State College, 5 N.C. App. 168, 167 S.E.2d 838 (1969); Cogburn v. North Carolina State Hwy. Comm'n, 14 N.C. App. 544, 188 S.E.2d 553 (1972); Stroud v. North Carolina Mem. Hosp., 15 N.C. App. 592, 190 S.E.2d 392 (1972); Bullman v. North Carolina State Hwy. Comm'n, 18 N.C. App. 94, 195 S.E.2d 803 (1973); Brown v. Vance, 55 N.C. App. 387, 285 S.E.2d 333 (1982).

**Cited** in Eller v. Board of Educ., 242 N.C. 584, 89 S.E.2d 144 (1955); Bradshaw v. State Bd. of Educ., 244 N.C. 393, 93 S.E.2d 434 (1956); Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956); General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963); United States v. Muniz, 374 U.S. 150, 83 S. Ct. 1850, 10 L. Ed. 2d 805 (1963); Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966); Brown v. Charlotte-Mecklenburg Bd. of Educ., 267 N.C. 740, 149 S.E.2d 10 (1966); Wilmington Shipyard, Inc. v. North Carolina State Hwy.

Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969); Steelman v. City of New Bern, 279 N.C. 589, 184 S.E.2d 239 (1971); Sides v. Cabarrus Mem. Hosp., 287 N.C. 14, 213 S.E.2d 297 (1975); Mazzucco v. North Carolina Bd. of Medical Exmrs., 31 N.C. App. 47, 228 S.E.2d 529 (1976); Lanier v. North Carolina State Hwy. Comm'n, 31 N.C. App. 304, 229 S.E.2d 321 (1976); Potter v. North Carolina Sch. of Arts, 37 N.C. App. 1, 245 S.E.2d 188 (1978); Huyck Corp. v. C.C. Mangum, Inc., 58 N.C. App. 532, 293 S.E.2d 846 (1982); Riggan v. North Carolina State Hwy. Patrol, 61 N.C. App. 69, 300 S.E.2d 252 (1983); Smith v. McDowell County Bd. of Educ., 68 N.C. App. 541, 316 S.E.2d 108 (1984); Spell v. McDaniel, 591 F. Supp. 1090 (E.D.N.C. 1984); Karp v. UNC, 78 N.C. App. 214, 336 S.E.2d 640 (1985); Langley v. North Carolina Dep't of Crime Control & Pub. Safety, 83 N.C. App. 335, 349 S.E.2d 876 (1986); Smith v. Bounds, 657 F. Supp. 1327 (E.D.N.C. 1986); Baker v. North Carolina Dep't of Cor., 85 N.C. App. 345, 354 S.E.2d 733 (1987); Selective Ins. Co. v. NCNB Nat'l Bank, 324 N.C. 560, 380 S.E.2d 521 (1989); Medley v. North Carolina Dep't of Cor., 330 N.C. 837, 412 S.E.2d 654 (1992); Smith v. North Carolina Dep't of Natural Resources & Community Dev., 112 N.C. App. 739, 436 S.E.2d 878 (1993); Gammons v. North Carolina Dep't of Human Resources, 119 N.C. App. 589, 459 S.E.2d 295 (1995); Williams v. North Carolina Dep't of Correction, 120 N.C. App. 356, 462 S.E.2d 545 (1995); Allen v. North Carolina Dep't of Transp., 120 N.C. App. 627, 463 S.E.2d 275 (1995); Sword v. State, DOT, 121 N.C. App. 213, 464 S.E.2d 715 (1995); Carter v. Stanly County, 123 N.C. App. 235, 472 S.E.2d 378 (1996); Soderlund v. North Carolina Sch. of Arts, 125 N.C. App. 386, 481 S.E.2d 336 (1997); Simmons v. North Carolina DOT, 128 N.C. App. 402, 496 S.E.2d 790 (1998); Cash v. Granville County Board of Educ., 242 F.3d 219, 2001 U.S. App. LEXIS 2976 (4th Cir. 2001); Soderlund v. Kuch, 143 N.C. App. 361, 546 S.E.2d 632, 2001 N.C. App. LEXIS 313 (2001); Mabrey v. Smith, 144 N.C. App. 119, 548 S.E.2d 183, 2001 N.C. App. LEXIS 349 (2001); Kawai Am. Corp. v. Univ. of N.C. at Chapel Hill, 152 N.C. App. 163, 567 S.E.2d 215, 2002 N.C. App. LEXIS 887 (2002); Hooper v. North Carolina, 379 F. Supp. 2d 804, 2005 U.S. Dist. LEXIS 19515 (M.D.N.C. Apr. 13, 2005).

## II. PROCEDURE.

***Editor's Note.*** *— Some of the cases below were decided prior to the amendments to G.S. 143-300 making the Rules of Civil Procedure applicable to proceedings under this Article.*

**Limitation on Claims Same as If Agency Were Private Person.** — The legal limitation on the right to allow a claim under the provisions of the State Tort Claims Act is limited to the same category with respect to tort claims against the agency covered as if such agency were a private person and such private person would be liable under the laws of North Carolina. Guthrie v. North Carolina State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983).

**Jurisdiction.** — Fact that the N.C. Tort Claims Act provided for subject matter jurisdiction in the North Carolina Industrial Commission over a negligence claim against the State of North Carolina did not preclude a claim against an administratrix in superior court; thus, the accident victims could maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the administratrix for the deceased National Guard member in the superior court for common-law negligence. Gregory v. Penland, 179 N.C. App. 505, 634 S.E.2d 625, 2006 N.C. App. LEXIS 1981 (2006).

**Application of Proper Legal Standard.** — In a visitor's personal injury claim under the Tort Claims Act, the North Carolina Industrial Commission properly applied the same premises liability legal standard under G.S. 143-291(a) as would apply to a private person, which was a standard of reasonable care; distinctions between licensees and invitees had been eliminated. Cherney v. N.C. Zoological Park, 185 N.C. App. 203, 648 S.E.2d 242, 2007 N.C. App. LEXIS 1719 (2007), rev'd, 362 N.C. 223, 657 S.E.2d 352 (2008).

**A party to a compensation case is not entitled to try his case "piecemeal."** Bailey v. North Carolina Dep't of Mental Health, 272 N.C. 680, 159 S.E.2d 28 (1968).

**State May Require Claimant to Follow Certain Procedural Rules.** — In a suit against the State for an alleged tort, the plaintiff cannot complain when the State requires him to follow certain procedural rules before it gives its consent to waive its sovereign immunity. Bailey v. North Carolina Dep't of Mental Health, 2 N.C. App. 645, 163 S.E.2d 652 (1968).

**Which May Differ from Court Procedure.** — The manner in which the Industrial Commission transacts its business need not necessarily conform to court procedure. Crawford v. Wayne County Bd. of Educ., 3 N.C. App. 343, 164 S.E.2d 748 (1968), aff'd, 275 N.C. 354, 168 S.E.2d 33 (1969).

The Legislature has made the procedure in hearings before the Industrial Commission different from the procedures in the superior court. Bailey v. North Carolina Dep't of Mental Health, 2 N.C. App. 645, 163 S.E.2d 652 (1968).

**Determination of jurisdiction is the first order of business** in every proceeding before the Industrial Commission. Crawford v. Wayne County Bd. of Educ., 3 N.C. App. 343, 164 S.E.2d 748 (1968), aff'd, 275 N.C. 354, 168 S.E.2d 33 (1969).

**Affidavit and Evidence Must Name Em-**

**ployee and Set Forth Act of Negligence.** — It is necessary to recovery that the affidavit filed in support of the claim and the evidence offered before the Commission identify the employee alleged to have been negligent and set forth the specific act or acts of negligence relied upon. Ayscue v. North Carolina State Hwy. Comm'n, 270 N.C. 100, 153 S.E.2d 823 (1967); Brooks v. University of N.C., 2 N.C. App. 157, 162 S.E.2d 616 (1968).

It is necessary to a recovery under this section that the affidavit of claimant set forth the name of the allegedly negligent employee and the acts of negligence relied upon. Crawford v. Wayne County Bd. of Educ., 275 N.C. 354, 168 S.E.2d 33 (1969).

**Purpose of Naming Negligent Employee.** — The purpose of requiring the negligent employee to be named is to enable the department of the State against which the claim is made to investigate, not all of its employees, but the particular ones actually involved. Crawford v. Wayne County Bd. of Educ., 275 N.C. 354, 168 S.E.2d 33 (1969).

**Public Official Immunity.** — North Carolina State Tort Claims Act, G.S. 143-291 et seq., case was properly not dismissed as, although the case was based on the negligence of the director, two supervisors, two social workers, and a caseworker of a county department of social services in improperly investigating physician-made reports of suspected child sexual abuse, the action was filed in the North Industrial Commission against the North Carolina Department of Health and Human Services; the doctrine of public official immunity did not apply to actions against a state agency. Patrick v. N.C. HHS, — N.C. App. —, 666 S.E.2d 171, 2008 N.C. App. LEXIS 1648 (2008).

**Amendment of Affidavit to Allege Name of Employee Held Proper.** — In a proceeding under the Tort Claims Act, the Industrial Commission properly allowed amendment of claimant's affidavit to allege the name of the negligent State employee, since the amendment served the purpose of showing the existence of jurisdiction rather than conferring it. Crawford v. Wayne County Bd. of Educ., 3 N.C. App. 343, 164 S.E.2d 748 (1968), aff'd, 275 N.C. 354, 168 S.E.2d 33 (1969).

**Affidavit Held Insufficient for Failure to Specify Act of Negligence.** — Where the affidavit filed with the Commission alleged only that a named person was the road maintenance supervisor for the defendant Highway Commission (now Department of Transportation) in the county where the injury occurred on an allegedly defective highway, but it did not allege any act done by him, and there was no evidence of any negligent act on his part, the record would not support an order for recovery under the Tort Claims Act. Ayscue v. North Carolina State Hwy. Comm'n, 270 N.C. 100, 153 S.E.2d 823 (1967).

**Order to Compel Discovery.** — North Carolina Industrial Commission acted within its authority in issuing its order compelling state facilities and their employees to comply with discovery requests in a personal injury action brought under the North Carolina Tort Claims Act, G.S. 143-291 et seq., and the requested juvenile records, social services records, and law enforcement records sought in discovery were subject to disclosure. Jane Doe 1 v. Swannanoa Valley Youth Dev. Ctr., 163 N.C. App. 136, 592 S.E.2d 715, 2004 N.C. App. LEXIS 299 (2004).

**The Industrial Commission must make findings of fact and conclusions of law** to determine the issues raised by the evidence in a case before it. Martinez v. Western Carolina Univ., 49 N.C. App. 234, 271 S.E.2d 91 (1980).

North Carolina Industrial Commission's denial of a negligence claim brought by an estate co-administrator against the state transportation department following an automobile accident at a site where there was no median barrier, was reversed and the matter was remanded for additional findings of fact and further proceedings because the Commission's legal conclusions were based upon an erroneous application of the law to the facts, and were not supported by its findings of fact. Viar v. N.C. DOT, 162 N.C. App. 362, 590 S.E.2d 909, 2004 N.C. App. LEXIS 184 (2004).

**This section prohibits the Industrial Commission from awarding specific performance** rather than monetary damages. Price v. North Carolina Dep't of Cor., 103 N.C. App. 609, 406 S.E.2d 906 (1991).

**Covering Crucial Questions of Fact.** — Specific findings covering the crucial questions of fact upon which a plaintiff's right to compensation depends are required to be made by the Industrial Commission. Martinez v. Western Carolina Univ., 49 N.C. App. 234, 271 S.E.2d 91 (1980).

**But the Commission is not required to make a finding as to each detail** of the evidence or as to every inference or shade of meaning to be drawn therefrom. Bundy v. Cabarrus County Bd. of Educ., 5 N.C. App. 397, 168 S.E.2d 682 (1969).

The Industrial Commission is not required to make findings coextensive with the credible evidence. Bundy v. Cabarrus County Bd. of Educ., 5 N.C. App. 397, 168 S.E.2d 682 (1969).

**Findings Necessary to Authorize Payment.** — In order to authorize the payment of compensation, the Industrial Commission's findings must include (1) a negligent act, (2) on the part of a State employee, (3) while acting in the scope of his employment. Mackey v. North Carolina State Hwy. Comm'n, 4 N.C. App. 630, 167 S.E.2d 524 (1969).

**How Facts to Be Found.** — The determination of facts must be found from judicial admissions made by the parties, facts agreed, stipulations entered into and noted at the hearing, and evidence offered in open court, after all parties have been given full opportunity to be heard. Crawford v. Wayne County Bd. of Educ., 3 N.C. App. 343, 164 S.E.2d 748 (1968), aff'd, 275 N.C. 354, 168 S.E.2d 33 (1969).

**Finding of Fact Supported by Evidence is Binding on Appeal.** — A finding of fact on appeal by the Industrial Commission, other than a jurisdictional finding, is conclusive if there is any competent evidence in the record to support it. Barney v. North Carolina State Hwy. Comm'n, 282 N.C. 278, 192 S.E.2d 273 (1972).

Where the Industrial Commission's finding of fact is supported by the evidence, it is binding upon the Court of Appeals, even though a finding to the contrary could have been made. Hulcher Bros. & Co. v. North Carolina Dep't of Transp., 76 N.C. App. 342, 332 S.E.2d 744 (1985).

A finding of fact by the Industrial Commission in a proceeding under the Tort Claims Act is binding if there is any competent evidence to support it. Bolkhir v. North Carolina State Univ., 321 N.C. 706, 365 S.E.2d 898 (1988).

**But the Industrial Commission's designation of a declaration as a finding of fact is not conclusive.** Barney v. North Carolina State Hwy. Comm'n, 282 N.C. 278, 192 S.E.2d 273 (1972).

**Industrial Commission Not Bound by Deputy Commissioner's Findings and Conclusions.** — In an action filed pursuant to the North Carolina Tort Claims Act, G.S. 143-291 et seq., by a university student who was injured while lifting weights in a university facility, the North Carolina Industrial Commission was not bound by a deputy commissioner's findings of fact or by the deputy commissioner's award of $500,000 to the student; the full Commission properly made its own findings of fact after reviewing the record of the hearing before the deputy commissioner, and its award of $50,000 to the student was upheld on appeal. Hummel v. Univ. of N.C., 156 N.C. App. 108, 576 S.E.2d 124, 2003 N.C. App. LEXIS 72 (2003).

**Determination of negligence, proximate cause, and contributory negligence are mixed questions of law and fact** in a proceeding under the Tort Claims Act and are reviewable on appeal from the Industrial Commission, and the designation "Finding of Fact" or "Conclusion of Law" by the Commission is not conclusive. Braswell v. North Carolina A & T State Univ., 5 N.C. App. 1, 168 S.E.2d 24 (1969); Martinez v. Western Carolina Univ., 49 N.C. App. 234, 271 S.E.2d 91 (1980).

Negligence and contributory negligence are mixed questions of law and fact and, upon appeal, the reviewing court must determine whether facts found by the Industrial Commission support its conclusion of contributory negligence. Barney v. North Carolina State Hwy. Comm'n, 282 N.C. 278, 192 S.E.2d 273 (1972).

Negligence is a mixed question of law and fact, and the reviewing court must determine whether the Commission's findings support its conclusions. Bolkhir v. North Carolina State Univ., 321 N.C. 706, 365 S.E.2d 898 (1988).

**Prior Practice as Proper Factor for Consideration.** — Where evidence was presented to the Industrial Commission that even before the employee named in plaintiff's complaint recommended spaces be painted on the road, vehicles waiting to board a ferry had lined up in the southbound lane and vehicles wanting to reach the parking lot had passed the stopped vehicles by driving south in the northbound lane, a finding of the practice before the spaces were painted was important, because there was no evidence before the Industrial Commission that the employee designed the waiting area or created the problem of motorists driving in the wrong lane to the parking lot; therefore, plaintiff did not show that employee's recommendations were a proximate cause of decedent's injury. Woolard v. North Carolina Dep't of Transp., 93 N.C. App. 214, 377 S.E.2d 267, cert. denied, 325 N.C. 230, 381 S.E.2d 792 (1989).

**Power of Commission to Grant Rehearing.** — The Industrial Commission, in a proper case, may grant a rehearing and hear additional evidence. Bailey v. North Carolina Dep't of Mental Health, 272 N.C. 680, 159 S.E.2d 28 (1968).

A motion for a further hearing on the ground of introducing additional or newly discovered evidence rests in the sound discretion of the Industrial Commission, and its ruling thereon is not reviewable in the absence of an abuse of discretion by the Commission. Mason v. North Carolina State Hwy. Comm'n, 273 N.C. 36, 159 S.E.2d 574 (1968).

**Waiver of Objection to Conduct of Second Hearing.** — In a Tort Claims Act proceeding, where defendant county board of education made no objection to a member of the Industrial Commission conducting the second hearing, the first hearing and award being conducted by another member of the Commission, the defendant was held to have waived any objection thereto, especially when defendant joined in the request for a second hearing and had sufficient notice beforehand as to the identity of the Commissioner. Crawford v. Wayne County Bd. of Educ., 3 N.C. App. 343, 164 S.E.2d 748 (1968), aff'd, 275 N.C. 354, 168 S.E.2d 33 (1969).

**Third-Party Complaint Against the State Held Improperly Dismissed.** — Where the state was the subject of an action as a third-party defendant for indemnification pursuant to subsection (c) of this rule, the trial court erred when it dismissed a third-party complaint against the Department of Transportation. Columbus County Auto Auction, Inc. v. Aycock Auction Co., 90 N.C. App. 439, 368 S.E.2d 888 (1988).

**Lack of Jurisdiction over Crossclaim.** — The Legislature has not similarly excepted crossclaims against the State from the Tort Claims Act as it has for third-party claims, and the State may be sued in tort only as authorized by the Tort Claims Act; therefore, the superior court had no subject matter jurisdiction over defendant's crossclaim against the State. Selective Ins. Co. v. NCNB Nat'l Bank, 91 N.C. App. 597, 372 S.E.2d 876 (1988), rev'd on other grounds, 324 N.C. 560, 380 S.E.2d 521 (1989).

**Failure to Establish Basis for Application of "Foreseeability Test".** — Although city police department had notice of incidents in which objects were dropped or thrown from a bridge, the employees, officers and agents of the Greensboro Police Department were not employees, officers or agents of the State under the Tort Claims Act; therefore, in suit for damages based upon injuries sustained when an object thrown from the bridge struck plaintiff, who was a passenger in a car below, plaintiff failed to show actual or constructive knowledge attributable to the State Department of Transportation. Stallings v. North Carolina DOT, 92 N.C. App. 346, 374 S.E.2d 469 (1988).

**Choice of Law in Action for Collision Occurring in Virginia.** — In an action brought in this State under the Tort Claims Act for a collision which occurred in Virginia, the substantive law of Virginia and the procedural law of North Carolina apply. Parsons v. Alleghany County Bd. of Educ., 4 N.C. App. 36, 165 S.E.2d 776 (1969).

**As to joinder of the State in the State courts as a third-party defendant,** see Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982).

Even though, under G.S. 1A-1, Rule 14(c) of the North Carolina Rules of Civil Procedure (third party practice), the State may be made a third party in a tort action, the rules governing liability and the limits of liability of the State and its agencies as provided in the State Tort Claims Act apply. Guthrie v. North Carolina State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983).

**Contribution Among Tort-Feasors Act.** — Although under the Uniform Contribution Among Tort-Feasors Act (G.S. 1B-1), the State may be sued for contribution as a joint tortfeasor, the rules governing and limiting the liability of the State and its agencies as provided in the Tort Claims Act apply. Guthrie v. North Carolina State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983).

**Plaintiff was not collaterally estopped** from bringing a medical negligence claim against state psychiatric hospital and staff, even though in a prior claim for malicious prosecution, false imprisonment and deprivation of due process, summary judgment had been granted in favor of defendant hospital and staff. Alt v. John Umstead Hosp., 125 N.C. App. 193, 479 S.E.2d 800 (1997).

**Prison Inmate's Injury Claim.** — When an inmate is injured while working at his prison job, his exclusive remedy for any injury is a workers' compensation claim, but he must wait until release for a determination of entitlement to such compensation. Vereen v. N.C. Dep't of Corr., 168 N.C. App. 588, 608 S.E.2d 412, 2005 N.C. App. LEXIS 333 (2005).

**Failure to Meet Burden of Proof.** — Parents of an injured child were not entitled to payment of damages for personal injuries to the child in an action against a county board of education because the parents failed to prove that board's employee, who was a school bus driver, was negligent and that the negligence of the employee caused the injury to the child in a school bus accident. Coulter v. Catawba County Bd. of Educ., 189 N.C. App. 183, 657 S.E.2d 428, 2008 N.C. App. LEXIS 414 (2008).

## OPINIONS OF ATTORNEY GENERAL

**Local sanitation inspectors** are serving as officers, employees or agents of the State while acting within the scope of their office, employment, service, agency or authority in performing migrant housing inspections, and the inspectors are covered by the State Tort Claims Act when performing such inspections. See opinion of Attorney General to Mr. Bob Everett, Chairman, North Carolina Farm Worker Council, 57 N.C.A.G. 2 (1987).

**North Carolina Emergency Response Commission.** — State employees named to the North Carolina Emergency Response Commission are entitled to coverage under the Tort Claims Act, G.S. 143-291 et seq., as they would be for any other assigned duties. See Opinion of Attorney General to Eric Tolbert, Chairman, N.C. Emergency Response Commission, 2000 N.C. AG LEXIS 14 (9/6/2000).

Members of the North Carolina Emergency Response Commission who are not employed by the state, but appointed by the Governor to act on behalf of the state, become agents of the state and are entitled to coverage under the Tort Claims Act, G.S. 143-291 et seq. See Opinion of Attorney General to Eric Tolbert, Chairman, N.C. Emergency Response Commission, 2000 N.C. AG LEXIS 14 (9/6/2000).

## § 143-291.1. Costs.

The Industrial Commission is authorized by such order to tax the costs against the loser in the same manner as costs are taxed by the superior court in civil actions. When a State department, institution, or agency appeals the decision rendered by the hearing commissioner to the full Commission, the State department, institution or agency shall furnish a copy of the transcript of the hearing to the appellee without cost therefor. The State department, institution or agency concerned is authorized and directed to pay such costs as may be taxed against it, including all costs heretofore taxed against such department, agency or institution. (1955, c. 1102, s. 2; 1971, c. 58.)

### CASE NOTES

**The Commission has jurisdiction and authority to award attorney's fees** pursuant to G.S. 6-21.1 for actions brought under the Tort Claims Act. Karp v. UNC, 88 N.C. App. 282, 362 S.E.2d 825 (1987), aff'd, 323 N.C. 473, 373 S.E.2d 430 (1988).

**Attorney Fees Awarded in Error.** — Costs and attorney fees were awarded to a property owner in error as, when read by themselves, G.S. 143-291 and G.S. 143-291.1 did not grant the North Carolina Industrial Commission the authority to award attorney fees; when read together with G.S. 6-21.1, the Commission had jurisdiction and authority to award attorney fees in a North Carolina Tort Claims Act case, but the owner's damages far exceeded the statutory maximum of $10,000. Watts v. N.C. Dep't of Env't & Natural Res., 182 N.C. App. 178, 641 S.E.2d 811, 2007 N.C. App. LEXIS 595 (2007), aff'd in part, modified in part, 362 N.C. 487, 666 S.E.2d 752 (2008).

**Applied** in Sprinkle v. N.C. Wildlife Res. Comm'n, 165 N.C. App. 721, 600 S.E.2d 473, 2004 N.C. App. LEXIS 1513 (2004).

## § 143-291.2. Costs and fees.

(a) The Industrial Commission may by order tax the costs against the losing party in the same amount and the same manner as costs are taxed in the General Court of Justice. When a State department, institution, or agency appeals to the full commission the decision rendered by a hearing commissioner, the State department, institution, or agency shall furnish a copy of the transcript of the hearing to the appellee without cost. The State department, institution, or agency concerned may pay the costs taxed against it. When costs are not paid by a party from whom they are due, the Industrial Commission shall issue an execution for the costs and attach a bill of costs to each execution. The Sheriff shall levy upon the execution as provided in Chapter 6 of the General Statutes in civil actions.

(b) The Industrial Commission shall charge a filing fee for each affidavit initiating a claim filed under this Article in an amount equal to the filing fee charged for civil actions in the Superior Court Division of the General Court of Justice. No filing fee shall be required of indigent persons, provided each claim by an indigent complies with all statutory and administrative requirements applicable to the filing of civil actions by indigents in the Superior Court Division of the General Court of Justice. (1987 (Reg. Sess., 1988), c. 1087, s. 2.)

## § 143-291.3. Counterclaims by State.

The filing of a claim under this Article shall constitute consent by the plaintiff to the jurisdiction of the Industrial Commission to hear and determine any counterclaim of the maximum amount authorized for a claim in G.S. 143-299.2 or less that may be filed on behalf of a State department, institution or agency, or a county or city board of education. A final award of the Industrial Commission awarding damages on a counterclaim shall be filed with the clerk of the superior court of the county where the case was heard. These awards shall be docketed and shall be enforceable in the same manner as judgments of the General Court of Justice. Notwithstanding the provisions of Rule 12 of the Rules of Civil Procedure, nothing in this section shall require the filing of a counterclaim. (1987 (Reg. Sess., 1988), c. 1087, s. 3; 1995, c. 509, s. 82; 2000-67, s. 7A(c).)

**Editor's Note.** — Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 7A(j), provides that, notwithstanding the limitations of G.S. 143-291.3, for claims pending on the effective date of the act, any counterclaim made by the State under G.S. 143-291.3 shall not exceed the greater of $150,000 or the amount of the plaintiff's claim.

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

## § 143-292. Notice of determination of claim; appeal to full Commission.

Upon determination of said claim the Commission shall notify all parties concerned in writing of its decision and either party shall have 15 days after receipt of such notice within which to file notice of appeal with the Industrial Commission. Such appeal, when so taken, shall be heard by the Industrial Commission, sitting as a full Commission, on the basis of the record in the matter and upon oral argument of the parties, and said full Commission may amend, set aside, or strike out the decision of the hearing commissioner and may issue its own findings of fact and conclusions of law. Upon determination of said claim by the Industrial Commission, sitting as a full Commission, the Commission shall notify all parties concerned in writing of its decision. Such determination by the Industrial Commission, sitting as a full Commission, upon claims in an amount of five hundred dollars ($500.00) or less, shall be final as to the State or any of its departments, institutions or agencies, and no appeal shall lie therefrom by the State or any of its departments, institutions or agencies. (1951, c. 1059, s. 2; 1955, c. 770; 1979, c. 581.)

### CASE NOTES

**Findings and Conclusions of Full Commission.** — The legislature's use of the word "may" indicates that although the full Commission is permitted to enter its own findings of fact and conclusions of law, it is not required to do so. Smith v. North Carolina Dep't of Natural Resources & Community Dev., 112 N.C. App. 739, 436 S.E.2d 878 (1993), cert. denied, 336 N.C. 74, 445 S.E.2d 37 (1994).

In an action filed pursuant to the North Carolina Tort Claims Act, G.S. 143-291 et seq., by a university student who was injured while lifting weights in a university facility, the North Carolina Industrial Commission was not bound by a deputy commissioner's findings of fact or by the deputy commissioner's award of $500,000 to the student; the full Commission properly made its own findings of fact after reviewing the record of the hearing before the deputy commissioner, and its award of $50,000 to the student was upheld on appeal. Hummel v. Univ. of N.C., 156 N.C. App. 108, 576 S.E.2d 124, 2003 N.C. App. LEXIS 72 (2003).

**Authority of Full Commission.** — In an action brought under the Tort Claims Act, G.S. 143-291 et seq., Industrial Commission had the authority under G.S. 143-292 to reject the finding of a deputy commissioner that the actions of a state trooper who shot and killed a driver during a traffic stop were negligent; as the commission lacked jurisdiction over claims involving intentional acts, the claim was properly dismissed. Fennell v. North Carolina Dep't of Crime Control & Pub. Safety, 145 N.C. App. 584, 551 S.E.2d 486, 2001 N.C. App. LEXIS 745 (2001).

**The function performed by the full Industrial Commission when addressing claims under the Tort Claims Act is not the same as the one it performs when hearing**

**a workers' compensation claim.** The Commission, when hearing appeals of claims from a hearing commissioner under the Tort Claims Act may make its own findings of fact and conclusions of law, but it is not required to do so. When the claimant appeals to the Commission, making only a general allegation that the hearing commissioner erred in finding that the defendant was not negligent and that such decision was not supported by the evidence, the Commission may respond to such appeal by reviewing the record and, when appropriate, may affirm and adopt the decision and order of the hearing commissioner. Brewington v. North Carolina Dep't of Cor., 111 N.C. App. 833, 433 S.E.2d 798 (1993), cert. denied, 335 N.C. 552, 439 S.E.2d 142 (1993).

**Cited** in Brewington v. North Carolina Dep't of Cor., 111 N.C. App. 833, 433 S.E.2d 798; Bradshaw v. State Bd. of Educ., 244 N.C. 393, 93 S.E.2d 434 (1956); Solomon v. Dixon, 724 F. Supp. 1193 (E.D.N.C. 1989).

## § 143-293. Appeals to Court of Appeals.

Either the claimant or the State may, within 30 days after receipt of the decision and order of the full Commission, to be sent by registered or certified mail, but not thereafter, appeal from the decision of the Commission to the Court of Appeals. Such appeal shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them. The appellant shall cause to be prepared a statement of the case as required by the rules of the Court of Appeals. A copy of this statement shall be served on the respondent within 45 days from the entry of the appeal taken; within 20 days after such service, the respondent shall return the copy with his approval or specified amendments endorsed or attached; if the case be approved by the respondent, it shall be filed with the Clerk of the Court of Appeals as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved. The chairman of the Industrial Commission shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counterstatement of case.

If the case on appeal is returned by the respondent with objections as prescribed, or if a countercase is served on appellant, the appellant shall immediately request the chairman of the Industrial Commission to fix a time and place for settling the case before him. If the appellant delays longer than 15 days after the respondent serves his countercase or exceptions to request the chairman to settle the case on appeal, and delays for such period to mail the case and countercase or exceptions to the chairman, then the exceptions filed by the respondent shall be allowed; or the countercase served by him shall constitute the case on appeal; but the time may be extended by agreement of counsel.

The chairman shall forthwith notify the attorneys of the parties to appear before him for that purpose at a certain time and place, which time shall not be more than 20 days from the receipt of the request. At the time and place stated, the chairman of the Industrial Commission or his designee shall settle and sign the case and deliver a copy to the attorneys of each party. The appellant shall within five days thereafter file it with the Clerk of the Court of Appeals, and if he fails to do so the respondent may file his copy.

No appeal bond or supersedeas bond shall be required of State departments or agencies. (1951, c. 1059, s. 3; 1967, c. 655, s. 1; 1987 (Reg. Sess., 1988), c. 1087, s. 4.)

**Legal Periodicals.** — For article, "Liability for Discretionary Decisions of State Officers and Employees Under the North Carolina Tort Claims Act: A Critical Analysis of Hochheiser v. North Carolina Dep't of Transp.," see 18 N.C. Cent. L.J. 143 (1989).

## CASE NOTES

**Who Has Right to Appeal.** — Under G.S. 143-293, either party may appeal a decision of the North Carolina Industrial Commission. Norman v. N.C. DOT, 161 N.C. App. 211, 588 S.E.2d 42, 2003 N.C. App. LEXIS 2043 (2003), review dismissed, review denied, 358 N.C. 235, 595 S.E.2d 153 (2004), cert. denied, 358 N.C. 545, 599 S.E.2d 404 (2004).

**Necessity for Exceptions and Taking of Appeal.** — Where the record failed to show any exception to the findings, conclusions and order of the Industrial Commission dismissing plaintiff's claim or an appeal taken as permitted by this section, the superior court (now Court of Appeals) was without jurisdiction to hear plaintiff's claim. McBride v. North Carolina State Bd. of Educ., 257 N.C. 152, 125 S.E.2d 393 (1962).

**Exceptions Should Be Filed Prior to Hearing Before Court.** — If the appellants desire to enter exceptions to the findings of fact made by the Industrial Commission, they should file them prior to the hearing in the superior court (now Court of Appeals). Whether the judge should interrupt the hearing and call in the court reporter so that specific exceptions can be taken to certain findings of fact and conclusions of law of the Commission rests in his sound discretion. Greene v. Mitchell County Bd. of Educ., 237 N.C. 336, 75 S.E.2d 129 (1953).

**Preservation for Review.** — Although the parents of an injured child assigned as error a deputy commissioner's alleged errors, they did not assign as error the North Carolina Industrial Commission's failure to address this alleged error; thus, the issue was not properly preserved for appellate review because appellate review was limited to the decision and order of the Commission pursuant to G.S. 143-293. Coulter v. Catawba County Bd. of Educ., 189 N.C. App. 183, 657 S.E.2d 428, 2008 N.C. App. LEXIS 414 (2008).

**Scope of Judicial Review.** — In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) Whether or not there was any competent evidence before the Commission to support its findings of fact; and (2) Whether or not the findings of fact of the Commission justify its legal conclusions and decision. Bailey v. North Carolina Dep't of Mental Health, 272 N.C. 680, 159 S.E.2d 28 (1968); Mason v. North Carolina State Hwy. Comm'n, 273 N.C. 36, 159 S.E.2d 574 (1968); Stroud v. North Carolina Mem. Hosp., 15 N.C. App. 592, 190 S.E.2d 392 (1972); Paschall v. North Carolina Dep't of Cor., 88 N.C. App. 520, 364 S.E.2d 144, cert. denied, 322 N.C. 326, 368 S.E.2d 868 (1988).

In reviewing a decision of the Industrial Commission in a case arising under the Tort Claims Act, an appellate court has two questions to consider: whether the Commission's findings of fact are supported by competent evidence, and whether its conclusions of law are supported by its findings of fact. Tanner v. State Dep't of Cor., 19 N.C. App. 689, 200 S.E.2d 350 (1973).

**Questions to Consider on Appeal.** — When considering an appeal from the Industrial Commission, the North Carolina Court of Appeals is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision. Simmons v. North Carolina DOT, 128 N.C. App. 402, 496 S.E.2d 790 (1998).

**When reviewing the North Carolina Industrial Commission's entry of summary judgment,** instead of addressing the questions which the appellate court is usually limited to pursuant to G.S. 143-293, the appellate court must determine whether the pleadings, interrogatory answers, affidavits, or other materials contained a genuine question of material fact, and whether at least one party was entitled to a judgment as a matter of law. Norman v. N.C. DOT, 161 N.C. App. 211, 588 S.E.2d 42, 2003 N.C. App. LEXIS 2043 (2003), review dismissed, review denied, 358 N.C. 235, 595 S.E.2d 153 (2004), cert. denied, 358 N.C. 545, 599 S.E.2d 404 (2004).

**Specific Findings Required for Review.** — Specific findings of fact by the Industrial Commission are required. These must cover the crucial questions of fact upon which plaintiff's right to compensation depends. Otherwise, the reviewing court cannot determine whether an adequate basis exists, either in fact or in law, for the ultimate finding. Bailey v. North Carolina Dep't of Mental Health, 272 N.C. 680, 159 S.E.2d 28 (1968).

**Commission's Findings Are Conclusive If Supported by Evidence.** — The findings of fact by the Industrial Commission are conclusive if there is any competent evidence to support them. Mitchell v. Guilford County Bd. of Educ., 1 N.C. App. 373, 161 S.E.2d 645 (1968); Mackey v. North Carolina State Hwy. Comm'n, 4 N.C. App. 630, 167 S.E.2d 524 (1969).

**Even If Evidence Would Support Contrary Findings.** — The Industrial Commission's findings of fact are conclusive on appeal when supported by competent evidence, except for jurisdictional findings. This is true, even though there is evidence which would support findings to the contrary. Bailey v. North Carolina Dep't of Mental Health, 272 N.C. 680, 159

S.E.2d 28 (1968); Bailey v. North Carolina Dep't of Mental Health, 2 N.C. App. 645, 163 S.E.2d 652 (1968).

If there is any competent evidence to support findings of fact by the Industrial Commission, such findings are conclusive, and on appeal are not subject to review even though there is evidence that would support a finding to the contrary. English Mica Co. v. Avery County Bd. of Educ., 246 N.C. 714, 100 S.E.2d 72 (1957); Gordon v. North Carolina State Hwy. & Pub. Works Comm'n, 250 N.C. 645, 109 S.E.2d 376 (1959); Jordan v. State Hwy. Comm'n, 256 N.C. 456, 124 S.E.2d 140 (1962); Tanner v. State Dep't of Cor., 19 N.C. App. 689, 200 S.E.2d 350 (1973).

Findings of fact of the Industrial Commission, if supported by any competent evidence, are conclusive on appeal even though there is evidence which would support a contrary finding. Bullman v. North Carolina State Hwy. Comm'n, 18 N.C. App. 94, 195 S.E.2d 803 (1973).

**But findings by the Commission which are mixtures of findings of fact and conclusions of law are subject to review** on appeal. Brown v. Charlotte-Mecklenburg Bd. of Educ., 269 N.C. 667, 153 S.E.2d 335 (1967).

**Finding of Absence of Negligence Upheld.** — Where the Industrial Commission found as a fact and concluded as a matter of law that there was no negligence on the part of employee bus driver resulting in damages to the claimant within the purview of G.S. 143-291 to 143-300, and the superior court (now Court of Appeals) was unable to find that there was no evidence to support the finding of the Commission, the judgment of the superior court affirming the decision and order of the Commission was proper. Bradshaw v. State Bd. of Educ., 244 N.C. 393, 93 S.E.2d 434 (1956).

North Carolina Industrial Commission's denial of an injured person's negligence claim under the North Carolina Tort Claims Act for an incident involving a tree falling on the injured person at a zoo was affirmed since the evidence supported the commission's findings that the state employees named by the injured person were not negligent. Cherney v. N.C. Zoological Park, 166 N.C. App. 684, 603 S.E.2d 842, 2004 N.C. App. LEXIS 2029 (2004).

Administrator's wrongful death claim against the state department of transportation arising from a fatal traffic accident caused by water on a highway was properly dismissed where the administrator's evidence failed to establish the department's standard of care, and failed to show that any failure by the department proximately caused the accident. Drewry v. N.C. DOT, 168 N.C. App. 332, 607 S.E.2d 342, 2005 N.C. App. LEXIS 262 (2005), cert. denied, 359 N.C. 410, 612 S.E.2d 318 (2005).

**Finding of Negligence Reversed.** — North Carolina Industrial Commission award to vehicle owners was reversed because the Industrial Commission's finding that a bailment was created when the North Carolina Department of Motor Vehicles (DMV) seized the owners' vehicles and had them stored pending a criminal case was reversed because the seizure of the vehicles was a unilateral act which did not suggest the mutual intent necessary to form even an implied bailment contract. Further, the findings of fact by the Industrial Commission did not support a finding of negligence by the DMV. Becker v. N.C. DMV, 177 N.C. App. 436, 628 S.E.2d 446, 2006 N.C. App. LEXIS 969 (2006).

**Competent evidence supported factual findings,** pursuant to G.S. 143-293, that bus driver noticed the fight between the students before turning onto the highway and that the fight escalated as the driver turned onto the highway; the injured party testified that the fight began before the bus turned onto the highway, thus creating a reasonable inference that the fight escalated as the bus turned onto the highway, and the driver noticed the fight prior to turning onto the highway, as the driver yelled to the children. Simmons v. Columbus County Bd. of Educ., 171 N.C. App. 725, 615 S.E.2d 69, 2005 N.C. App. LEXIS 1317 (2005).

Where the North Carolina Industrial Commission found that the school bus driver was negligent for failing to pull the bus over and stop the fight, competent evidence under G.S.143-293 supported the finding that there was a safe place for the driver to pull the bus over; testimony was received establishing that there was a safe place where the driver could have stopped the bus. Simmons v. Columbus County Bd. of Educ., 171 N.C. App. 725, 615 S.E.2d 69, 2005 N.C. App. LEXIS 1317 (2005).

North Carolina Industrial Commission's decision in favor of a county board of education was affirmed because the Commission's findings of fact were supported by competent evidence, and the Commission did not err in concluding that the parents of an injured child failed to prove that the board's employee, who was a school bus driver, was negligent and that the negligence of the employee caused the injury to the child in a school bus accident. Coulter v. Catawba County Bd. of Educ., 189 N.C. App. 183, 657 S.E.2d 428, 2008 N.C. App. LEXIS 414 (2008).

**Additional Facts May Not Be Found on Appeal.** — Upon an appeal from the Industrial Commission, the reviewing court may not find facts in addition to those found by the Commission, even though there is in the record evidence to support such findings, the appeal being for errors of law only. Brown v. Charlotte-Mecklenburg Bd. of Educ., 269 N.C. 667, 153 S.E.2d 335 (1967).

**Reviewability of Ruling on Motion for Further Hearing.** — A motion for a further hearing on the ground of introducing additional or newly discovered evidence rests in the sound discretion of the Industrial Commission, and its ruling thereon is not reviewable in the superior court (now Court of Appeals) in the absence of an abuse of discretion by the Commission. Mason v. North Carolina State Hwy. Comm'n, 273 N.C. 36, 159 S.E.2d 574 (1968).

**Finding of Negligence Upheld.** — Decision and order of the North Carolina Industrial Commission was affirmed because (1) the North Carolina Tort Claims Act, G.S. 143-291 et seq., governed the property owners' negligence claim against a state agency, rather than G.S. 136-111; (2) the deputy commissioner of the Commission did not lack jurisdiction to hear the matter after the state agency filed its notice of appeal before a hearing as the state agency could not file an appeal before the commissioner made a ruling; and (3) the negligence claim was not barred under the doctrine of res judicata due to a prior inverse condemnation ruling in a civil action. Pate v. N.C. DOT, 176 N.C. App. 530, 626 S.E.2d 661, 2006 N.C. App. LEXIS 528 (2006), cert. denied, 360 N.C. 535, 633 S.E.2d 819 (2006).

**Finding of Contributory Negligence Upheld.** — Sufficient evidence supported a commission's findings that plaintiff knew that shrubbery beds he walked on were not intended for foot travel and that the sidewalk was a more prudent choice; the commission's holding that plaintiff was barred from recovery under the Tort Claims Act for injuries resulting from his fall in the shrubbery beds due to his contributory negligence was proper. Webb v. N.C. DOT, 180 N.C. App. 466, 637 S.E.2d 304, 2006 N.C. App. LEXIS 2382 (2006).

**Power to Remand on Ground of Newly Discovered Evidence.** — In the superior court (now Court of Appeals) upon appeal from an award by the Industrial Commission, the court has power in a proper case to order a rehearing, and to remand the proceeding to the Industrial Commission, on the ground of newly discovered evidence, but this is a matter within the sound discretion of the court. Mason v. North Carolina State Hwy. Comm'n, 273 N.C. 36, 159 S.E.2d 574 (1968).

Ordinarily, the limited authority of the reviewing court does not permit the judge to order remand of the cause for the taking of additional evidence. However, the judge of the superior court (now Court of Appeals) may remand a cause to the Industrial Commission on the ground of newly discovered evidence in a proper case; such proper case is made out only when it appears by affidavits: (1) that the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is competent, material, and relevant; (4) that due diligence has been used and the means employed, or that there has been no laches, in procuring the testimony at the trial; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; and (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. Bailey v. North Carolina Dep't of Mental Health, 272 N.C. 680, 159 S.E.2d 28 (1968).

**Remand for Misapprehension of Law.** — Where facts are found or where the Commission fails to find facts under a misapprehension of law, the court will, where the ends of justice require, remand the cause so that the evidence may be considered in its true legal light. Bailey v. North Carolina Dep't of Mental Health, 272 N.C. 680, 159 S.E.2d 28 (1968); Bailey v. North Carolina Dep't of Mental Health, 2 N.C. App. 645, 163 S.E.2d 652 (1968).

**Remand Where Findings Are Insufficient.** — When the findings are insufficient to enable the reviewing court to determine the rights of the parties, the case must be remanded to the Commission for proper findings. Bailey v. North Carolina Dep't of Mental Health, 272 N.C. 680, 159 S.E.2d 28 (1968).

**Commission Bound by Order of Court.** — Where, in a proceeding under the Tort Claims Act, the superior court (now Court of Appeals) on appeal adjudicates that certain findings of the Commission were not supported by evidence, and remands the cause, the Commission is bound by the order unless and until it is set aside on further appeal to the Supreme Court, and the Commission may not merely rephrase its original findings and adopt them as so rephrased. Johnson v. Cleveland County Bd. of Educ., 241 N.C. 56, 84 S.E.2d 256 (1954).

**Applied** in Lyon & Sons v. North Carolina State Bd. of Educ., 238 N.C. 24, 76 S.E.2d 553 (1953); Gay v. Wake County Bd. of Educ., 254 N.C. 622, 119 S.E.2d 460 (1961); Lanier v. North Carolina State Hwy. Comm'n, 31 N.C. App. 304, 229 S.E.2d 321 (1976); Withers v. Charlotte-Mecklenburg Bd. of Educ., 32 N.C. App. 230, 231 S.E.2d 276 (1977); Jackson v. North Carolina Dep't of Crime Control & Pub. Safety, 97 N.C. App. 425, 388 S.E.2d 770 (1990).

**Cited** in Tucker v. North Carolina State Hwy. & Pub. Works Comm'n, 247 N.C. 171, 100 S.E.2d 514 (1957); Adams v. State Bd. of Educ., 248 N.C. 506, 103 S.E.2d 854 (1958); Bateman v. Elizabeth City State College, 5 N.C. App. 168, 167 S.E.2d 838 (1969); Parsons v. Alleghany County Bd. of Educ., 4 N.C. App. 36, 165 S.E.2d 776 (1969); Solomon v. Dixon, 724 F. Supp. 1193 (E.D.N.C. 1989); Medley v. North Carolina Dep't of Cor., 99 N.C. App. 296, 393 S.E.2d 288 (1990); Price v. North Carolina Dep't of Cor., 103 N.C. App. 609, 406 S.E.2d 906 (1991); Midgett v. N.C. DOT, 152 N.C. App. 666, 568

S.E.2d 643, 2002 N.C. App. LEXIS 979 (2002); Hummel v. Univ. of N.C., 156 N.C. App. 108, 576 S.E.2d 124, 2003 N.C. App. LEXIS 72 (2003).

## § 143-294. Appeal to Court of Appeals to act as supersedeas.

The appeal from the decision of the Industrial Commission to the Court of Appeals shall act as a supersedeas, and the State department, institution or agency shall not be required to make payment of any judgment until the questions at issue therein shall have been finally determined as provided in this Article. (1951, c. 1059, s. 4; 1967, c. 655, s. 2.)

## § 143-295. Settlement of claims.

(a) Any claims except claims of minors pending or hereafter filed against the various departments, institutions and agencies of the State may be settled upon agreement between the claimant and the Attorney General for an amount not in excess of twenty-five thousand dollars ($25,000), without the approval of the Industrial Commission. The Attorney General may also make settlements by agreement for claims in excess of twenty-five thousand dollars ($25,000) and claims of infants or persons non sui juris, provided such claims have been subject to review and approval by the Industrial Commission.

(b) In settlements under twenty-five thousand dollars ($25,000), agreed upon between the Attorney General and the claimant, the filing of an affidavit as set forth in G.S. 143-297 shall not be required.

(c) Transfer of title of a motor vehicle acquired in behalf of the State in settlement of claim pursuant to the provisions of this Article may be transferred by the Attorney General in the same manner as provided for such transfer by an insurance company under the provisions of G.S. 20-75. (1951, c. 1059, s. 5; 1971, c. 1103, s. 1; 1973, c. 699; 1975, c. 756; 1979, c. 877; 1981, c. 166; 1985, c. 693; 1989, c. 228.)

## § 143-295.1. Settlement of small claims against institutions of the Department of Health and Human Services.

When the property of a resident of a State institution under the Department of Health and Human Services is lost, destroyed, or otherwise damaged through negligent handling by the institution, and the amount of damages is less than five hundred dollars ($500.00), the institution may make direct payment or provide replacement of the item to the resident without recourse to the procedures otherwise provided by this Article. (2003-285, s. 1.)

## § 143-296. Powers of Industrial Commission; Deputies.

The members of the Industrial Commission, or a deputy thereof, shall have power to issue subpoenas, administer oaths, conduct hearings, take evidence, enter orders, opinions, and awards based thereon, punish for contempt, and issue writs of habeas corpus ad testificandum pursuant to G.S. 97-101.1. The Industrial Commission is authorized to appoint deputies and clerical assistants to carry out the purpose and intent of this Article, and such deputy or deputies are hereby vested with the same power and authority to hear and determine tort claims against State departments, institutions, and agencies as is by this Article vested in the members of the Industrial Commission. Such deputy or deputies shall also have and are hereby vested with the same power and authority to hear and determine cases arising under the Workers'

Compensation Act when assigned to do so by the Industrial Commission. The Commission may order parties to participate in mediation, under rules substantially similar to those approved by the Supreme Court for use in the Superior Court division, except the Commission shall determine the manner in which payment of the costs of the mediated settlement conference is assessed. (1951, c. 1059, s. 6; 1979, c. 714, s. 2; 1993, c. 399, s. 2; c. 321, s. 25(b); 1995, c. 358, s. 8(a); c. 437, s. 6(a); c. 467, s. 5(a); c. 507, s. 25.13; 1998-217, s. 31.1(b).)

**Editor's Note.** — Session Laws 1993, c. 321, s. 25(b) provided that, if HB 658 (Session Laws 1993, c. 399) was enacted, the first sentence of s. 4 of c. 399 would be amended by deleting "only if the General Assembly appropriates funds to implement the purpose of this act." However, this language is in the second sentence of section 5 of Chapter 399 and reads "only if the General Assembly appropriates funds to implement the purpose of these sections." The Revisor of Statutes was informed that appropriation was made in 1994.

CASE NOTES

**Cited** in Smith v. North Carolina Dep't of Natural Resources & Community Dev., 112 N.C. App. 739, 436 S.E.2d 878 (1993).

## § 143-297. Affidavit of claimant; docketing; venue; notice of hearing; answer, demurrer or other pleading to affidavit.

In all claims listed in Section 13 of Chapter 1059 of the Session Laws of 1951, and all claims which may hereafter be filed against the various departments, institutions, and agencies of the State, the claimant or the person in whose behalf the claim is made shall file with the Industrial Commission an affidavit in duplicate, setting forth the following information:

(1) The name of the claimant;
(2) The name of the department, institution or agency of the State against which the claim is asserted, and the name of the State employee upon whose alleged negligence the claim is based;
(3) The amount of damages sought to be recovered;
(4) The time and place where the injury occurred;
(5) A brief statement of the facts and circumstances surrounding the injury and giving rise to the claim.

Upon receipt of such affidavit in duplicate, the Industrial Commission shall enter the case upon its hearing docket and shall hear and determine the matter in the county where the injury occurred unless the parties agree or the Industrial Commission directs that the case may be heard in some other county. All parties shall be given reasonable notice of the date when and the place where the claim will be heard.

Immediately upon docketing the case, the Industrial Commission shall forward one copy of plaintiff's affidavit to the office of the Attorney General of North Carolina if the claim is asserted against any department, institution, or agency of the State.

The department, institution or agency of the State against whom the claim is asserted shall file answer, demurrer or other pleading to the affidavit within 30 days after receipt of copy of same setting forth any defense it proposes to make in the hearing or trial, and no defense may be asserted in the hearing or trial unless it is alleged in such answer, except such defenses as are not required by the Code of Civil Procedure or other laws to be alleged. (1951, c. 1059, s. 9; 1963, c. 1063; 1971, c. 893, s. 2; c. 1103, s. 2.)

**Legal Periodicals.** — For article, "Liability for Discretionary Decisions of State Officers and Employees Under the North Carolina Tort Claims Act: A Critical Analysis of Hochheiser v. North Carolina Dep't of Transp.," see 18 N.C. Cent. L.J. 143 (1989).

## CASE NOTES

***Editor's Note.*** *— Some of the cases below were decided prior to the amendments to G.S. 143-300 making the Rules of Civil Procedure applicable to proceedings under this Article.*

**How Jurisdiction of Commission Invoked.** — In order to invoke the jurisdiction of the Industrial Commission it is only necessary for the claimant or the person in whose behalf the claim is made to file an affidavit with the Industrial Commission in duplicate setting forth the material facts, as required by this section. Branch Banking & Trust Co. v. Wilson County Bd. of Educ., 251 N.C. 603, 111 S.E.2d 844 (1960).

**This section does not require the use of legal, technical or formal language** or formal pleadings. Branch Banking & Trust Co. v. Wilson County Bd. of Educ., 251 N.C. 603, 111 S.E.2d 844 (1960).

**But Claim Must State Sufficient Facts.** — Adherence to formal rules of pleading is not required under this section, but the claim should state facts sufficient to identify the agent or employee and a brief statement of the negligent act that caused the injury. Turner v. Gastonia City Bd. of Educ., 250 N.C. 456, 109 S.E.2d 211 (1959); Branch Banking & Trust Co. v. Wilson County Bd. of Educ., 251 N.C. 603, 111 S.E.2d 844 (1960).

**And Defective Claim May Be Challenged.** — If a claim, upon its face, shows that the State department or agency sought to be charged is not liable, the Commission may end the proceeding; and a proper way to take advantage of the defect was formerly by demurrer. Turner v. Gastonia City Bd. of Educ., 250 N.C. 456, 109 S.E.2d 211 (1959).

**Requirement of Affidavit as Procedural Rule.** — The requirement of an affidavit delineated in this section is not a rule governing liability or the limits of liability of the State and its agencies. Rather, it is a procedural rule. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982).

**Affidavit Must Name Employee and Set Forth Acts of Negligence.** — It is necessary to a recovery under the Tort Claims Act that the affidavit of the claimant set forth the name of the allegedly negligent employee and the acts of negligence relied upon. Crawford v. Wayne County Bd. of Educ., 3 N.C. App. 343, 164 S.E.2d 748 (1968), aff'd, 275 N.C. 354, 168 S.E.2d 33 (1969).

A claim under the State Tort Claims Act must identify the employee of the State whose negligence is asserted, and set forth the act or acts on his part which are relied upon. Floyd v. North Carolina State Hwy. & Pub. Works Comm'n, 241 N.C. 461, 85 S.E.2d 703 (1955).

**Plaintiff Should Identify Agency and Employee in Pleadings.** — Plaintiff's pleadings may be fatal to his claim if he fails to properly identify the negligent State employee and agency in the affidavit used to initiate an action with the Industrial Commission. Laughinghouse v. State ex rel. N.C. Ports Ry. Comm'n, 101 N.C. App. 375, 399 S.E.2d 587, cert. denied, 328 N.C. 732, 404 S.E.2d 871 (1991), 502 U.S. 1029, 112 S. Ct. 866, 116 L. Ed. 2d 772 (1992).

**The purpose of this section in requiring the negligent employee to be named** is to enable the department of the State against which the claim is made to investigate, not all of its employees, but the particular ones actually involved. Tucker v. North Carolina State Hwy. & Pub. Works Comm'n, 247 N.C. 171, 100 S.E.2d 514 (1957); Northwestern Distribs., Inc. v. North Carolina Dep't of Transp., 41 N.C. App. 548, 255 S.E.2d 203, cert. denied, 298 N.C. 567, 261 S.E.2d 123 (1979).

The reason for requiring the negligent employee to be named in the affidavit is so that the department of the State against which a claim is made will not have to investigate all of its employees, but only those alleged to have been negligent. Mason v. North Carolina State Hwy. Comm'n, 7 N.C. App. 644, 173 S.E.2d 515 (1970).

**Stipulation Obviates Error in Naming Employee in Affidavit and Claim.** — Where, prior to the hearing, the parties stipulate the name and position of the State employee charged with negligence, such stipulation meets the requirements of this section that the negligent employee be named and obviates error in naming the employee in the affidavit and claim; hence, the allowance of an amendment to this effect on appeal to the superior court (now Court of Appeals) is immaterial. Tucker v. North Carolina State Hwy. & Pub. Works Comm'n, 247 N.C. 171, 100 S.E.2d 514 (1957).

**Amendment Where Claimant Names Wrong Employee.** — If a claimant mistakenly names a wrong employee, his remedy is to address a motion to amend the affidavit to the sound discretion of the Industrial Commission. Mason v. North Carolina State Hwy. Comm'n, 7 N.C. App. 644, 173 S.E.2d 515 (1970).

**Discretion of Commission to Allow Amendment to Affidavit After Time Specified.** — The affidavit filed by a claimant pursuant to this section is in the nature of a complaint in an ordinary tort action; hence, the allowance of an amendment thereto after the expiration of the time allowed by statute rests in the sound discretion of the Industrial Commission, and its ruling thereon is not subject to review in the absence of an abuse of such discretion. Mason v. North Carolina State Hwy. Comm'n, 273 N.C. 36, 159 S.E.2d 574 (1968).

**Actions brought against the State as a third-party defendant in the State courts** need not conform to the pleading requirements of the Industrial Commission. The third-party plaintiff must, however, prove the same elements as required in cases heard before the Industrial Commission. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982).

**Notice Sufficient.** — Plaintiff's affidavit gave sufficient notice to defendant to allow it to narrow its investigation to those involved with treating patient where the affidavit notified defendant that decedent's death was caused by a former patient, decedent, named the correct state agency, the specific division of that agency, and where the alleged negligence took place. The failure to name doctor specifically did not impede defendant's investigation and the objective of this section was achieved. Davis v. North Carolina Dep't of Human Resources, 121 N.C. App. 105, 465 S.E.2d 2 (1995).

Tractor-trailer driver complied with G.S. 143-297(2) where he filed an affidavit against the North Carolina Department of Transportation for damages due to having gotten stuck on a railroad crossing where warning signs were lacking, whereupon his truck was hit by a train; the affidavit named various officials of the Department as well as indicating unknown employees who were responsible for maintaining the safety of that particular railroad crossing, and such information was sufficient to allow the Department to investigate the employee actually involved, even though the particular individual was not specifically named. Smith v. N.C. DOT, 156 N.C. App. 92, 576 S.E.2d 345, 2003 N.C. App. LEXIS 83 (2003).

**Evidence Sufficient.** — Evidence was such that the defendant, Department of Human Resources was negligent and could have reasonably foreseen the violent acts by mental patient and the resultant harm to decedent; thus, defendant's breach was the proximate cause of the death. Davis v. North Carolina Dep't of Human Resources, 121 N.C. App. 105, 465 S.E.2d 2 (1995).

**Evidence Insufficient.** — North Carolina Industrial Commission's unchallenged findings of fact showed that a patient who was injured in an altercation with other patients presented no evidence that any hospital employee named in the patient's affidavit was negligent; these findings of fact supported the Commission's conclusion that the patient presented no evidence of negligence on the part of the employees, and therefore his claim failed. Thornton v. F.J. Cherry Hosp., 183 N.C. App. 177, 644 S.E.2d 369, 2007 N.C. App. LEXIS 1047 (2007).

**Applied** in Parsons v. Alleghany County Bd. of Educ., 4 N.C. App. 36, 165 S.E.2d 776 (1969); Woolard v. North Carolina Dep't of Transp., 93 N.C. App. 214, 377 S.E.2d 267 (1989).

**Cited** in Wrape v. North Carolina State Hwy. Comm'n, 263 N.C. 499, 139 S.E.2d 570 (1965); Phillips v. North Carolina Dep't of Transp., 80 N.C. App. 135, 341 S.E.2d 339 (1986); Zimmer v. North Carolina Dep't of Transp., 87 N.C. App. 132, 360 S.E.2d 115 (1987); Midgett v. N.C. DOT, 152 N.C. App. 666, 568 S.E.2d 643, 2002 N.C. App. LEXIS 979 (2002).

## § 143-298. Duty of Attorney General; expenses; subpoenas.

It shall be the duty of the Attorney General to represent all departments, institutions, and agencies of the State in connection with claims asserted against them and to attend all hearings in connection therewith where the amount of the claim, in the opinion of the Attorney General, is of sufficient import to require and justify such appearance. In the event the amount appropriated to the Attorney General's office for travel and subsistence is insufficient to take care of the additional expense incident to attending these hearings, the Governor and Council of State are authorized to pay such additional travel expenses from the Contingency and Emergency Fund.

Subpoenas for any purpose authorized by G.S. 1A-1, Rule 45 may be issued by an Attorney of Record for either party in all proceedings under the State Tort Claims Act and served by the means specified in the North Carolina Rules of Civil Procedure or served by registered or certified mail, and service shall be proved by filing of the return receipt. (1951, c. 1059, s. 10; 1971, c. 1103, s. 3; 1987 (Reg. Sess., 1988), c. 1087, s. 5.)

## § 143-299. Limitation on claims.

All claims against any and all State departments, institutions, and agencies shall henceforth be forever barred unless a claim be filed with the Industrial Commission within three years after the accrual of such claim, or if death results from the accident, the claim for wrongful death shall be forever barred unless a claim be filed by the personal representative of the deceased with the Industrial Commission within two years after such death. (1951, c. 1059, s. 11; 1973, c. 659.)

**Editor's Note.** — Session Laws 2005-243, s. 1, effective July 29, 2005, provides: "Notwithstanding G.S. 143-299, where a judgment was entered in a civil action in federal court prior to the effective date of this act against a member of the Highway Patrol for an injury to a person and where the court that rendered the judgment concluded that the person's injury was the result of an act of the member of the Highway Patrol committed while acting within the course and scope of the officer's employment, the person who brought the action has 180 days from the effective date of this act to file an action to recover damages under Article 31 of Chapter 143 of the General Statutes. It shall not be a defense that the member of the Highway Patrol is no longer a State employee, or that any time limit for seeking the recovery of damages or any other time limit of civil procedure has expired. The limitation on the amount that may be recovered under this section shall be the limit of liability under Article 31 of Chapter 143 of the General Statutes applicable at the time the tort occurred. No interest on the amount recoverable shall accrue until an amount of damages is awarded under Article 31 of Chapter 143 of the General Statutes as authorized by this section."

### CASE NOTES

**Cited** in Lyon & Sons v. N.C. State Bd. of Educ., 238 N.C. 24, 76 S.E.2d 553 (1953).

## § 143-299.1. Contributory negligence a matter of defense; burden of proof.

Contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted shall be deemed to be a matter of defense on the part of the State department, institution or agency against which the claim is asserted, and such State department, institution or agency shall have the burden of proving that the claimant or the person in whose behalf the claim is asserted was guilty of contributory negligence. (1955, c. 400, s. 11/4.)

**Legal Periodicals.** — For article, "Liability for Discretionary Decisions of State Officers and Employees Under the North Carolina Tort Claims Act: A Critical Analysis of Hochheiser v. North Carolina Dep't of Transp.," see 18 N.C. Cent. L.J. 143 (1989).

For article, "Contributory negligence, comparative negligence, and stare decisis in North Carolina", see 18 Campbell L. Rev. 1 (1996).

### CASE NOTES

**Contributory Negligence Bars Recovery.** — The State Tort Claims Act does not authorize recovery unless the claimant is free from contributory negligence. Crawford v. Wayne County Bd. of Educ., 275 N.C. 354, 168 S.E.2d 33 (1969).

Patient's claim against a hospital and a state department was denied because the patient's claim was barred by contributory negligence because the patient provoked the attack by other patients and failed to notify hospital staff members of any alleged threats by other patients. Thornton v. F.J. Cherry Hosp., 183 N.C. App. 177, 644 S.E.2d 369, 2007 N.C. App. LEXIS 1047 (2007).

**Contributory Negligence of Minor.** — Substantive case law concerning a minor's capability for negligence applies to this section, and thus a six-year-old child is incapable of contributory negligence as a matter of law. Crawford v. Wayne County Bd. of Educ., 275 N.C. 354, 168 S.E.2d 33 (1969).

Where the bus driver was found negligent in failing to pull the school bus over in order to stop the fight between the student and the injured party, who was 11 years old, the Columbus County Board of Education could not rely on a defense of contributory negligence by the injured party, as the Board failed to prove contributory negligence pursuant to G.S. 143-299.1; it was presumed that a child of the injured party's age was incapable of contributory negligence, and the Board failed to show that the injured party did not handle herself as a normal 11-year-old child. Simmons v. Columbus County Bd. of Educ., 171 N.C. App. 725, 615 S.E.2d 69, 2005 N.C. App. LEXIS 1317 (2005).

**Basis for Conclusion of Contributory Negligence.** — A conclusion of negligence or contributory negligence may not be drawn in favor of the party having the burden of proof upon no basis other than speculation and unproved possibilities. Barney v. North Carolina State Hwy. Comm'n, 282 N.C. 278, 192 S.E.2d 273 (1972).

**Negligence and contributory negligence are mixed questions of law and fact** and, upon appeal, the reviewing court must determine whether facts found by the Industrial Commission support its conclusion of contributory negligence. Barney v. North Carolina State Hwy. Comm'n, 282 N.C. 278, 192 S.E.2d 273 (1972).

**Applied** in Oates v. North Carolina Dep't of Motor Vehicles, 24 N.C. App. 690, 212 S.E.2d 33 (1975).

**Cited** in Tucker v. North Carolina State Hwy. & Pub. Works Comm'n, 247 N.C. 171, 100 S.E.2d 514 (1957); Simmons v. North Carolina DOT, 128 N.C. App. 402, 496 S.E.2d 790 (1998); Midgett v. N.C. DOT, 152 N.C. App. 666, 568 S.E.2d 643, 2002 N.C. App. LEXIS 979 (2002); Smith v. N.C. DOT, 156 N.C. App. 92, 576 S.E.2d 345, 2003 N.C. App. LEXIS 83 (2003).

## § 143-299.1A. Limit use of public duty doctrine as an affirmative defense.

(a) Except as provided in subsection (b) of this section, the public duty doctrine is an affirmative defense on the part of the State department, institution, or agency against which a claim is asserted if and only if the injury of the claimant is the result of any of the following:

(1) The alleged negligent failure to protect the claimant from the action of others or from an act of God by a law enforcement officer as defined in subsection (d) of this section.

(2) The alleged negligent failure of an officer, employee, involuntary servant or agent of the State to perform a health or safety inspection required by statute.

(b) Notwithstanding subsection (a) of this section, the affirmative defense of the public duty doctrine may not be asserted in any of the following instances:

(1) Where there is a special relationship between the claimant and the officer, employee, involuntary servant or agent of the State.

(2) When the State, through its officers, employees, involuntary servants or agents, has created a special duty owed to the claimant and the claimant's reliance on that duty is causally related to the injury suffered by the claimant.

(3) Where the alleged failure to perform a health or safety inspection required by statute was the result of gross negligence.

(c) This section does not apply to a unit of local government or its officers, employees, or agents.

(d) For purposes of this section, "law enforcement officer" means a full-time or part-time employee or agent of a State department, institution, or agency or an agent of the State operating under an agreement with a State department, institution, or agency of the State who is any of the following:

(1) Actively serving in a position with assigned primary duties and responsibilities for prevention and detection of crime or the general enforcement of the criminal laws of the State or serving civil processes.

(2) Possesses the power of arrest by virtue of an oath administered under the authority of the State.
(3) Is a juvenile justice officer, chief court counselor, or juvenile court counselor.
(4) Is a correctional officer performing duties of custody, supervision, and treatment to control and rehabilitate criminal offenders.
(5) Is a firefighter as defined in G.S. 113-60.32(1).
(6) Is a probation officer appointed under Article 20 of Chapter 15 of the General Statutes. (2008-170, s. 1; 2008-187, s. 47; 2009-570, s. 21.)

**Editor's Note.** — Session Laws 2008-170, s. 2, made this section effective October 1, 2008, and applicable to claims arising on or after that date.

This section was amended by Session Laws 2008-187, s. 47, in the coded bill drafting format provided by G.S. 120-20.1. The amendment by Session Laws 2008-187, s. 47, did not strike through the first sentence of subsection (c), as enacted by Session Laws 2008-170, s. 1. Session Laws 2009-570, s. 21 corrected the oversight.

Session Laws 2008-187, s. 47, was contingent on House Bill 1113 (Session Laws 2008-170) becoming law, which it did.

**Effect of Amendments.** — Session Laws 2008-187, s. 47, effective August 7, 2008, rewrote subsection (c).

Session Laws 2009-570, s. 21, effective August 28, 2009, deleted the former first sentence of subsection (c) which read: "Nothing in this section shall limit the assertion of the public duty doctrine as a defense on the part of a unit of local government or its officers, employees, or agents."

## § 143-299.2. Limitation on payments by the State.

(a) The maximum amount that the State may pay cumulatively to all claimants on account of injury and damage to any one person arising out of any one occurrence, whether the claim or claims are brought under this Article, or Article 31A or Article 31B of this Chapter, shall be one million dollars ($1,000,000), less any commercial liability insurance purchased by the State and applicable to the claim or claims under G.S. 143-291(b), 143-300.6(c), or 143-300.16(c).

(b) The fact that a claim or claims may be brought under more than one Article under this Chapter shall not increase the above maximum liability of the State. (1987 (Reg. Sess., 1988), c. 1087, s. 6; 1995, c. 509, s. 83; 2000-67, s. 7A(d); 2007-452, s. 1.)

**Cross References.** — For the State Employee Federal Remedy Restoration Act, waiving the sovereign immunity of the State for certain purposes, see G.S. 143-300.35.

**Editor's Note.** — This section, as amended by Session Laws 2007-452, s. 1, effective August 27, 2007, is applicable to torts committed on or after that date.

Session Laws 2007-452, s. 2, provides: "State agencies, departments, and institutions and local boards of education shall use funds available for the 2007-2008 fiscal year to implement the provisions of this act."

### CASE NOTES

**Cited** in Oakley v. Thomas, 112 N.C. App. 130, 434 S.E.2d 663 (1993); Batts v. Batts, 160 N.C. App. 554, 586 S.E.2d 550, 2003 N.C. App. LEXIS 1837 (2003).

## § 143-299.3. Use of State vehicles by North Carolina Amateur Sports; State to incur no liability.

(a) Notwithstanding G.S. 14-247 and G.S. 143-341(8)i, the Department of Administration or any other department of State government may allow North Carolina Amateur Sports to have the use of State trucks and vans for the 1989 and the 1990 State Games of North Carolina. There will not be any charge for use of vehicles under this section.

(b) The State of North Carolina shall incur no liability for any damages resulting from use of vehicles under this section and North Carolina Amateur Sports shall carry liability insurance of not less than $500,000 covering such vehicles while in its use. (1989, c. 242, s. 1(a), (b); 1991, c. 636, s. 17; 1993, c. 553, s. 5.)

**Local Modification.** — Columbus: 1977, c. 850; Moore County Board of Education: 1999-176, s. 1 (effective June 14, 1999-June 20, 1999); Haywood County Consolidated School System Board of Education: 2006-3 (use of buses for events); Roanoke Rapids Graded School District: 2006-8 (as to use of buses to serve transportation needs of BikeWalk Virginia event).

**Editor's Note.** — Session Laws 1991, c. 294, s. 1, provides: "(a) Notwithstanding G.S. 14-247 and G.S. 143-341(8)i., the Department of Administration may allow North Carolina Amateur Sports to have the use of State trucks and vans for the 1991-92 State Games of North Carolina according to the following schedule:

"June 12, 1991 - June 29, 1991 — one cargo van, one passenger van, and one blazer;

"June 12, 1991 - July 5, 1991 — four cargo vans;

"June 30, 1991 — one passenger van.

"The Department of Administration need not make any charge for use of vehicles under this act.

"(b) The State of North Carolina shall incur no liability for any damages resulting from use of vehicles under this act and North Carolina Amateur Sports shall carry liability insurance of not less than $1,000,000 covering each vehicle while in its use."

Session Laws 1993, c. 87, s. 1 provides: "(a) Notwithstanding G.S. 14-247 and G.S. 143-341(8)i., the Department of Administration may allow North Carolina Amateur Sports to have the use of State trucks and vans for the 1993 and 1994 State Games of North Carolina, but only during the months of June 1993 and June 1994.

"The Department of Administration need not make any charge for use of vehicles under this act. The Department may require North Carolina Amateur Sports to pay the cost of fuel.

"North Carolina Amateur Sports shall submit to the Department of Administration a list of the purposes for which the vehicles are to be used, which list is subject to approval by the Department of Administration.

"(b) The State of North Carolina shall incur no liability for any damages resulting from use of vehicles under this act, and North Carolina Amateur Sports shall carry liability insurance of not less than one million dollars ($1,000,000) covering each vehicle while in its use."

Session Law 1998-10, s. 1, provides: "Notwithstanding the provisions of G.S. 143-341(8)i. and G.S. 14-247, the Department of Administration may allow the 1999 Special Olympics World Summer Games Organizing Committee, Inc., to use State-owned trucks and vans for the 1999 Special Olympics World Summer Games in North Carolina.

"The Department of Administration shall not charge any fees for the use of the vehicles for the 1999 Special Olympics World Summer Games.

"The 1999 Special Olympics World Summer Games Organizing Committee, Inc., shall submit to the Department of Administration, for its approval, a list of the purposes for which the vehicles may be used. Vehicles may only be used for approved purposes.

"The State shall incur no liability for any damages resulting from the use of vehicles under this provision. The 1999 Special Olympics World Summer Games Organizing Committee, Inc., shall carry liability insurance of not less than five million dollars ($5,000,000) covering the use of the vehicles and shall be responsible for the full cost of repairs to these vehicles if they are damaged while used for the 1999 Special Olympics World Summer Games."

Session Laws 1998-212, s. 9.25 provides: "Notwithstanding any other provision of law, the Charlotte-Mecklenburg Board of Education may permit the use and operation of public school buses as the board deems necessary from June 1, 2001, through June 30, 2001, for the transportation needs of persons associated with the National Association of Student Councils Conference to be held in Charlotte.

"State funds shall not be used for the use and operation of buses under this act.

"The State of North Carolina shall incur no liability for any damages resulting from the use and operation of buses under this act. The National Association of Student Councils shall carry liability insurance covering the use and operation of buses under this act."

Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year."

Session Laws 1998-212, s. 30.5 contains a severability clause.

## § 143-299.4. Payment of State excess liability.

For each claim payable during any fiscal year in excess of one hundred fifty thousand dollars ($150,000) per claim arising under this Article, or Article 31A or 31B of this Chapter, on account of injury or damage to any one person, each State agency shall transfer to the Office of State Budget and Management its proportionate share of that agency's estimated lapsed salaries, as determined by the Director of the Budget, and the Director of the Budget shall use these transferred funds to pay the balance of that claim in excess of one hundred fifty thousand dollars ($150,000). However, if the Director of the Budget determines that the agency liable for the claim has the resources to pay the full claim even though it exceeds one hundred fifty thousand dollars ($150,000), then the Director of the Budget may, in the Director's discretion, require the agency to pay the full claim. Additionally, the Director of the Budget may, in the Director's discretion, limit the number of agencies required to transfer funds to the agency liable for the claim to pay the balance of the claim. (2000-67, s. 7A(e); 2000-140, s. 93.1(i); 2001-424, s. 12.2(b); 2002-159, s. 43.)

### CASE NOTES

**Cited** in Batts v. Batts, 160 N.C. App. 554, 586 S.E.2d 550, 2003 N.C. App. LEXIS 1837 (2003).

## § 143-300. Rules and regulations of Industrial Commission; destruction of records.

The Industrial Commission is hereby authorized and empowered to adopt such rules and regulations as may, in the discretion of the Commission, be necessary to carry out the purpose and intent of this Article. The North Carolina Rules of Civil Procedure and Rules of Evidence, insofar as they are not in conflict with the provisions of this Article, shall be followed in proceedings under this Article. When any case or claim under this Article has been closed by proper order or award, all records concerning such case or claim may, after five years, in the discretion of the Industrial Commission with and by the authorization of the Department of Cultural Resources, be destroyed by burning or otherwise; provided, that no record pertaining to a case or claim of a minor shall be destroyed until the expiration of three years after such minor attains the age of 18 years. (1951, c. 1059, s. 12; 1957, c. 311; 1971, c. 1231, s. 1; 1973, c. 476, s. 48; 1987 (Reg. Sess., 1988), c. 1087, s. 7.)

### CASE NOTES

**Procedural Rules.** — Regarding the procedural rules governing proceedings under the North carolina Tort Claims Act, G.S. 143-291 et seq., the North Carolina industrial Commission is authorized under G.S. 143-300 to adopt such rules and regulations as may, in the discretion of the Commission, be necessary to carry out the purpose and intent of the Tort Claims Act. However, the North carolina Rules of Civil Procedure apply in tort claims before the Commission,to the extent that such rules are not inconsistent with the Tort Claims Act, in which case the Tort Claims Act controls. Pate v. N.C. DOT, 176 N.C. App. 530, 626 S.E.2d 661, 2006 N.C. App. LEXIS 528 (2006), cert. denied, 360 N.C. 535, 633 S.E.2d 819 (2006).

**Order to Compel Discovery.** — North Carolina Industrial Commission acted within its authority in issuing its order compelling state facilities and their employees to comply with discovery requests in a personal injury action brought under the North Carolina Tort Claims Act, G.S. 143-291 et seq., and the requested juvenile records, social services records, and law enforcement records sought in discovery were subject to disclosure. Moreover, the North Carolina Rules of Civil Procedure applied in tort claims before the Commission, to the extent that such rules were not inconsistent with the Tort Claims Act, and the Commission had the authority under G.S. 1A-1, N.C. R. Civ. P. 37 to enter an order compelling discovery and to impose sanctions on the party refusing to comply with the order. Jane Doe 1 v. Swannanoa Valley Youth Dev. Ctr., 163 N.C. App. 136, 592 S.E.2d 715, 2004 N.C. App. LEXIS 299 (2004).

## § 143-300.1. Claims against county and city boards of education for accidents involving school buses or school transportation service vehicles.

(a) The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education, which claims arise as a result of any alleged mechanical defects or other defects which may affect the safe operation of a public school bus or school transportation service vehicle resulting from an alleged negligent act of maintenance personnel or as a result of any alleged negligent act or omission of the driver, transportation safety assistant, or monitor of a public school bus or school transportation service vehicle when:

(1) The driver is an employee of the county or city administrative unit of which that board is the governing body, and the driver is paid or authorized to be paid by that administrative unit,

(1a) The monitor was appointed and acting in accordance with G.S. 115C-245(d),

(1b) The transportation safety assistant was employed and acting in accordance with G.S. 115C-245(e), or

(2) The driver is an unpaid school bus driver trainee under the supervision of an authorized employee of the Department of Transportation, Division of Motor Vehicles, or an authorized employee of that board or a county or city administrative unit thereof,

and which driver was at the time of the alleged negligent act or omission operating a public school bus or school transportation service vehicle in accordance with G.S. 115C-242 in the course of his employment by or training for that administrative unit or board, which monitor was at the time of the alleged negligent act or omission acting as such in the course of serving under G.S. 115C-245(d), or which transportation safety assistant was at the time of the alleged negligent act or omission acting as such in the course of serving under G.S. 115C-245(e). The liability of such county or city board of education, the defenses which may be asserted against such claim by such board, the amount of damages which may be awarded to the claimant, and the procedure for filing, hearing and determining such claim, the right of appeal from such determination, the effect of such appeal, and the procedure for taking, hearing and determining such appeal shall be the same in all respects as is provided in this Article with respect to tort claims against the State Board of Education except as hereinafter provided. Any claim filed against any county or city board of education pursuant to this section shall state the name and address of such board, the name of the employee upon whose alleged negligent act or omission the claim is based, and all other information required by G.S. 143-297 in the case of a claim against the State Board of Education. Immediately upon the docketing of a claim, the Industrial Commission shall forward one copy of the plaintiff's affidavit to the superintendent of the schools of the county or city administrative unit against the governing board of which such claim is made, one copy of the plaintiff's affidavit to the State Board of Education and one copy of the plaintiff's affidavit to the office of the Attorney General of North

Carolina. All notices with respect to tort claims against any such county or city board of education shall be given to the superintendent of schools of the county or city administrative unit of which such board is a governing board, to the State Board of Education and also to the office of the Attorney General of North Carolina.

(b) The Attorney General shall be charged with the duty of representing the city or county board of education in connection with claims asserted against them pursuant to this section where the amount of the claim, in the opinion of the Attorney General, is of sufficient import to require and justify such appearance.

(c) In the event that the Industrial Commission awards damages against any county or city board of education under this section, the Attorney General shall draw a voucher for the amount required to pay the award. The funds necessary to cover the first one hundred fifty thousand dollars ($150,000) of liability per claim for claims against county and city boards of education for accidents involving school buses and school transportation service vehicles shall be made available from funds appropriated to the State Board of Education. The balance of any liability owed shall be paid in accordance with G.S. 143-299.4. Neither the county or city boards of education, or the county or city administrative unit shall be liable for the payment of any award made pursuant to the provisions of this section in excess of the amount paid upon a voucher by the Attorney General. Settlement and payment may be made by the Attorney General as provided in G.S. 143-295.

(d) Except as otherwise provided in this subsection, the Attorney General may, upon the request of an employee or former employee, defend any civil action brought against the driver, transportation safety assistant, or monitor of a public school bus or school transportation service vehicle or school bus maintenance mechanic when the driver or mechanic is employed and paid by the local school administrative unit, when the monitor is acting in accordance with G.S. 115C-245(d), when the transportation safety assistant is acting in accordance with G.S. 115C-245(e), or when the driver is an unpaid school bus driver trainee under the supervision of an authorized employee of the Department of Transportation, Division of Motor Vehicles, or an authorized employee of a county or city board of education or administrative unit. The Attorney General may afford this defense through the use of a member of his staff or, in his discretion, employ private counsel. The Attorney General is authorized to pay any judgment rendered in the civil action not to exceed the limit provided under the Tort Claims Act. The funds necessary to cover the first one hundred fifty thousand dollars ($150,000) of liability per claim shall be made available from funds appropriated to the State Board of Education. The balance of any liability owed shall be paid in accordance with G.S. 143-299.4. The Attorney General may compromise and settle any claim covered by this section to the extent that he finds the same to be valid, up to the limit provided in the Tort Claims Act, provided that the authority granted in this subsection shall be limited to only those claims that would be within the jurisdiction of the Industrial Commission under the Tort Claims Act.

The Attorney General shall refuse to provide for the defense of a civil action or proceeding brought against an employee or former employee if the Attorney General determines that:

(1) The act or omission was not within the scope and course of his employment as a State employee; or
(2) The employee or former employee acted or failed to act because of actual fraud, corruption, or actual malice on his part; or
(3) Defense of the action or proceeding by the State would create a conflict of interest between the State and the employee or former employee; or
(4) Defense of the action or proceeding would not be in the best interests of the State. (1955, c. 1283; 1961, c. 1102, ss. 1-3; 1967, c. 1032, s. 1;

1975, c. 589, s. 1; c. 916, ss. 1, 2; 1977, c. 935, s. 1; 1979, 2nd Sess., c. 1332, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1034, s. 30; 1998-212, s. 9.17(b); 2000-67, ss. 7A(f), 7A(g); 2001-424, s. 6.18.)

**Cross References.** — As to liability insurance and immunity of local boards of education, see G.S. 115C-42. As to liability insurance and waiver of immunity as to certain acts of school bus drivers, see G.S. 115C-255. As to liability insurance and tort liability of local boards of education regarding transportation services, see G.S. 115C-262.

**Legal Periodicals.** — For comment, "Municipal Tort Liability for Negligent Failure to Provide Adequate Police Protection," see 20 Wake Forest L. Rev. 697 (1984).

For note, "Municipal Liability for Negligent Inspections in Sinning v. Clark — A 'Hollow' Victory for the Public Duty Doctrine," see 18 Campbell L. Rev. 241 (1996).

## CASE NOTES

**Legislative Intent.** — The intent of the legislature in amending this section in 1961 to include service vehicles as well as school buses must have been primarily and simply to include those motor vehicles which are the functional equivalents of a school bus, but are not technically buses, such as vans, and also such service vehicles as are used in their maintenance. Smith v. McDowell County Bd. of Educ., 68 N.C. App. 541, 316 S.E.2d 108 (1984).

**Strict Construction of Section.** — This section is in derogation of sovereign immunity and, therefore, it must be strictly construed and its terms must be strictly adhered to. Withers v. Charlotte-Mecklenburg Bd. of Educ., 32 N.C. App. 230, 231 S.E.2d 276 (1977); Smith v. McDowell County Bd. of Educ., 68 N.C. App. 541, 316 S.E.2d 108 (1984).

**Subject Matter Jurisdiction.** — Trial court properly dismissed assault victims' negligence claim against a city education board, which was based on the alleged acts of a school bus monitor and driver in not reporting a conversation between two teenagers on the bus that they would rob someone with a gun, because the North Carolina Industrial Commission had exclusive jurisdiction over the claim. Stein v. Asheville City Bd. of Educ., 168 N.C. App. 243, 608 S.E.2d 80, 2005 N.C. App. LEXIS 263 (2005), rev'd on other grounds, 360 N.C. 321, 626 S.E.2d 263 (2006).

**As to the meaning of "operating,"** see Withers v. Charlotte-Mecklenburg Bd. of Educ., 32 N.C. App. 230, 231 S.E.2d 276 (1977).

**Driver education vehicles are not included in the phrase "school transportation service vehicles."** Smith v. McDowell County Bd. of Educ., 68 N.C. App. 541, 316 S.E.2d 108 (1984).

The mere fact that a driver education vehicle is a motor vehicle which ordinarily may serve a "transportation" function does not bring it within the phrase "school transportation service vehicle" as that phrase is used in this section. Smith v. McDowell County Bd. of Educ., 68 N.C. App. 541, 316 S.E.2d 108 (1984).

**If an award is made, it must be based on the negligent act or omission of the driver** of a public school bus who was employed at the time by the county or city administrative unit of which such board was the governing body. Huff v. Northampton County Bd. of Educ., 259 N.C. 75, 130 S.E.2d 26 (1963).

**And Not on Act or Omission of Principal or Board of Education.** — An award against a county board of education under the provisions of the Tort Claims Act may not be predicated on the negligent act or omission of a school principal or the county board of education. Huff v. Northampton County Bd. of Educ., 259 N.C. 75, 130 S.E.2d 26 (1963).

**Affidavit Must Name Employee and Set Forth Acts of Negligence.** — It is necessary to a recovery under this section that the claimant's affidavit set forth the name of the allegedly negligent employee and the acts of negligence relied upon. Crawford v. Wayne County Bd. of Educ., 275 N.C. 354, 168 S.E.2d 33 (1969).

**Purpose of Naming Employee.** — The purpose of requiring the negligent employee to be named is to enable the department of the State against which the claim is made to investigate, not all of its employees, but the particular ones actually involved. Crawford v. Wayne County Bd. of Educ., 275 N.C. 354, 168 S.E.2d 33 (1969).

**Amendment of Affidavit to Allege Name of Employee.** — In a proceeding under the Tort Claims Act, the Industrial Commission properly allowed amendment of claimant's affidavit to allege the name of the negligent State employee, since the amendment served the purpose of showing the existence of jurisdiction rather than conferring it. Crawford v. Wayne County Bd. of Educ., 3 N.C. App. 343, 164 S.E.2d 748 (1968), aff'd, 275 N.C. 354, 168 S.E.2d 33 (1969).

**State Board of Education Relieved of Responsibility as to School Buses.** — The

General Assembly relieved the State Board of Education from all responsibility in connection with the operation and control of school buses in this State by the enactment of former G.S. 115-180 et seq., authorizing county and city boards of education to operate buses for the transportation of pupils enrolled in the public schools of such county or city administrative units. Huff v. Northampton County Bd. of Educ., 259 N.C. 75, 130 S.E.2d 26 (1963); Brown v. Charlotte-Mecklenburg Bd. of Educ., 267 N.C. 740, 149 S.E.2d 10 (1966).

**Section 115C-42 does not apply to the type of claims which are covered by this section.** Smith v. McDowell County Bd. of Educ., 68 N.C. App. 541, 316 S.E.2d 108 (1984).

**Proper Dismissal of Claims.** — Trial court's dismissal of a father's claims arising from the death of a student who was struck by a school bus was proper because the claims were inseparably connected to events occurring at the time the driver was operating the bus in the course of his employment, and thus fell within G.S. 143-300.1; the North Carolina Industrial Commission therefore had exclusive jurisdiction. Stacy v. Merrill, 191 N.C. App. 131, 664 S.E.2d 565, 2008 N.C. App. LEXIS 1156 (2008).

**Applied** in English Mica Co. v. Avery County Bd. of Educ., 246 N.C. 714, 100 S.E.2d 72 (1957); Mitchell v. Guilford County Bd. of Educ., 1 N.C. App. 373, 161 S.E.2d 645 (1968).

**Cited** in Turner v. Gastonia City Bd. of Educ., 250 N.C. 456, 109 S.E.2d 211 (1959); Branch Banking & Trust Co. v. Wilson County Bd. of Educ., 251 N.C. 603, 111 S.E.2d 844 (1960); McBride v. North Carolina State Bd. of Educ., 257 N.C. 152, 125 S.E.2d 393 (1962); Guthrie v. North Carolina State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983); North Carolina Farm Bureau Mut. Ins. Co. v. Knudsen, 109 N.C. App. 114, 426 S.E.2d 88 (1993); Oakley v. Thomas, 112 N.C. App. 130, 434 S.E.2d 663 (1993); Myers v. McGrady, 360 N.C. 460, 628 S.E.2d 761, 2006 N.C. LEXIS 47 (2006).

## § 143-300.1A. (See Editor's note on condition precedent) Claims arising from certain smallpox vaccinations of State employees.

The North Carolina Industrial Commission shall have jurisdiction to hear and determine claims in accordance with the procedures set forth in this Article made against the State by a person who is permanently or temporarily living in the home of a State employee who receives in employment vaccination against smallpox incident to the Administration of Smallpox Countermeasures by Health Professionals, section 304 of the Homeland Security Act, Pub. L. No. 107-296 (Nov. 25, 2002) (to be codified at 42 U.S.C. § 233(p)) when the person contracts an infection with smallpox or an infection with vaccinia or has any adverse medical reaction due to the vaccination received by the employee. A person covered by this section shall be entitled to recover from the State damages incurred by the person that are directly attributable to the vaccination of the employee under this section. No showing of negligence is required under this section. The provisions of G.S. 143-299.1 shall not apply to claims made under this section, and contributory negligence is not a defense for claims under this section. Damages awarded under this section shall be paid in accordance with G.S. 143-291(a1) and shall be subject to the same limits as those which apply to tort claims under this Article. (2003-169, s. 3.)

**Condition Precedent.** — Session Laws 2003-169, s. 7, provides: "In the event that federal regulatory or statutory provisions providing compensation and benefits to persons for infection with smallpox, infection with vaccinia, or any adverse medical reaction incident to the Administration of Smallpox Countermeasures by Health Professionals, section 304 of the Homeland Security Act, Pub. L. No. 107-296 (Nov. 25, 2002) (to be codified at 42 U.S.C. § 233(p)) are adopted, a condition precedent to recovery under this act shall be that the person claiming compensation and benefits under this act shall first seek compensation and benefits under the federal provisions, with those provisions constituting primary coverage and the person then being entitled to compensation and benefits under this act not exceeding a total recovery under the federal provisions and this act equal to the amount available under the applicable provisions of this act." The Smallpox Emergency Personnel Protection Act of 2003, Public Law 108-20, 117 Stat. 638, authorized the Secretary of Health and Human Services to establish the Smallpox Vaccine Injury Compensation Program, which covers individuals immunized through Jan. 23, 2005 (smallpox) or vaccinia contacts who show symptoms by Feb. 22, 2005.

**Editor's Note.** — Session Laws 2003-169, s. 8, is a severability clause.

Session Laws 2003-169, s. 9, made this section effective June 12, 2003, and applicable to claims arising from infection or adverse medical reactions related to smallpox vaccinations incident to the Administration of Smallpox Countermeasures by Health Professionals, section 304 of the Homeland Security Act, Pub. L. No.107-296 (Nov. 25, 2002) (to be codified at 42 U.S.C. § 233(p)) whether the infection or adverse medical reactions occurred before, on, or after June 12, 2003.

### CASE NOTES

**Cited** in Gregory v. Penland, 179 N.C. App. 505, 634 S.E.2d 625, 2006 N.C. App. LEXIS 1981 (2006).

## ARTICLE 31A.

## *Defense of State Employees, Medical Contractors and Local Sanitarians.*

### § 143-300.2. Definitions.

Unless the context otherwise requires, the definitions contained in this section govern the construction of this Article.

(1) "Civil or criminal action or proceeding" includes any case, prosecution, special proceedings, or administrative proceeding in or before any court or agency of this State or any other state or the United States.

(2) "Employee" includes an officer, agent, or employee but does not include an independent contractor.

(3) "Employment" includes office, agency, or employment.

(4) "The State" includes all departments, agencies, boards, commissions, institutions, bureaus, and authorities of the State. Community colleges, technical colleges, and occupational licensing boards regulated by Chapter 93B of the General Statutes shall be deemed State agencies for purposes of this Article. (1967, c. 1092, s. 1; 1987, c. 684, s. 2; 2002-168, s. 2.)

**Editor's Note.** — Session Laws 1987, c. 654, s. 1 rewrote the title of Article 31A.

### CASE NOTES

**Cited** in Brotherton v. Paramore, 5 N.C. App. 657, 169 S.E.2d 36 (1969).

### OPINIONS OF ATTORNEY GENERAL

**"Employee."** — The officers and directors of the Foundation of The University of North Carolina at Charlotte, Inc., the Athletic Foundation of The University of North Carolina at Charlotte, and the University of North Carolina at Charlotte Alumni Association are not covered by the Defense of State Employees Act, G.S. 143-300.2 et seq., as such officers, directors, and employees are not "employees" of the state as defined by the statute. See opinion of Attorney General to William M. Steimer, University Attorney, The University of North Carolina at Charlotte, 2000 N.C. AG LEXIS 21 (4/14/2000).

## § 143-300.3. Defense of State employees.

Except as otherwise provided in G.S. 143-300.4, upon request of an employee or former employee, the State may provide for the defense of any civil or criminal action or proceeding brought against him in his official or individual capacity, or both, on account of an act done or omission made in the scope and course of his employment as a State employee. (1967, c. 1092, s. 1.)

### CASE NOTES

**Applied** in Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).

### OPINIONS OF ATTORNEY GENERAL

**Legislative Intent.** — The General Assembly intended the phrase "actions or suits to which this article applies" in subsection (a) of G.S. 143-300.6 to describe those actions or suits against a State employee for which the State has agreed to provide defense under this section. See opinion of Attorney General to Mr. Richard H. Robinson, Jr., Assistant to the President, The University of North Carolina, 59 N.C.A.G. 21 (1989).

**Authority Under Section Dependent on 3 Factors.** — Under this section the authority to provide for the defense of a state employee is dependent on three distinct factors: First, the State may exercise its authority to represent an employee only upon the request of the employee; second, the State may provide for the defense of an employee only when the action or proceeding in question is brought against him on account of an act done or omission made in the scope and course of his state employment; and third, the State is prohibited from providing for the defense of any employee if the Attorney General determines that any of the four conditions described in G.S. 143-300.4(a) applies. See opinion of Attorney General to Mr. Richard H. Robinson, Jr., Assistant to the President, The University of North Carolina, 59 N.C.A.G. 21 (1989).

**Decision to Exercise Authority Discretionary.** — This section simply authorizes the State to provide for the defense of State employees under certain circumstances. It does not obligate the State to provide for the defense of any employee under any circumstances. The decision to exercise the authority granted in this section lies entirely within the State's discretion. See opinion of Attorney General to Mr. Richard H. Robinson, Jr., Assistant to the President, The University of North Carolina, 59 N.C.A.G. 21 (1989).

**Section 143-300.6 does not permit the State to pay a final judgment awarded against a State employee** in a civil or criminal proceeding brought against him on account of an act done or omission made in the scope and course of his employment, where the State has decided not to provide for the employee's defense under this section or G.S. 143-300.4. See opinion of Attorney General to Mr. Richard H. Robinson, Jr., Assistant to the President, Univ. of N.C., 59 N.C.A.G. 21 (1989).

## § 143-300.4. Grounds for refusal of defense.

(a) The State shall refuse to provide for the defense of a civil or criminal action or proceeding brought against an employee or former employee if the State determines that:

(1) The act or omission was not within the scope and course of his employment as a State employee; or

(2) The employee or former employee acted or failed to act because of actual fraud, corruption, or actual malice on his part; or

(3) Defense of the action or proceeding by the State would create a conflict of interest between the State and the employee or former employee; or

(4) Defense of the action or proceeding would not be in the best interests of the State.

(b) The determinations required by subsection (a) of this section shall be made by the Attorney General. The Attorney General may delegate his authority to make these determinations to the chief administrative authority of any agency, institution, board, or commission whose employees are to be defended as provided by subdivision (3) or (4) of G.S. 143-300.5. Approval of the request by an employee or former employee for provision of defense shall raise a presumption that the determination required by this section had been made and that no grounds for refusal to defend were discovered. (1967, c. 1092, s. 1.)

### CASE NOTES

**The attorney general's office possesses the responsibility for determining whether it represents an employee,** and this determination is not made post-hoc by a jury verdict; thus, the jury's finding of actual malice has no effect on the attorney general's ability or responsibility to represent the defendants. Houck & Sons v. Transylvania County, 852 F. Supp. 442 (W.D.N.C. 1993), aff'd, 36 F.3d 1092 (4th Cir. 1994).

**Obligation to Provide Defense Shown.** — The fact that preliminary site evaluation was not required by the rules of the Commission for Health Services [now the Commission for Public Health] (the reason given by the Attorney General to support its decision that providing a defense was not in the best interest of the State) was not a reason supported in the law. The Attorney General thus had an obligation to provide sanitarians a defense in litigation. Cates v. North Carolina Dep't of Justice, 121 N.C. App. 243, 465 S.E.2d 64 (1996), modified and aff'd, 346 N.C. 781, 487 S.E.2d 723 (1997).

### OPINIONS OF ATTORNEY GENERAL

**Authority to Provide Defense Dependent upon 3 Factors.** — Under G.S. 143-300.3 the authority to provide for the defense of a state employee is dependent on three distinct factors: First, the State may exercise its authority to represent an employee only upon the request of the employee; second, the State may provide for the defense of an employee only when the action or proceeding in question is brought against him on account of an act done or omission made in the scope and course of his state employment; and third, the State is prohibited from providing for the defense of any employee of the Attorney General determines that any of the four conditions described in subsection (a) of this section applies. See opinion of Attorney General to Mr. Richard H. Robinson, Jr., Assistant to the President, The University of North Carolina, 59 N.C.A.G. 21 (1989).

**Section 143-300.6 does not permit the State to pay a final judgment awarded against a State employee** in a civil or criminal proceeding brought against him on account of an act done or omission made in the scope and course of his employment, where the State has decided not to provide for the employee's defense under G.S. 143-300.3 or this section. See opinion of Attorney General to Mr. Richard H. Robinson, Jr., Assistant to the President, Univ. of N.C., 59 N.C.A.G. 21 (1989).

## § 143-300.5. Regulations for providing defense counsel.

The Governor may issue regulations for the defense of employees or former employees of the State pursuant to this Article through one or more of the following methods as may be appropriate to the employee or class of employees in question:

(1) By the Attorney General;
(2) By employing other counsel for this purpose as provided in G.S. 147-17;
(3) By authorizing the purchase of insurance which requires that the insurer provide or underwrite the cost of the defense; or
(4) By authorizing defense by counsel assigned to or employed by the department, agency, board, commission, institution, bureau, or authority which employed the person requesting the defense. (1967, c. 1092, s. 1.)

### OPINIONS OF ATTORNEY GENERAL

**Decision to Defend Discretionary.** — This section does not obligate the State to utilize any one of the four methods outlined therein in any particular case. Rather, the

State has the discretion under this section to provide for an employee's defense through any one of the four methods as may be appropriate to the employee or class of employees in question. See opinion of Attorney General to Mr. Richard H. Robinson, Jr., Assistant to the President, The University of North Carolina, 59 N.C.A.G. 21 (1989).

**Defense Pursuant to Section Prerequisite to Payment of Judgment.** — Section 143-300.6(a) does not authorize the State to pay any judgment rendered in any case where the state does not provide the defense for the employee under one of the methods specified in this section. See Opinion of Attorney General to Mr. Richard H. Robinson, Jr., Assistant to the President, The University of North Carolina, 59 N.C.A.G. 21 (1989).

## § 143-300.6. Payments of judgments; compromise and settlement of claims.

(a) Payment of Judgments and Settlements. In an action to which this Article applies, the State shall pay (i) a final judgment awarded in a court of competent jurisdiction against a State employee or (ii) the amount due under a settlement of the action under this section. The unit of State government that employed the employee shall pay the first one hundred fifty thousand dollars ($150,000) of liability, and the balance of any payment owed shall be paid in accordance with G.S. 143-299.4. This section does not waive the sovereign immunity of the State with respect to any claim. A payment of a judgment or settlement of a claim against a State employee or several State employees as joint tort-feasors may not exceed the amount payable for one claim under the Tort Claims Act.

(b) Settlement of Claims. The Attorney General may compromise and settle any claim covered by this section to the extent he finds the claim valid. A settlement in excess of the limit provided in subsection (a) must be approved by the employee. In an action in which the Attorney General has stated in writing that private counsel should be provided the employee because of a conflict of interest between the employee and the State, a settlement in excess of the limit provided in subsection (a) must be approved by the private counsel.

(c) Other Insurance. The coverage afforded employees and former employees under this Article shall be excess coverage over any commercial liability insurance, other than insurance written under G.S. 58-32-15, up to the limit provided in subsection (a). (1973, c. 1372; 1975, c. 209, ss. 1, 2; 1979, c. 886; 1981, c. 1109, s. 2; 1991, c. 674, s. 2; 2000-67, s. 7A(h).)

**Legal Periodicals.** — For note on the liability of those charged as custodians of the convicted for personal injuries inflicted by inmates, parolees, and probationers, see 13 Wake Forest L. Rev. 668 (1977).

### CASE NOTES

**Section Is Not Waiver of Sovereign Immunity.** — Nothing in the language of subsection (a) of this section indicates that the state is consenting to suits against it, but only that the state will pay judgments awarded by "courts of competent jurisdiction" in certain suits brought against state employees. Though other provisions of Article 31A suggest that subsection (a) requires the state to pay judgments entered in certain official-capacity actions against its employees, subsection (a) makes it clear that by agreeing to pay such judgments, the State does not intend to waive any underlying defense of sovereign immunity, either common law or constitutional. North Carolina ex rel. Thornburg v. Blackwood, 7 F.3d 1140 (4th Cir. 1993), cert. denied, 511 U.S. 1109, 114 S. Ct. 2106, 128 L. Ed. 2d 667 (1994).

**Actions in Federal Court.** — Whatever Article 31A may imply about the State's willingness to allow the payment of obligations created by subsection (a) of this section to be enforced against it in its own courts, the implication that it is willing to permit such obligations to be enforced against it in federal court is not so "overwhelming" as to permit a finding of Eleventh Amendment waiver of immunity. North Carolina ex rel. Thornburg v. Blackwood, 7 F.3d 1140 (4th Cir. 1993), cert. denied, 511 U.S. 1109, 114 S. Ct. 2106, 128 L. Ed. 2d 667 (1994).

**The Eleventh Amendment barred plaintiff's 42 U.S.C. § 1983 claim** for monetary damages against state officers in their official capacities. Lynn v. West, 134 F.3d 582, 1998 U.S. App. LEXIS 403 (4th Cir.), cert. denied, 525 U.S. 813, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998) (But see Milligan v. State, 135 N.C. App. 781, 522 S.E.2d 330 (1999)).

**Applied** in Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).

**Cited** in Houck & Sons v. Transylvania County, 852 F. Supp. 442 (W.D.N.C. 1993).

### OPINIONS OF ATTORNEY GENERAL

**Legislative Intent.** — The General Assembly intended the phrase "actions or suits to which this article applies" in subsection (a) of this section to describe those actions or suits against a state employee for which the State has agreed to provide defense under G.S. 143-300.3. See opinion of Attorney General to Mr. Richard H. Robinson, Jr., Assistant to the President, The University of North Carolina, 59 N.C.A.G. 21 (1989).

**State Must Provide a Defense Prescribed in § 143-300.5.** — Subsection (a) of this section does not authorize the State to pay any judgment rendered in any case where the State does not provide the defense for the employee under one of the methods specified in G.S. 143-300.5. See opinion of Attorney General to Mr. Richard H. Robinson, Jr., Assistant to the President, The University of North Carolina, 59 N.C.A.G. 21 (1989).

**This section does not permit the State to pay a final judgment awarded against a State employee in a civil or criminal proceeding** brought against him on account of an act done or omission made in the scope and course of his employment, where the State has decided not to provide for the employee's defense under G.S. 143-300.3 or G.S. 143-300.4. See opinion of Attorney General to Mr. Richard H. Robinson, Jr., Assistant to the President, Univ. of N.C., 59 N.C.A.G. 21 (1989).

## § 143-300.7. Defense of medical contractors.

Notwithstanding any other provisions of this Article, any person or professional association who at the request of the Department of Correction provides medical and dental services to inmates in the custody of the Department of Correction and who is sued pursuant to the Federal Civil Rights Act of 1871 may be defended by the Attorney General and shall be protected from liability for violations of civil rights in accordance with the provisions of this Article. (1979, c. 1053, s. 2.)

### CASE NOTES

**Liability Protection Given for Medical Services to Inmates.** — By this statute, the State provides for representation and protection from liability for any person who provides medical services to inmates and who is sued pursuant to 42 U.S.C. § 1983. West v. Atkins, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988).

## § 143-300.8. Defense of local sanitarians.

Any local health department sanitarian enforcing rules of the Commission for Public Health or of the Environmental Management Commission under the supervision of the Department of Environment and Natural Resources pursuant to G.S. 130A-4 shall be defended by the Attorney General, subject to the provisions of G.S. 143-300.4, and shall be protected from liability in accordance with the provisions of this Article in any civil or criminal action or proceeding brought against the sanitarian in his official or individual capacity, or both, on account of an act done or omission made in the scope and course of enforcing the rules of the Commission for Public Health or of the Environmental Management Commission. The Department of Environment and Natural Resources shall pay any judgment against the sanitarian, or any settlement made on his behalf, subject to the provisions of G.S. 143-300.6. (1987, c. 654, s. 2; 1989, c. 727, s. 219(36); 1997-443, s. 11A.96; 2006-202, s. 7; 2007-182, s. 2.)

**Editor's Note.** — Session Laws 2001-505, s. 3, as amended by Session Laws 2002-159, s. 60, provides: "The Public Officers and Employees Liability Insurance Commission in the Department of Insurance shall effect and place professional liability insurance coverage under G.S. 58-32-15 for local health department sanitarians defended by the State under G.S. 143-300.8. For insurance purposes only under G.S. 58-32-15, local health department sanitarians are considered to be employees of the Department of Environment and Natural Resources."

### CASE NOTES

**Obligation to Defend Shown.** — As affirmative obligation on the Attorney General to provide certain sanitarians a legal defense did not accrue or become fixed until the filing of the civil action and the civil action against defendant was filed after the effective date of the statute, the rules against retroactive application were not violated and the statute applied. Cates v. North Carolina Dep't of Justice, 121 N.C. App. 243, 465 S.E.2d 64 (1996), modified and aff'd, 346 N.C. 781, 487 S.E.2d 723 (1997).

**Preliminary Soil Evaluation.** — Preliminary soil evaluation conducted by sanitarian was neither a prerequisite to obtaining an improvements permit nor otherwise required by the rules of the Commission for Health Services [now the Commission for Public Health]; thus, this section did not require the Attorney General to defend sanitarian in the action arising out of his alleged negligence. Cates v. North Carolina Dep't of Justice, 346 N.C. 781, 487 S.E.2d 723 (1997).

While a preliminary soil evaluation or analysis is a valuable service to a potential purchaser of land, a social health department sanitarian is not "enforcing rules of the Commission for Health Services" as required by this section when he conducts such an evaluation. Cates v. North Carolina Dep't of Justice, 346 N.C. 781, 487 S.E.2d 723 (1997).

**Applied** in Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).

**Cited** in Houck & Sons v. Transylvania County, 852 F. Supp. 442 (W.D.N.C. 1993).

## § 143-300.9. Payment of excess damages relating to unconstitutional taxes.

In an action to which this Article applies, the State shall pay the excess amount of a judgment or settlement under G.S. 143-300.6 for damages against a State employee for collecting or administering a tax that is held unconstitutional. The excess amount is the amount of the judgment or settlement over (i) the limit provided in G.S. 143-300.6(a) and (ii) any coverage under G.S. 58-32-15. This section does not waive the sovereign immunity of the State with respect to any claim. (1991, c. 674, s. 1.)

## § 143-300.10. Payment of excess damages relating to unconstitutional goals program.

In an action to which this Article applies, the State shall pay the excess amount of a judgment or settlement under G.S. 143-300.6 for damages against a State employee or member of a State board or commission for enforcing or administering a goals program promoting participation by disadvantaged businesses, minority businesses, and women businesses, in contracts let by a State department or agency that is held unconstitutional. The excess amount is the amount of the judgment or settlement over (i) the limit provided in G.S. 143-300.6(a) and (ii) any coverage under G.S. 58-32-15. This section does not waive the sovereign immunity of the State with respect to any claim. (1991 (Reg. Sess. 1992), c. 1044, s. 39(a).)

**§§ 143-300.11, 143-300.12:** Reserved for future codification purposes.

## Article 31B.

## *Defense of Public School Employees.*

### § 143-300.13. Definition of public school employee.

For the purpose of this Article, a public school employee is a person whose major responsibility is to teach or directly supervise teaching and who is employed in either a full-time or part-time capacity, including, but not limited to, the superintendent, assistant or associate superintendent, principal, assistant principal, classroom teacher, substitute teacher, supervisor, teacher aide, student teacher, or school nurse. (1979, c. 971, s. 2.)

### § 143-300.14. Defense of public school employees.

Except as provided in G.S. 143-300.15, the State shall provide defense counsel for the employee against whom a claim is made or civil action is commenced for personal injury on account of an act done or omission made in the course of the employee's duties under G.S. 115-146.1; provided that, no later than 30 days after the employee is notified of a claim or 10 days after the employee is served with complaint of the injured party, the employee gives written notice of the claim or action to the Attorney General which notice shall include:

(1) The name and address of the claimant and his attorney;
(2) A concise statement of the basis of the claim;
(3) The name and address of any other employees involved; and
(4) A copy of any correspondence received by the employee and legal documents served on the employee pertaining to the claim or civil action. (1979, c. 971, s. 2.)

**Editor's Note.** — Section 115-146.1, referred to in this section, was repealed by Session Laws 1981, c. 423, s. 1, effective July 1, 1981. As to present provisions, pertaining to teachers' duties, see G.S. 115C-307.

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

### § 143-300.15. Refusal of defense.

The Attorney General may refuse to defend an employee for any of the reasons listed in G.S. 143-300.4(a). (1979, c. 971, s. 2.)

### § 143-300.16. Payment of judgments and settlement of claims.

(a) Any final judgment awarded against an employee in an action that meets the requirements of G.S. 143-300.14, or any amount payable under a settlement of the action, shall be paid the State. The first one hundred fifty thousand dollars($150,000) of liability shall be paid from funds appropriated to the State Board of Education for the payment of State Tort Claims. The balance of any payment owed shall be paid in accordance with G.S. 143-299.4. No payment shall be made from either funds appropriated to the State Board of Education or funds transferred from State agencies under G.S. 143-299.4 for any judgment for punitive damages. Nothing in this section shall be deemed to waive the sovereign immunity of the State with respect to a claim covered under this section or authorize the payment of any judgment or settlement against a public school employee in excess of the limit provided in the Tort Claims Act.

(b) The Attorney General may settle any claim to which this Article applies which he finds valid. In any case in which the Attorney General has stated in writing that private counsel ought to be provided because of a conflict with the interests of the State, any settlement shall be approved by the private counsel and the Attorney General.

(c) The coverage afforded an employee under this Article is excess coverage over any commercial insurance liability that the employee may have. (1979, c. 971, s. 2; 2000-67, s. 7A(i).)

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

## § 143-300.17. Employee's obligation for attorney fees.

If any employee has been defended by the Attorney General, or if the State has provided private counsel for an employee, and judgment rendered on the claim establishes that the act or omission complained of did not meet the requirements of G.S. 115-146.1, the judgment against the employee may provide for payment to the State of its costs including a reasonable attorney fee. (1979, c. 971, s. 2.)

**Editor's Note.** — Section 115-146.1, referred to in this section, was repealed by Session Laws 1981, c. 423, s. 1, effective July 1, 1981. As to elementary and secondary education, see now Chapter 115C.

**Legal Periodicals.** — For note, "A Public Goods Approach to Calculating Reasonable Fees under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

## § 143-300.18. Protection is additional.

The protection to employees provided in this Article is in addition to any other protection provided in the General Statutes. (1979, c. 971, s. 2.)

**§§ 143-300.19 through 14-300.29:** Reserved for future codification purposes.

## ARTICLE 31C.

### *Service on Certification Entity.*

## § 143-300.30. Service on National Tobacco Grower Settlement Trust.

(a)(1) Philip Morris, Inc., Brown and Williamson Tobacco Corporation, Lorillard Tobacco Company, and R.J. Reynolds Tobacco Company (hereinafter, the 'tobacco companies') have proposed to create a National Tobacco Grower Settlement Trust under which the tobacco companies will pay, during a 12-year period, a base amount of approximately five billion one hundred fifty million dollars ($5,150,000,000) into a trust to provide payments to tobacco growers and allotment holders in 14 grower states, including North Carolina, for the purposes of ameliorating potential adverse economic consequences of likely changes in the tobacco market on grower states.

(2) The tobacco companies desire that the money paid into the trust be divided among tobacco producers and allotment holders in accordance

with a plan designed and approved by a certification entity in each state.

(3) The tobacco companies desire that in larger grower states, including North Carolina, the certification entity be a nonprofit corporation governed by a board of directors consisting of the following public officials and persons appointed by public officials: the Governor, who shall serve as chair of the board of directors; the Commissioner of Agriculture, who shall serve as vice-chair; the Attorney General, who shall serve as secretary; a State Senator appointed by the President Pro Tempore of the Senate; a StateRepresentative appointed by the Speaker of the House of Representatives; two members of the North Carolina congressional delegation selected by the delegation; and four to seven citizens appointed by the Governor.

(4) It is in the public interest that these officials and citizens serve on the board of directors and determine the distribution of these private trust funds to tobacco producers and allotment holders in North Carolina.

(b) The Governor, the Speaker of the House of Representatives, and the President Pro Tempore of the Senate are authorized to appoint members of the board of directors of the certification entity as provided in Section 1.(a)(3), and the public officials referred to in Section 1.(a)(3) are authorized to serve on that board.

(c) No member of the certification entity for the National Tobacco Grower Trust Fund is subject to civil liability for any act or omission arising out of the performance of the member's duties as a member or officer of the certification entity. This section does not apply to liability arising from willful or wanton misconduct, intentional wrong doing, or the operation of a motor vehicle. (1999-333, s. 1)

**Editor's Note.** — This Article was codified at the direction of the reviser of statutes.

**§§ 143-300.31 through 143-300.34:** Reserved for future codification purposes.

## Article 31D.

## *State Employee Federal Remedy Restoration Act.*

### § 143-300.35. State Employee Federal Remedy Restoration Act.

(a) The sovereign immunity of the State is waived for the limited purpose of allowing State employees, except for those in exempt policy-making positions designated pursuant to G.S. 126-5(d), to maintain lawsuits in State and federal courts and obtain and satisfy judgments against the State or any of its departments, institutions, or agencies under:

(1) The Fair Labor Standards Act, 29 U.S.C. § 201, et seq.
(2) The Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq.
(3) The Family and Medical Leave Act, 29 U.S.C. § 2601, et seq.
(4) The Americans with Disabilities Act, 42 U.S.C. § 12101, et seq.

(b) The amount of monetary relief a State employee receives under subsection (a) of this section shall not exceed the amounts authorized under G.S. 143-299.2 or the amounts authorized under the applicable federal law under this section, whichever is less. (2001-467, s. 1.)

### CASE NOTES

**Applicability.** — Employee's age discrimination claims under the Age Discrimination in Employment Act of 1967, 29 U.S.C.S. § 621 et seq., were barred by the doctrine of sovereign immunity where the employee's claim stemmed from events occurring before October 1, 2001, thereby making North Carolina's recent waiver of sovereign immunity, G.S. 143-300.35, inapplicable. Candillo v. N.C. Dep't of Corr., 199 F. Supp. 2d 342, 2002 U.S. Dist. LEXIS 13272 (M.D.N.C. 2002).

**Waiver of Immunity.** — In an action by a state employee against his state employer alleging that the employer violated the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA), the state waived its immunity under U.S. Const. amend. XI to the employee's ADA and ADEA claims, pursuant to G.S. 143-300.35, because the employee was not in an exempt policy-making position, and his cause of action arose after October 1, 2001. Wright v. N.C. HHS, 405 F. Supp. 2d 631, 2005 U.S. Dist. LEXIS 36653 (E.D.N.C. 2005).

In a suit by a former employee against a county, a county and state department of social services (DSS) and others alleging that she was harassed and constructively discharged due to her disability of bipolar disorder, in violation of the Americans with Disabilities Act (ADA), dismissal of the claims against the state and county DSS and individuals in their official capacities for lack of subject matter jurisdiction was denied because the state had waived its Eleventh Amendment immunity from suit under the ADA pursuant to the State Employee Federal Remedy Restoration Act. Johnson v. N.C. HHS, 454 F. Supp. 2d 467, 2006 U.S. Dist. LEXIS 71498 (M.D.N.C. 2006).

## ARTICLE 32.

## *Payroll Savings Plan for State Employees.*

### § 143-301. Authority of Governor.

The Governor may, with the approval of the Council of State, authorize any or all of the departments, institutions, and agencies of the State to establish a voluntary payroll deduction plan for the purchase of United States savings bonds by State employees, and to set up the necessary machinery for carrying out the purposes of this Article. (1951, c. 1020, s. 1.)

### § 143-302. Expenses.

Funds may be allotted out of the contingency and emergency appropriation to defray the necessary expenses incurred by departments, institutions and agencies financed out of the general fund of the State, and departments, institutions and agencies financed out of special funds or entirely from receipts shall defray the necessary expenses incurred without expense to the general fund of the State. (1951, c. 1020, s. 2.)

### § 143-303. Agreements of employees with heads of departments, etc.

Any of the employees of the State of North Carolina may voluntarily enter into written agreement with heads of the department or institution or agency where employed, which has adopted the payroll savings plan, to authorize deductions from his or her salary of certain designated sums to be invested in United States savings bonds of the kind and type specified in such agreement. (1951, c. 1020, s. 3.)

### § 143-304. Salary deductions and purchase of bonds authorized.

Upon the execution of such agreement by any State employee with the State department, institution or agency where employed, the department, institution or agency is authorized and empowered to deduct the sum specified in said agreement from the weekly or monthly salary of such employee, and to show deduction on all pay rolls similar to withholding tax, retirement, insurance, hospitalization, etc. Such sums shall be held until sufficient moneys have accumulated to the credit of each individual sufficient to purchase a bond, and such sum shall be invested in United States savings bonds, for and on behalf of such employee, and the bonds shall be delivered to the employee as soon as practical. Provided that no coercion of any sort shall be exercised to require any person to participate. (1951, c. 1020, s. 4.)

## § 143-305. Cancellation of agreements.

Such agreement may be cancelled by the employee executing the same upon giving written notice to the head of the department, institution or agency where employed not later than the fifteenth day of the month in which he or she desires such agreement to be terminated, and the head of the department, institution or agency may cancel any agreement, herein provided for, upon giving 10 days' written notice to the affected employee. Upon the termination of the agreement the head of the department, institution or agency is hereby authorized to refund any amount of money held for the employee. (1951, c. 1020, s. 5.)

## Article 33.

## *Judicial Review of Decisions of Certain Administrative Agencies.*

**§§ 143-306 through 143-316:** Repealed by Session Laws 1973, c. 1331, s. 2, as amended by Session Laws 1975, c. 69, s. 4.

**Cross References.** — For present provisions as to judicial review of decisions of administrative agencies, see G.S. 150B-43 et seq.

## Article 33A.

## *Rules of Evidence in Administrative Proceedings before State Agencies.*

**§§ 143-317, 143-318:** Repealed by Session Laws 1973, c. 1331, s. 2, as amended by Session Laws 1975, c. 69, s. 4.

**Cross References.** — For present provisions as to evidence in administrative proceedings, see G.S. 150B-28 et seq.

## Article 33B.

## *Meetings of Governmental Bodies.*

**§§ 143-318.1 through 143-318.8:** Repealed by Session Laws 1979, c. 655, s. 1.

## ARTICLE 33C.

## *Meetings of Public Bodies.*

### § 143-318.9. Public policy.

Whereas the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people's business, it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly. (1979, c. 655, s. 1.)

**Local Modification.** — (As to Article 33C) Edgecombe: 1991, c. 404, ss. 3(h), 4(h) and 5(e); (as to Article 33C) Franklin: 1993, c. 341; (As to Article 33C) Mecklenburg: 2009-52, s. 1(g) (terminates upon filing of final report or June 15, 2014); (as to Article 33C) city of Charlotte: 2000-26, s. 1, as amended by 2007-255, s. 1; city of Durham: 1983, c. 373; city of Fayetteville: 1989, c. 355, s. 1; (as to Article 33C) city of Franklinton: 1993, c. 341; (as to Article 33C) city of Greensboro: 1987, c. 51; (As to Article 33C) city of Rocky Mount: 2003-327, as amended by 2009-74.

**Cross References.** — As to meetings of agencies concerned with public education, see G.S. 115C-4.

**Editor's Note.** — Session Laws 1979, c. 655, s. 3, provided: "All provisions of general laws, city charters, and local acts in effect as of October 1, 1979, and in conflict with the provisions of G.S. Chapter 143, Article 33C, as enacted by Section 1 of this act, are repealed insofar as they conflict with the provisions of G.S. Chapter 143, Article 33C. No general law, city charter, or local act enacted or taking effect after October 1, 1979, may be construed to modify, amend, or repeal any provision of Article 33C unless it expressly so provides by specific reference to the appropriate section number of that Article."

Session Laws 1997-443, s. 11.57(b), provides that meetings of the State Child Fatality Review Team are not subject to the provisions of Article 33C of Chapter 143 of the General Statutes.

**Legal Periodicals.** — For article, "Interpreting North Carolina's Law," see 54 N.C.L. Rev. 777 (1976).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

For survey of 1977 law on open meetings, see 56 N.C.L. Rev. 861 (1978).

#### CASE NOTES

***Editor's Note.*** — *Most of the cases cited below were decided under former G.S. 143-318.1 et seq.*

**Public body which underwent little more than a change of name through incorporation** continued to be an agency of the county. To hold otherwise would eviscerate the public policy of this section. Winfas, Inc. v. Region P Human Dev. Agency, 64 N.C. App. 724, 308 S.E.2d 99 (1983).

**Voting for a person to fill a vacancy on a board was an "action"** under former G.S. 143-318.1. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

**Voting by secret ballot could not be reconciled with acting "openly"** under former G.S. 143-318.1. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

**Actions on Pending Motions.** — Section 143-318.9 does not require the solicitation of public comment as a prerequisite to a vote on a pending motion, it simply requires that if there is any discussion or debate of public business at an official meeting, that discussion or debate must occur in a meeting open to the public with any person entitled to attend. Sigma Constr. Co. v. Guilford County Bd. of Educ., 144 N.C. App. 376, 547 S.E.2d 178, 2001 N.C. App. LEXIS 442 (2001).

**Effect of Closed Meeting on Validity of Action Taken.** — There was nothing in former Article 33B which supported the contention that all action taken at a meeting of any governmental body of the State or of one of its political subdivisions would be completely void if such meeting was not open to the public. Lewis v. White, 287 N.C. 625, 216 S.E.2d 134 (1975).

**As to strict construction of exceptions to former Article 33B,** see News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

**Burden on Those Claiming Exceptions.** — Those seeking to come within the exceptions to the open meetings law, former Article 33B, had the burden of justifying their action. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

**An action by a Board of Education to give itself a pay raise must be deliberated at a meeting open to the public.** Jacksonville Daily News Co. v. Onslow County Bd. of Educ., 113 N.C. App. 127, 439 S.E.2d 607 (1993).

**Consideration of Prospective Employee's Qualifications.** — Board of a substance abuse area authority properly entered a closed session and continued the closed session on later dates to evaluate and consider a prospective employee's qualifications; therefore, the board did not violate the North Carolina Open Meetings Law, G.S. 143-318.9 et. seq., to warrant the employee's appointment to be declared null and void or a nullity. Davis v. Durham Mental Health/Development Disabilities/Substance Abuse Area Auth., 165 N.C. App. 100, 598 S.E.2d 237, 2004 N.C. App. LEXIS 1156 (2004).

**School board violated the Open Meetings Law** where it had a policy of entering closed session for reasons that were similar to the reasons that the General Assembly passed the Open Meetings Law, to curtail unwarranted secrecy by public bodies. H.B.S. Contractors v. Cumberland County Bd. of Educ., 122 N.C. App. 49, 468 S.E.2d 517 (1996), discretionary review improvidently allowed, 345 N.C. 178, 477 S.E.2d 926 (1996).

**Application to Private Corporate Entity.** — Though a housing authority was once a governmental agency, it was not subject to the North Carolina Open Meetings Law, G.S. 143-318.9 et seq., and the North Carolina Public Records Law, G.S. 132-1 et seq., because it was changed to a private corporation and only public entities were subject to the Public Records Law. Chatfield v. Wilmington Hous. Fin. & Dev., Inc., 166 N.C. App. 703, 603 S.E.2d 837, 2004 N.C. App. LEXIS 2027 (2004), cert. denied, — N.C. —, 609 S.E.2d 393 (2005).

**Mediation Was Not a Public Meeting.** — Because no more than one representative of a city or a county participated in a mediation, it was not an official meeting mandated to be open to the public pursuant to G.S. 143-318.9 et seq.; the mediation, which was to negotiate terms of an agreement, was not called or held to evade the spirit and the purposes of the statute and thus was not an official meeting. Gannett Pac. Corp. v. City of Asheville, 178 N.C. App. 711, 632 S.E.2d 586, 2006 N.C. App. LEXIS 1642 (2006).

**Affirmative defense of public official immunity did not apply** to a claim for a violation of G.S. 143-318.9 (the open meetings law) because plaintiffs did not allege that a violation caused injury for which plaintiffs were entitled to compensation as persons distinct from the general public. Free Spirit Aviation, Inc. v. Rutherford Airport Auth., 191 N.C. App. 581, 664 S.E.2d 8, 2008 N.C. App. LEXIS 1494 (2008).

**Cited** in DTH Publishing Corp. v. University of N.C., 128 N.C. App. 534, 496 S.E.2d 8 (1998).

## § 143-318.10. All official meetings of public bodies open to the public.

(a) Except as provided in G.S. 143-318.11, 143-318.14A, 143-318.15, and 143-318.18, each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.

(b) As used in this Article, "public body" means any elected or appointed authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, constituent institutions of The University of North Carolina, or other political subdivisions or public corporations in the State that (i) is composed of two or more members and (ii) exercises or is authorized to exercise a legislative, policy-making, quasi-judicial, administrative, or advisory function. In addition, "public body" means the governing board of a "public hospital" as defined in G.S. 159-39 and the governing board of any nonprofit corporation to which a hospital facility has been sold or conveyed pursuant to G.S. 131E-8, any subsidiary of such nonprofit corporation, and any nonprofit corporation owning the corporation to which the hospital facility has been sold or conveyed.

(c) "Public body" does not include (i) a meeting solely among the professional staff of a public body, or (ii) the medical staff of a public hospital or the medical staff of a hospital that has been sold or conveyed pursuant to G.S. 131E-8.

(d) "Official meeting" means a meeting, assembly, or gathering together at any time or place or the simultaneous communication by conference telephone or other electronic means of a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body. However, a social meeting or other informal assembly or gathering together of the members of a public body does not constitute an official meeting unless called or held to evade the spirit and purposes of this Article.

(e) Every public body shall keep full and accurate minutes of all official meetings, including any closed sessions held pursuant to G.S. 143-318.11. Such minutes may be in written form or, at the option of the public body, may be in the form of sound or video and sound recordings. When a public body meets in closed session, it shall keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired. Such accounts may be a written narrative, or video or audio recordings. Such minutes and accounts shall be public records within the meaning of the Public Records Law, G.S. 132-1 et seq.; provided, however, that minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session. (1979, c. 655, s. 1; 1985 (Reg. Sess., 1986), c. 932, s. 4; 1991, c. 694, ss. 1, 2; 1993 (Reg. Sess., 1994), c. 570, s. 1; 1995, c. 509, s. 135.2(p); 1997-290, s. 1; 1997-465, s. 27.)

**Local Modification.** — Hyde: 2008-111, ss. 2 and 3.

**Editor's Note.** — Subdivisions (1) and (2) in subsection (c) were renumbered as subdivisions (i) and (ii) pursuant to S.L. 1997-465, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

## CASE NOTES

**Definition of "Public Body" as Affecting Classification of Actions as "State Action."** — The label given Chapter 131E is irrelevant in determining whether a private, non-profit hospital's suspension and revocation of staff privileges constitutes state action. Likewise, the definition of a "public body" for purposes of the open meetings statute does not establish a sufficient nexus for state action. Weston v. Carolina Medicorp, Inc., 102 N.C. App. 370, 402 S.E.2d 653 (1991).

**Wake County Hospital System as a "Public Body."** — By virtue of the definitions in subsection (b) of this section and G.S. 159-39(a), the Wake County Hospital System is a "public body" that must, by law, record settlement terms considered in executive sessions; in addition, the public has the right to know the terms of settlements made by the system in actions for wrongful terminations of its agreements, since the funds from which the settlements are paid must be considered the county's funds. News & Observer Publishing Co. v. Wake County Hosp. Sys., 55 N.C. App. 1, 284 S.E.2d 542 (1981), cert. denied, 305 N.C. 302, 291 S.E.2d 151, appeal dismissed and cert. denied, 459 U.S. 803, 103 S. Ct. 26, 74 L. Ed. 2d 47 (1982).

**School board** was a public body and was required to hold its meetings in conformity with the open meetings law. Sigma Constr. Co. v. Guilford County Bd. of Educ., 144 N.C. App. 376, 547 S.E.2d 178, 2001 N.C. App. LEXIS 442 (2001).

**College's undergraduate court was a "public body" under this section.** DTH Publishing Corp. v. University of N.C., 128 N.C. App. 534, 496 S.E.2d 8 (1998), cert. denied, 348 N.C. 496, 510 S.E.2d 382 (1998).

**Withholding of Recordings from Closed Session.** — Closed session of Undergraduate Court was authorized under G.S. 143-318.11 and the recordings of the closed session may be withheld from public inspection pursuant to subsection (e) of this section. DTH Publishing Corp. v. University of N.C., 128 N.C. App. 534, 496 S.E.2d 8 (1998), cert. denied, 348 N.C. 496, 510 S.E.2d 382 (1998).

**Public Records Act and This Section Compared.** — The Public Records Act (G.S. 132-1 et seq.) and the Open Meetings Law (G.S. 143-318.10) are discrete statutes, each designed to promote in a different way openness in government. There is no suggestion in either statute that an agency not subject to one is, ipso facto, exempt from the other. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

**Agencies Exempt from § 143-318.10.** — The Public Records Law (G.S. 132-1 et seq.)

may apply to minutes from meetings of an agency exempt from the Open Meetings Law (G.S. 143-318.10). News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

**The only meetings required by former § 143-318.2 to be open to the public** were official meetings of the governing and governmental bodies of this State and its political subdivisions, including specified types of subsidiary or component parts of such bodies. Student Bar Ass'n Bd. of Governors v. Byrd, 293 N.C. 594, 239 S.E.2d 415 (1977).

**Mediation Was Not Public Meeting.** — Because no more than one representative of a city or a county participated in a mediation, it was not an official meeting mandated to be open to the public pursuant to G.S. 143-318.9 et seq.; the mediation, which was to negotiate terms of an agreement, was not called or held to evade the spirit and the purposes of the statute and thus was not an official meeting. Gannett Pac. Corp. v. City of Asheville, 178 N.C. App. 711, 632 S.E.2d 586, 2006 N.C. App. LEXIS 1642 (2006).

**County board of elections violated the North Carolina Open Meetings Law, G.S. 143-318.9 et seq.,** by going into closed session without a vote of the board or stating its purpose for such a session. The board's failure to consider a recusal motion in a public setting also violated the Open Meetings Law. Knight v. Higgs, 189 N.C. App. 696, 659 S.E.2d 742, 2008 N.C. App. LEXIS 702 (2008).

## OPINIONS OF ATTORNEY GENERAL

**Definition of "Public Entity".** — The term "public entity" includes all elected or appointed authorities of the state and their individual departments, commissions, committees, councils, including the constituent institutions of the University of North Carolina. See opinion of Attorney General to T. Brooks Skinner, Jr., General Counsel, North Carolina Department of Administration, 2002 N.C. AG LEXIS 13 (3/7/02).

**Opening of Closed Session Minutes.** — When board of county commissioners returned to public session, after meeting with its attorney in closed session, and announced that, during the closed session, its attorney had recommended changes to a proposed ordinance, the minutes of the closed session had to be disclosed under G.S. 143-318.10(e), because it would no longer frustrate the purpose of the closed session to disclose the minutes. Multimedia Publ'g of N.C., Inc. v. Henderson County, 145 N.C. App. 365, 550 S.E.2d 846, 2001 N.C. App. LEXIS 638 (2001).

Under G.S. 143-318.10, minutes of all official meetings, including closed sessions, are public records within meaning of Public Records Law, G.S. 132-1 et seq. Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 566 S.E.2d 701, 2002 N.C. App. LEXIS 859 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002).

Even though they are public records, minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session, under G.S. 143-318.10(e). Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 566 S.E.2d 701, 2002 N.C. App. LEXIS 859 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002).

Plain language of G.S. 143-138.10 requires that a closed session be conducted in compliance with G.S. 143-318.11 in order for the minutes of such session to be withheld from public inspection. Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 566 S.E.2d 701, 2002 N.C. App. LEXIS 859 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002).

**University Board of Governors and Employees Not Covered by Former § 143-318.2.** — Board of Governors of The University of North Carolina is not, itself, a "governmental body of this State," and former G.S. 143-318.2 did not extend to the meetings of its employees, even though such employees be deemed a component part of the Board of Governors. Student Bar Ass'n Bd. of Governors v. Byrd, 293 N.C. 594, 239 S.E.2d 415 (1977).

**Former § 143-318.2 did not require that meetings of the faculty of the School of Law of The University of North Carolina be open** to the public. Student Bar Ass'n Bd. of Governors v. Byrd, 293 N.C. 594, 239 S.E.2d 415 (1977).

**Acquisition of Property.** — Because the Open Meetings Law authorizes a closed session to discuss the acquisition of property, and G.S. 158-7.1(c) requires that notice of the public hearing thereon describe the intention to approve it, it logically follows that the intent to approve the acquisition which is the subject of the notice may be formed in a closed session. Maready v. City of Winston-Salem, 342 N.C. 708, 467 S.E.2d 615 (1996).

**Application to Private Corporate Entity.** — Though a housing authority was once a governmental agency, it was not subject to the North Carolina Open Meetings Law, G.S. 143-318.9 et seq., and the North Carolina Public Records Law, G.S. 132-1 et seq., because it was changed to a private corporation and only public entities were subject to the Public Records

Law. Chatfield v. Wilmington Hous. Fin. & Dev., Inc., 166 N.C. App. 703, 603 S.E.2d 837, 2004 N.C. App. LEXIS 2027 (2004), cert. denied, — N.C. —, 609 S.E.2d 393 (2005).

**Applied** in Winfas, Inc. v. Region P Human Dev. Agency, 64 N.C. App. 724, 308 S.E.2d 99 (1983).

**Cited** in Dockside Discotheque, Inc. v. Board of Adjustment, 115 N.C. App. 303, 444 S.E.2d 451; Cohn v. Wilkes Gen. Hosp., 127 F.R.D. 117 (W.D.N.C. 1989); Multimedia Publishing of N.C., Inc. v. Henderson County, 136 N.C. App. 567, 525 S.E.2d 786 (2000); Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 566 S.E.2d 701, 2002 N.C. App. LEXIS 859 (2002).

## § 143-318.11. Closed sessions.

(a) Permitted Purposes. — It is the policy of this State that closed sessions shall be held only when required to permit a public body to act in the public interest as permitted in this section. A public body may hold a closed session and exclude the public only when a closed session is required:

(1) To prevent the disclosure of information that is privileged or confidential pursuant to the law of this State or of the United States, or not considered a public record within the meaning of Chapter 132 of the General Statutes.

(2) To prevent the premature disclosure of an honorary degree, scholarship, prize, or similar award.

(3) To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. If the public body has approved or considered a settlement, other than a malpractice settlement by or on behalf of a hospital, in closed session, the terms of that settlement shall be reported to the public body and entered into its minutes as soon as possible within a reasonable time after the settlement is concluded.

(4) To discuss matters relating to the location or expansion of industries or other businesses in the area served by the public body, including agreement on a tentative list of economic development incentives that may be offered by the public body in negotiations. The action approving the signing of an economic development contract or commitment, or the action authorizing the payment of economic development expenditures, shall be taken in an open session.

(5) To establish, or to instruct the public body's staff or negotiating agents concerning the position to be taken by or on behalf of the public body in negotiating (i) the price and other material terms of a contract or proposed contract for the acquisition of real property by purchase, option, exchange, or lease; or (ii) the amount of compensation and other material terms of an employment contract or proposed employment contract.

(6) To consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of an individual public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge, or grievance by or against an individual public officer or employee. General personnel policy issues may not be considered in a closed session. A public body may not consider the qualifications, competence, performance, character, fitness, appointment, or removal of a member of the

public body or another body and may not consider or fill a vacancy among its own membership except in an open meeting. Final action making an appointment or discharge or removal by a public body having final authority for the appointment or discharge or removal shall be taken in an open meeting.

(7) To plan, conduct, or hear reports concerning investigations of alleged criminal misconduct.

(8) To formulate plans by a local board of education relating to emergency response to incidents of school violence.

(9) To discuss and take action regarding plans to protect public safety as it relates to existing or potential terrorist activity and to receive briefings by staff members, legal counsel, or law enforcement or emergency service officials concerning actions taken or to be taken to respond to such activity.

(b) Repealed by Session Laws 1991, c. 694, s. 4.

(c) Calling a Closed Session. — A public body may hold a closed session only upon a motion duly made and adopted at an open meeting. Every motion to close a meeting shall cite one or more of the permissible purposes listed in subsection (a) of this section. A motion based on subdivision (a)(1) of this section shall also state the name or citation of the law that renders the information to be discussed privileged or confidential. A motion based on subdivision (a)(3) of this section shall identify the parties in each existing lawsuit concerning which the public body expects to receive advice during the closed session.

(d) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 570, s. 2.(1979, c. 655, s. 1; 1981, c. 831; 1985 (Reg. Sess., 1986), c. 932, s. 5; 1991, c. 694, ss. 3, 4; 1993 (Reg. Sess., 1994), c. 570, s. 2; 1995, c. 509, s. 84; 1997-222, s. 2; 1997-290, s. 2; 2001-500, s. 2; 2003-180, s. 2.)

### CASE NOTES

**Legislative Intent of Subsection (a)(1).** — Legislature intended, in G.S. 143-318.11(a)(1), to restrict the subject matter which may be considered by a public body in a closed session. Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 566 S.E.2d 701, 2002 N.C. App. LEXIS 859 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002).

**Legislative Intent of Subsection (a)(3).** — The legislature did not intend the reference to claims and settlements in the second half of the (a)(3) exception to create a limitation to the exception, but only to provide an illustration of what types of discussions can proceed in closed session. Multimedia Publishing of N.C., Inc. v. Henderson County, 136 N.C. App. 567, 525 S.E.2d 786 (2000), cert. denied, 351 N.C. 474, 543 S.E.2d 492 (2000).

**Burden of Proof Requires Objective Indica.** — The burden is on the government body to demonstrate that the attorney-client exception in (a)(3) applies, and the government body can only meet its burden by providing some objective indicia that the exception is applicable under the circumstances; mere assertions by the body or its attorney(s) in pleadings will not suffice. Multimedia Publishing of N.C., Inc. v. Henderson County, 136 N.C. App. 567, 525 S.E.2d 786 (2000), cert. denied, 351 N.C. 474, 543 S.E.2d 492 (2000).

**Removal of County Official.** — Appeal from a judgment that a chairman of a county airport authority was improperly removed from his position by a board of county commissioners who convened in a closed session in violation of the North Carolina Open Meetings Law, G.S. 143-318.11(a)(3), to discuss the chairman's qualifications, was rendered moot as the chairman's term had expired. McClure v. County of Jackson, 185 N.C. App. 462, 648 S.E.2d 546, 2007 N.C. App. LEXIS 1814 (2007).

**The present attorney-client exception in subsection (a)(3)** does not require a claim to be pending or threatened before the privilege of a closed session may be invoked by the government body. Multimedia Publishing of N.C., Inc. v. Henderson County, 136 N.C. App. 567, 525 S.E.2d 786 (2000), cert. denied, 351 N.C. 474, 543 S.E.2d 492 (2000).

**Discussions Allowed Under Attorney-Client Privilege in (a)(3).** — Discussions regarding the drafting, phrasing, scope, and meaning of proposed enactments would be permissible during a closed session under (a)(3), but as soon as discussions move beyond legal technicalities and into the propriety and merits of proposed enactments, the legal justification for closing the session ends. Multimedia Publishing of N.C., Inc. v. Henderson County, 136 N.C. App. 567, 525 S.E.2d 786 (2000), cert. denied, 351 N.C. 474, 543 S.E.2d 492 (2000).

Public body was entitled to hold a closed session to consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, in accordance with G.S. 143.318.11(a)(3). Sigma Constr. Co. v. Guilford County Bd. of Educ., 144 N.C. App. 376, 547 S.E.2d 178, 2001 N.C. App. LEXIS 442 (2001).

**Attorney-Client Exception Held Applicable.** — As zoning appeals board held closed hearings solely in order to consult with its attorney on matters within the scope of the attorney-client privilege, and the aggrieved property owner failed to show any prejudice from the board's meeting in closed session, its challenge to the closed meetings was denied. Carolina Holdings, Inc. v. Hous. Appeals Bd., 149 N.C. App. 579, 561 S.E.2d 541, 2002 N.C. App. LEXIS 281 (2002).

Closed session of board of county commissioners at which it met with its attorney to discuss the legalities of a proposed ordinance and during which no general policy matters were discussed was authorized by the attorney client privilege in G.S. 143-318.11(a)(3). Multimedia Publ'g of N.C., Inc. v. Henderson County, 145 N.C. App. 365, 550 S.E.2d 846, 2001 N.C. App. LEXIS 638 (2001).

**Judicial Application of Subsection (d).** — Courts should ensure that the exception in subsection (d) of this section to the disclosure requirement should extend no further than necessary to protect ongoing efforts of a public body, respecting the policy against secrecy in government that underlies both the Public Records Act and Open Meetings Law. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

**"Administrative procedure" as used in subsection (a)(3)** refers only to administrative proceedings instituted under the Administrative Procedure Act (N.C.G.S. G.S. 150B-1, et seq.), and does not include mere clerical or managerial instructions to terminate a contract. H.B.S. Contractors v. Cumberland County Bd. of Educ., 122 N.C. App. 49, 468 S.E.2d 517 (1996), discretionary review improvidently allowed, 345 N.C. 178, 477 S.E.2d 926 (1996).

**Settlement of Case.** — Once the Board of County Commissioners authorized its attorney to settle the case, he was empowered to bind the board. Moore v. Beaufort County, 936 F.2d 159 (4th Cir. 1991).

A Board of County Commissioners' oral offer, through its attorney, to settle voting rights litigation on specific, enforceable terms was sufficient to bind the board. Under North Carolina law, public bodies can give instructions to their attorneys to settle litigation, so long as the settlement terms are later entered into the minutes in open session. Moore v. Beaufort County, 936 F.2d 159 (4th Cir. 1991).

**Matters Not Subject to Negotiation.** — Under G.S. 143-318.11(a)(5), a city council erroneously refused to reveal in open session the location, proposed purpose, and owner of certain property it was considering acquiring for a public park, because none of those matters were subject to negotiation. Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 566 S.E.2d 701, 2002 N.C. App. LEXIS 859 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002).

Language of G.S. 143-318.11(a)(5) does not permit a public body to deny the public access to information which is not a material term subject to negotiation regarding the acquisition of real property so a public body may not reserve for discussion in closed session, under the guise of G.S. 143-318.11(a)(5), matters relating to the terms of a contract for acquisition of real property unless those terms are material to the contract and also actually subject to negotiation. Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 566 S.E.2d 701, 2002 N.C. App. LEXIS 859 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002).

**Consideration of prospective employee's qualifications.** — Board of a substance abuse area authority properly entered a closed session and continued the closed session on later dates to evaluate and consider a prospective employee's qualifications; therefore, the board did not violate the North Carolina Open Meetings Law, G.S.143-318.9 et. seq., to warrant the employee's appointment to be declared null and void or a nullity. Davis v. Durham Mental Health/Development Disabilities/Substance Abuse Area Auth., 165 N.C. App. 100, 598 S.E.2d 237, 2004 N.C. App. LEXIS 1156 (2004).

**Wake County Hospital System as a "Public Body".** — By virtue of the definitions in G.S. 143-318.10(b) and 159-39(a), the Wake County Hospital System is a "public body" that must, by law, record settlement terms considered in executive sessions; in addition, the public has the right to know the terms of settlements made by the system in actions for wrongful terminations of its agreements, since the funds from which the settlements are paid must be considered the county's funds. News & Observer Publishing Co. v. Wake County Hosp. Sys., 55 N.C. App. 1, 284 S.E.2d 542 (1981), cert. denied, 305 N.C. 302, 291 S.E.2d 151, appeal dismissed and cert. denied, 459 U.S. 803, 103 S. Ct. 26, 74 L. Ed. 2d 47 (1982).

**Undergraduate Court was entitled to**

**hold a closed session** to prevent the disclosure of education records protected by FERPA (Family Educational and Privacy Rights Act). DTH Publishing Corp. v. University of N.C., 128 N.C. App. 534, 496 S.E.2d 8 (1998), cert. denied, 348 N.C. 496, 510 S.E.2d 382 (1998).

Closed session of Undergraduate Court was authorized under this section and the recordings of the closed session may be withheld from public inspection pursuant to subsection G.S. 143-318.10(e). DTH Publishing Corp. v. University of N.C., 128 N.C. App. 534, 496 S.E.2d 8 (1998), cert. denied, 348 N.C. 496, 510 S.E.2d 382 (1998).

**Considerations Where Proceedings No Longer Ongoing.** — The nature and purpose of the meetings at issue are relevant in determining the extent of protection, if any, provided in subsection (d) of this section for minutes of proceedings that are no longer ongoing. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

**Hospital "credentialing records" pertaining to a physician** were confidential and privileged. Whisenhunt v. Zammit, 86 N.C. App. 425, 358 S.E.2d 114 (1987).

**Commitment of Water Line in Executive Session.** — Even if water line commitment made at an executive session violated open meetings law, it did not prevent defendant city from later committing itself to furnish water to citizen's property. After lengthy public hearings all facts pertinent to the case were publicly presented, including the city's proposal to furnish water line. Coulter v. City of Newton, 100 N.C. App. 523, 397 S.E.2d 244 (1990).

**Disclosure of Minutes.** — Even though they are public records, minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session, under G.S. 143-318.10(e). Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 566 S.E.2d 701, 2002 N.C. App. LEXIS 859 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002).

Plain language of G.S. 143-138.10 requires that a closed session be conducted in compliance with G.S. 143-318.11 in order for the minutes of such session to be withheld from public inspection. Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 566 S.E.2d 701, 2002 N.C. App. LEXIS 859 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002).

**Disclosure Held Necessary Where Proceedings Not Ongoing.** — Where Commission formed to investigate improprieties in a university athletic program had completed its proceedings and had reported to the university system's chief executive officer, and no further action or disposition by any higher ranking university officer was pending, the Commission's work, or any results depending on that work, could not have been compromised by public inspection of minutes of its meetings. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

**Propriety of Closed Session.** — Pursuant to G.S. 143-318.11(c), county board of elections violated the North Carolina Open Meetings Law, G.S. 143-318.9 et seq., by going into closed session without a vote of the board or stating its purpose for such a session. The board's failure to consider a recusal motion in a public setting also violated the Open Meetings Law. Knight v. Higgs, 189 N.C. App. 696, 659 S.E.2d 742, 2008 N.C. App. LEXIS 702 (2008).

**Cited** in Dockside Discotheque, Inc. v. Board of Adjustment, 115 N.C. App. 303, 444 S.E.2d 451; Cohn v. Wilkes Gen. Hosp., 127 F.R.D. 117 (W.D.N.C. 1989); Durham Herald Co. v. County of Durham, 334 N.C. 677, 435 S.E.2d 317 (1993); Maready v. City of Winston-Salem, 342 N.C. 708, 467 S.E.2d 615 (1996); Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 566 S.E.2d 701, 2002 N.C. App. LEXIS 859 (2002); MCI Constr., LLC v. Hazen & Sawyer, P.C., 213 F.R.D. 268, 2003 U.S. Dist. LEXIS 2560 (M.D.N.C. 2003).

### OPINIONS OF ATTORNEY GENERAL

**Closed Sessions of Tax Review Board.** — The Tax Review Board may enter into a closed session for the limited purposes enumerated in this section. See opinion of Attorney General to The Honorable Richard H. Moore, Treasurer, State of North Carolina, 2004 N.C.A.G. 10 (10/12/04).

## § 143-318.12. Public notice of official meetings.

(a) If a public body has established, by ordinance, resolution, or otherwise, a schedule of regular meetings, it shall cause a current copy of that schedule, showing the time and place of regular meetings, to be kept on file as follows:

(1) For public bodies that are part of State government, with the Secretary of State;

(2) For the governing board and each other public body that is part of a county government, with the clerk to the board of county commissioners;

(3) For the governing board and each other public body that is part of a city government, with the city clerk;

(4) For each other public body, with its clerk or secretary, or, if the public body does not have a clerk or secretary, with the clerk to the board of county commissioners in the county in which the public body normally holds its meetings.

If a public body changes its schedule of regular meetings, it shall cause the revised schedule to be filed as provided in subdivisions (1) through (4) of this subsection at least seven calendar days before the day of the first meeting held pursuant to the revised schedule.

(b) If a public body holds an official meeting at any time or place other than a time or place shown on the schedule filed pursuant to subsection (a) of this section, it shall give public notice of the time and place of that meeting as provided in this subsection.

(1) If a public body recesses a regular, special, or emergency meeting held pursuant to public notice given in compliance with this subsection, and the time and place at which the meeting is to be continued is announced in open session, no further notice shall be required.

(2) For any other meeting, except an emergency meeting, the public body shall cause written notice of the meeting stating its purpose (i) to be posted on the principal bulletin board of the public body or, if the public body has no such bulletin board, at the door of its usual meeting room, and (ii) to be mailed, e-mailed, or delivered to each newspaper, wire service, radio station, and television station that has filed a written request for notice with the clerk or secretary of the public body or with some other person designated by the public body. The public body shall also cause notice to be mailed, e-mailed, or delivered to any person, in addition to the representatives of the media listed above, who has filed a written request with the clerk, secretary, or other person designated by the public body. This notice shall be posted and mailed, e-mailed, or delivered at least 48 hours before the time of the meeting. The notice required to be posted on the principal bulletin board or at the door of its usual meeting room shall be posted on the door of the building or on the building in an area accessible to the public if the building containing the principal bulletin board or usual meeting room is closed to the public continuously for 48 hours before the time of the meeting. The public body may require each newspaper, wire service, radio station, and television station submitting a written request for notice to renew the request annually. The public body shall charge a fee to persons other than the media, who request notice, of ten dollars ($10.00) per calendar year, and may require them to renew their requests quarterly. No fee shall be charged for notices sent by e-mail.

(3) For an emergency meeting, the public body shall cause notice of the meeting to be given to each local newspaper, local wire service, local radio station, and local television station that has filed a written request, which includes the newspaper's, wire service's, or station's telephone number, for emergency notice with the clerk or secretary of the public body or with some other person designated by the public body. This notice shall be given either by e-mail, by telephone, or by the same method used to notify the members of the public body and shall be given immediately after notice has been given to those members. This notice shall be given at the expense of the party

notified. Only business connected with the emergency may be considered at a meeting to which notice is given pursuant to this paragraph.

(c) Repealed by Session Laws 1991, c. 694, s. 6.

(d) If a public body has a Web site and has established a schedule of regular meetings, the public body shall post the schedule of regular meetings to the Web site.

(e) If a public body has a Web site that one or more of its employees maintains, the public body shall post notice of any meeting held under subdivisions (b)(1) and (b)(2) of this section prior to the scheduled time of that meeting.

(f) For purposes of this section, an "emergency meeting" is one called because of generally unexpected circumstances that require immediate consideration by the public body. (1979, c. 655, s. 1; 1991, c. 694, ss. 5, 6; 2009-350, s. 1.)

**Effect of Amendments.** — Session Laws 2009-350, s. 1, effective for open meetings noticed on or after October 1, 2009, in subdivision (b)(2), inserted "e-mailed" throughout, in the first sentence, substituted "that" for "which," and added the fourth and last sentences; in subdivision (b)(3), in the second sentence, inserted "e-mail, by," and deleted the former fourth sentence, which read: "An 'emergency meeting' is one called because of generally unexpected circumstances that require immediate consideration by the public body"; and added subsections (d) through (f).

## CASE NOTES

**Reasonable Public Notice.** — In the absence of statutory provisions for notice, reasonable public notice of a board of education's meetings should be given, taking into consideration the urgency of the matter necessitating the meeting. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976), decided under former § 143-318.1, et seq.

**Notice to Local Media Adequate.** — Summary judgment was properly awarded to a city and its officials in an action by property owners challenging an annexation because the city complied with the Open Meetings Law, G.S. 143-318.12(b)(2), by providing notice of the special meetings regarding the annexation to the local media at least 48 hours in advance. Brown v. City of Winston-Salem, 171 N.C. App. 266, 614 S.E.2d 599, 2005 N.C. App. LEXIS 1266 (2005).

**Cited** in Wright v. County of Macon, 64 N.C. App. 718, 308 S.E.2d 97 (1983).

## § 143-318.13. Electronic meetings; written ballots; acting by reference.

(a) Electronic Meetings. — If a public body holds an official meeting by use of conference telephone or other electronic means, it shall provide a location and means whereby members of the public may listen to the meeting and the notice of the meeting required by this Article shall specify that location. A fee of up to twenty-five dollars ($25.00) may be charged each such listener to defray in part the cost of providing the necessary location and equipment.

(b) Written Ballots. — Except as provided in this subsection or by joint resolution of the General Assembly, a public body may not vote by secret or written ballot. If a public body decides to vote by written ballot, each member of the body so voting shall sign his or her ballot; and the minutes of the public body shall show the vote of each member voting. The ballots shall be available for public inspection in the office of the clerk or secretary to the public body immediately following the meeting at which the vote took place and until the minutes of that meeting are approved, at which time the ballots may be destroyed.

(c) Acting by Reference. — The members of a public body shall not deliberate, vote, or otherwise take action upon any matter by reference to a letter, number or other designation, or other secret device or method, with the intention of making it impossible for persons attending a meeting of the public body to understand what is being deliberated, voted, or acted upon. However, this subsection does not prohibit a public body from deliberating, voting, or otherwise taking action by reference to an agenda, if copies of the agenda, sufficiently worded to enable the public to understand what is being deliberated, voted, or acted upon, are available for public inspection at the meeting. (1979, c. 655, s. 1.)

**Local Modification.** — Hyde: 2008-111, s. 1.

## § 143-318.14. Broadcasting or recording meetings.

(a) Except as herein below provided, any radio or television station is entitled to broadcast all or any part of a meeting required to be open. Any person may photograph, film, tape-record, or otherwise reproduce any part of a meeting required to be open.

(b) A public body may regulate the placement and use of equipment necessary for broadcasting, photographing, filming, or recording a meeting, so as to prevent undue interference with the meeting. However, the public body must allow such equipment to be placed within the meeting room in such a way as to permit its intended use, and the ordinary use of such equipment shall not be declared to constitute undue interference; provided, however, that if the public body, in good faith, should determine that the size of the meeting room is such that all the members of the public body, members of the public present, and the equipment and personnel necessary for broadcasting, photographing, filming, and tape-recording the meeting cannot be accommodated in the meeting room without unduly interfering with the meeting and an adequate alternative meeting room is not readily available, then the public body, acting in good faith and consistent with the purposes of this Article, may require the pooling of such equipment and the personnel operating it; and provided further, if the news media, in order to facilitate news coverage, request an alternate site for the meeting, and the public body grants the request, then the news media making such request shall pay any costs incurred by the public body in securing an alternate meeting site. (1979, c. 655, s. 1.)

## § 143-318.14A. Legislative commissions, committees, and standing subcommittees.

(a) Except as provided in subsection (e) below, all official meetings of commissions, committees, and standing subcommittees of the General Assembly (including, without limitation, joint committees and study committees), shall be held in open session. For the purpose of this section, the following also shall be considered to be "commissions, committees, and standing subcommittees of the General Assembly":

(1) The Legislative Research Commission;
(2) The Legislative Services Commission;
(3) Repealed by Session Laws 2006-203, s. 93, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter.
(4) The Joint Legislative Utility Review Committee;
(5) The Joint Legislative Commission on Governmental Operations;
(6) The Joint Legislative Commission on Municipal Incorporations;
(7) Repealed by Session Laws 1997, c. 443, s. 12.30, effective August 28, 1997.
(8) The Joint Select Committee on Low-Level Radioactive Waste;
(9) The Environmental Review Commission;

(10) The Joint Legislative Transportation Oversight Committee;
(11) The Joint Legislative Education Oversight Committee;
(12) The Joint Legislative Commission on Future Strategies for North Carolina;
(13) The Commission on Children with Special Needs;
(14) The Legislative Committee on New Licensing Boards;
(15) The Agriculture and Forestry Awareness Study Commission;
(16) The North Carolina Study Commission on Aging; and
(17) The standing Committees on Pensions and Retirement.

(b) Reasonable public notice of all meetings of commissions, committees, and standing subcommittees of the General Assembly shall be given. For purposes of this subsection, "reasonable public notice" includes, but is not limited to:

(1) Notice given openly at a session of the Senate or of the House; or
(2) Notice mailed or sent by electronic mail to those who have requested notice, and to the Legislative Services Office, which shall post the notice on the General Assembly web site.

G.S. 143-318.12 shall not apply to meetings of commissions, committees, and standing subcommittees of the General Assembly.

(c) A commission, committee, or standing subcommittee of the General Assembly may take final action only in an open meeting.

(d) A violation of this section by members of the General Assembly shall be punishable as prescribed by the rules of the House or the Senate.

(e) The following sections shall apply to meetings of commissions, committees, and standing subcommittees of the General Assembly: G.S. 143-318.10(e) and G.S. 143-318.11, G.S. 143-318.13 and G.S. 143-318.14, G.S. 143-318.16 through G.S. 143-318.17. (1991, c. 694, s. 7; 1991 (Reg. Sess., 1992), c. 785, s. 4; c. 1030, s. 42; 1993, c. 321, s. 169.2(f); 1997-443, s. 12.30; 2003-374, s. 1; 2006-203, s. 93.)

**Editor's Note.** — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 93, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, repealed subdivision (a)(3).

**§ 143-318.15:** Repealed by Session Laws 2006-203, s. 94, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter.

**Editor's Note.** — Session Laws 2006-203, s. 126, provides: "This act becomes effective July 1, 2007, and applies to the budget for the 2007-2009 biennium and each subsequent biennium thereafter. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 143-318.16. Injunctive relief against violations of Article.

(a) The General Court of Justice has jurisdiction to enter mandatory or prohibitory injunctions to enjoin (i) threatened violations of this Article, (ii) the recurrence of past violations of this Article, or (iii) continuing violations of this Article. Any person may bring an action in the appropriate division of the General Court of Justice seeking such an injunction; and the plaintiff need not allege or prove special damage different from that suffered by the public at large. It is not a defense to such an action that there is an adequate remedy at law.

(b) Any injunction entered pursuant to this section shall describe the acts enjoined with reference to the violations of this Article that have been proved in the action.

(c) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 932, s. 3, effective October 1, 1986. (1979, c. 655, s. 1; 1985 (Reg. Sess., 1986), c. 932, s. 3.)

**Cross References.** — As to the award of attorney's fees to the prevailing party, see now G.S. 143-318.16B.

### CASE NOTES

**Application of Former § 143-318.6.** — The provisions of former G.S. 143-318.6 were intended to apply only to a situation where a citizen had been refused access to a meeting required to be open. Eggimann v. Wake County Bd. of Educ., 22 N.C. App. 459, 206 S.E.2d 754, cert. denied, 285 N.C. 756, 209 S.E.2d 280 (1974).

**Cited** in Free Spirit Aviation, Inc. v. Rutherford Airport Auth., 191 N.C. App. 581, 664 S.E.2d 8, 2008 N.C. App. LEXIS 1494 (2008).

## § 143-318.16A. Additional remedies for violations of Article.

(a) Any person may institute a suit in the superior court requesting the entry of a judgment declaring that any action of a public body was taken, considered, discussed, or deliberated in violation of this Article. Upon such a finding, the court may declare any such action null and void. Any person may seek such a declaratory judgment, and the plaintiff need not allege or prove special damage different from that suffered by the public at large. The public body whose action the suit seeks to set aside shall be made a party. The court may order other persons be made parties if they have or claim any right, title, or interest that would be directly affected by a declaratory judgment voiding the action that the suit seeks to set aside.

(b) A suit seeking declaratory relief under this section must be commenced within 45 days following the initial disclosure of the action that the suit seeks to have declared null and void; provided, however, that any suit for declaratory judgment brought pursuant to this section that seeks to set aside a bond order or bond referendum shall be commenced within the limitation periods prescribed by G.S. 159-59 and G.S. 159-62. If the challenged action is recorded in the minutes of the public body, its initial disclosure shall be deemed to have occurred on the date the minutes are first available for public inspection. If the challenged action is not recorded in the minutes of the public body, the date of its initial disclosure shall be determined by the court based on a finding as to when the plaintiff knew or should have known that the challenged action had been taken.

(c) In making the determination whether to declare the challenged action null and void, the court shall consider the following and any other relevant factors:

(1) The extent to which the violation affected the substance of the challenged action;

(2) The extent to which the violation thwarted or impaired access to meetings or proceedings that the public had a right to attend;

(3) The extent to which the violation prevented or impaired public knowledge or understanding of the people's business;

(4) Whether the violation was an isolated occurrence, or was a part of a continuing pattern of violations of this Article by the public body;

(5) The extent to which persons relied upon the validity of the challenged action, and the effect on such persons of declaring the challenged action void;

(6) Whether the violation was committed in bad faith for the purpose of evading or subverting the public policy embodied in this Article.

(d) A declaratory judgment pursuant to this section may be entered as an alternative to, or in combination with, an injunction entered pursuant to G.S. 143-318.16.

(e) The validity of any enacted law or joint resolution or passed simple resolution of either house of the General Assembly is not affected by this Article. (1985 (Reg. Sess., 1986), c. 932, s. 1; 1991, c. 694, s. 8.)

### CASE NOTES

**Time Limitations on Filing Suit.** — At a June 22, 1988, public hearing, plaintiffs gained knowledge of action taken by board of aldermen in executive session of February 3, 1987. Plaintiffs were present at the hearing and represented by counsel. Disclosure to plaintiffs of the action complained of therefore occurred on June 22, 1988, more than 60 days prior to September 1, 1988, the date plaintiffs filed their complaint. Thus plaintiffs' suit was barred by subsection (b) of this section and trial court properly granted defendants' motion dismissing plaintiffs' cause of action. Coulter v. City of Newton, 100 N.C. App. 523, 397 S.E.2d 244 (1990).

**Declaration of Violation.** — Where Board of Education improperly gave itself a pay raise the proper result was a declaration that the board violated the Open Meetings Law; no purpose would have been served by voiding the Board's action in such a manner as to require return of the monies by the board members. Jacksonville Daily News Co. v. Onslow County Bd. of Educ., 113 N.C. App. 127, 439 S.E.2d 607 (1993).

**Plaintiff Not Entitled to Exemption from Local Ordinance.** — Because plaintiff could not meet the definition of a nonconforming situation, plaintiff was not entitled to be exempted from the provisions in the local ordinance prohibiting adult entertainment in plaintiff's district. Dockside Discotheque, Inc. v. Board of Adjustment, 115 N.C. App. 303, 444 S.E.2d 451, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

**The term "persons" in subsection (c)(5)** includes any citizen of the State whose interests will be affected by voiding the action of the Board. H.B.S. Contractors v. Cumberland County Bd. of Educ., 122 N.C. App. 49, 468 S.E.2d 517 (1996), discretionary review improvidently allowed, 345 N.C. 178, 477 S.E.2d 926 (1996).

**Improper Purpose for Action.** — Deputy area director of a substance abuse area authority was not entitled to a declaratory judgment that the appointment by the authority of an interim area director was null and void because the board of the authority did not violate the North Carolina Open Meetings Law, G.S. 143-318.9 et. seq., in its conduct of closed meetings to consider and interview candidates for the position. Davis v. Durham Mental Health/Development Disabilities/Substance Abuse Area Auth., 165 N.C. App. 100, 598 S.E.2d 237, 2004 N.C. App. LEXIS 1156 (2004).

**Trial court's failure to make conclusions of law that demonstrated consideration of the statutory factors** for violations of the North Carolina Open Meetings Law, G.S. 143-318.9 et seq., was reversible error. Knight v. Higgs, 189 N.C. App. 696, 659 S.E.2d 742, 2008 N.C. App. LEXIS 702 (2008).

**Cited** in Hayes v. Town of Fairmont, 130 N.C. App. 125, 502 S.E.2d 380 (1998); Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 566 S.E.2d 701, 2002 N.C. App. LEXIS 859 (2002); Free Spirit Aviation, Inc. v. Rutherford Airport Auth., 191 N.C. App. 581, 664 S.E.2d 8, 2008 N.C. App. LEXIS 1494 (2008).

## § 143-318.16B. Assessments and awards of attorneys' fees.

When an action is brought pursuant to G.S. 143-318.16 or G.S. 143-318.16A, the court may make written findings specifying the prevailing party or parties, and may award the prevailing party or parties a reasonable attorney's fee, to be taxed against the losing party or parties as part of the costs. The court may order that all or any portion of any fee as assessed be paid personally by any individual member or members of the public body found by the court to have knowingly or intentionally committed the violation; provided, that no order against any individual member shall issue in any case where the public body or that individual member seeks the advice of an attorney, and such advice is followed. (1985 (Reg. Sess., 1986), c. 932, s. 2; 1993 (Reg. Sess., 1994), c. 570, s. 3.)

**Legal Periodicals.** — For note, "A Public Goods Approach to Calculating Reasonable Fees under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

CASE NOTES

**Merits Test for Award of Attorney's Fees to Prevailing Party.** — Award of attorney's fees is discretionary under G.S. 143-318.16B, and the merits test has been adopted as the proper standard for awarding attorney's fees to prevailing parties pursuant to G.S. 143-318.16B. Knight v. Higgs, 189 N.C. App. 696, 659 S.E.2d 742, 2008 N.C. App. LEXIS 702 (2008).

**Prevailing Party.** — The fact that plaintiff was a "prevailing party" under this section was determined by application of the merits test, which allows the award of attorney's fees to the prevailing party if the party prevails on the merits of at least some of his claims. H.B.S. Contractors v. Cumberland County Bd. of Educ., 122 N.C. App. 49, 468 S.E.2d 517 (1996), discretionary review improvidently allowed, 345 N.C. 178, 477 S.E.2d 926 (1996).

Registered voter who challenged the conduct of the county board of elections in finding that the voter was not a resident of the county in which the voter was registered was the prevailing party under G.S. 143-318.16B, and, upon remand, the trial court was to consider the taxing of attorney's fees. Knight v. Higgs, 189 N.C. App. 696, 659 S.E.2d 742, 2008 N.C. App. LEXIS 702 (2008).

**Jurisdiction of Trial Court to Award.** — Pursuant to G.S. 1-294, a trial court did not have jurisdiction to decide the issue of attorney fees after a county and its board of commissioners had filed their notice of appeal from the judgment in favor of a chairman of a county airport authority who had been improperly removed from his position; an exception did not apply, as the award of attorney fees under G.S. 6-1, G.S. 6-20, G.S. 6-19.1, G.S. 7A-314, and G.S. 143-318.16B was based upon the chairman being the prevailing party. McClure v. County of Jackson, 185 N.C. App. 462, 648 S.E.2d 546, 2007 N.C. App. LEXIS 1814 (2007).

**Cited** in Jacksonville Daily News Co. v. Onslow County Bd. of Educ., 113 N.C. App. 127, 439 S.E.2d 607 (1993); Free Spirit Aviation, Inc. v. Rutherford Airport Auth., 191 N.C. App. 581, 664 S.E.2d 8, 2008 N.C. App. LEXIS 1494 (2008).

## § 143-318.16C. Accelerated hearing; priority.

Actions brought pursuant to G.S. 143-318.16 or G.S. 143-318.16A shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts. (1993 (Reg. Sess., 1994), c. 570, s. 4.)

## § 143-318.16D. Local acts.

Any reference in any city charter or local act to an "executive session" is amended to read "closed session". (1993 (Reg. Sess., 1994), c. 570, s. 4.)

## § 143-318.17. Disruptions of official meetings.

A person who willfully interrupts, disturbs, or disrupts an official meeting and who, upon being directed to leave the meeting by the presiding officer, willfully refuses to leave the meeting is guilty of a Class 2 misdemeanor. (1979, c. 655, s. 1; 1993, c. 539, s. 1028; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

**Qualified Immunity to Police Officers Who Removed Allegedly Disruptive alderman From Meeting.** — Police officers who removed an alderman from a town board of aldermen meeting at the direction of other aldermen because the alderman was allegedly violating board rules were entitled to qualified immunity as to the alderman's claim of unlawful seizure as they had probable cause to seize the alderman. King v. Jefferies, 402 F. Supp. 2d 624, 2005 U.S. Dist. LEXIS 30548 (M.D.N.C. 2005).

## § 143-318.18. Exceptions.

This Article does not apply to:

(1) Grand and petit juries.

(2) Any public body that is specifically authorized or directed by law to meet in executive or confidential session, to the extent of the authorization or direction.

(3) The Judicial Standards Commission.

(3a) The North Carolina Innocence Inquiry Commission.

(4) Repealed by Session Laws 1991, c. 694, s. 9.

(4a) The Legislative Ethics Committee.

(4b) A conference committee of the General Assembly.

(4c) A caucus by members of the General Assembly; however, no member of the General Assembly shall participate in a caucus which is called for the purpose of evading or subverting this Article.

(5) Law enforcement agencies.

(6) A public body authorized to investigate, examine, or determine the character and other qualifications of applicants for professional or occupational licenses or certificates or to take disciplinary actions against persons holding such licenses or certificates, (i) while preparing, approving, administering, or grading examinations or (ii) while meeting with respect to an individual applicant for or holder of such a license or certificate. This exception does not amend, repeal, or supersede any other statute that requires a public hearing or other practice and procedure in a proceeding before such a public body.

(7) Any public body subject to the State Budget Act, Chapter 143C of the General Statutes and exercising quasi-judicial functions, during a meeting or session held solely for the purpose of making a decision in an adjudicatory action or proceeding.

(8) The boards of trustees of endowment funds authorized by G.S. 116-36 or G.S. 116-238.

(9) Repealed by Session Laws 1991, c. 694, s. 9.

(10) The Board of Awards.

(11) The General Court of Justice. (1979, c. 655, s. 1; 1985, c. 757, s. 206(e); 1991, c. 694, s. 9; 2006-184, s. 6; 2006-203, s. 95.)

**Editor's Note.** — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-184, s. 6, effective August 3, 2006, and applicable to claims of factual innocence filed on or before December 31, 2010, added subdivision (3a).

Session Laws 2006-203, s. 95, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "State Budget Act, Chapter 143C of the General Statutes" for "Executive Budget Act (G.S. 143-1 et seq.)" in subdivision (7).

**Legal Periodicals.** — For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

### CASE NOTES

**Resolution of Board into Committee of the Whole.** — A board of education cannot evade the provisions of statutes requiring its meetings to be open to the public merely by resolving itself into a committee of the whole. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976), decided under former § 143-318.4.

**Failure to Come Within Exception.** — Members of a board of education failed to show that their closed session came within the exception provided by former G.S. 143-318.4(7), relating to study, research and investigative committees, where, prior to the closed session, eight names were placed in nomination to fill a vacant position on the board, and following the passage of a motion authorizing same, the members of the board were appointed a committee of the whole to study and investigate the names recommended. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

### OPINIONS OF ATTORNEY GENERAL

**Applicability of Open Meetings Law to Tax Review Board Proceedings.** — The Tax Review Board is exempt from the Open Meetings Law while it is meeting "solely for the purpose of making a decision" in a petition pending before the Board; however, the exemption only applies to the deliberations of the Board and does not apply when it is receiving evidence or arguments in a hearing prior to deliberating upon the evidence, nor when it is meeting for any purpose other than deciding the outcome of a petition pending before it. See opinion of Attorney General to The Honorable Richard H. Moore, Treasurer, State of North Carolina, 2004 N.C.A.G. 10 (10/12/04).

## ARTICLE 34.

## *Local Affairs.*

**§ 143-319:** Repealed by Session Laws 1973, c. 1262, s. 51.

**Editor's Note.** — Former Article 34, comprising G.S. 143-317 through 143-328, and relating to the Board of Water Commissioners and water conservation and education, was repealed by Session Laws 1959, c. 779, s. 2.

### § 143-320. Definitions.

As used in this Article, unless the context otherwise requires:

(1) "Department" means the Department of Environment and Natural Resources.

(2) "Secretary" means the Secretary of Environment and Natural Resources.

(3) "Recreation" means those interests that are diversionary in character and that aid in promoting entertainment, pleasure, relaxation, instruction, and other physical, mental, and cultural developments and experiences of a leisure nature, and includes all governmental, private nonprofit and commercial recreation forms of the recreation field and includes parks, conservation, recreation travel, the use of natural resources, wilderness and high density recreation types and the variety of recreation interests in areas and programs which are incorporated in this range. (1969, c. 1145, s. 1; 1973, c. 1262, s. 51; 1977, c. 771, ss. 4, 8; 1989, c. 727, s. 168; 1997-443, s. 11A.119(a).)

**Cross References.** — As to the organization of the Department of Environment and Natural Resources, see G.S. 143B-279.1, et seq. As to the Parks and Recreation Council, see G.S.

143B-311 through 143B-313. As to the Community Development Council, see G.S. 143B-437.1 through 143B-437.3.

## §§ 143-321, 143-322: Repealed by Session Laws 1973, c. 1262, s. 51.

## § 143-323. Functions of Department of Environment and Natural Resources.

(a) Recreation. — The Department of Environment and Natural Resources shall have the following powers and duties with respect to recreation:

(1) To study and appraise the recreation needs of the State and to assemble and disseminate information relative to recreation.

(2) To cooperate in the promotion and organization of local recreation systems for counties, municipalities, and other political subdivisions of the State, to aid them in the administration, finance, planning, personnel, coordination and cooperation of recreation organizations and programs.

(3) To aid in recruiting, training, and placing recreation workers, and to promote recreation institutes and conferences.

(4) To establish and promote recreation standards.

(5) To cooperate with appropriate State, federal, and local agencies and private membership groups and commercial recreation interests in the promotion of recreation opportunities, and to represent the State in recreation conferences, study groups, and other matters of recreation concern.

(6) To accept gifts, bequests, devises, and endowments. The funds, if given as an endowment, shall be invested in securities designated by the donor, or if there is no such designation, in securities in which the State sinking fund may be invested. All such gifts, bequests, and devises and all proceeds from such invested endowments shall be used for carrying out the purposes for which they were made.

(7) To advise agencies, departments, organizations and groups in the planning, application and use of federal and State funds which are assigned or administered by the State for recreation programs and services on land and water recreation areas and on which the State renders advisory or other recreation services or upon which the State exercises control.

(8) To act jointly, when advisable, with any other State, local or federal agency, institution, private individual or group in order to better carry out the Department's objectives and responsibilities.

(b) Repealed by Session Laws 1977, c. 70, s. 32.

(c) Repealed by Session Laws 1989, c. 751, s. 5.

(d) Federal Assistance. — The Department, with the approval of the Governor, may apply for and accept grants from the federal government and its agencies and from any foundation, corporation, association, or individual, and may comply with the terms, conditions, and limitations of the grant, in order to accomplish any of the purposes of the Department. Grant funds shall be expended pursuant to the Executive Budget Act.

(e) General. — The Department shall have the following general powers and duties.

(1) To study and to sponsor research on all aspects of local government and of relationships between the federal government, the State and local governments in North Carolina.

(2) To collect, collate, analyze, publish, and disseminate information necessary for the effective operation of the Department and useful to local government.

(3) To maintain an inventory of data and information, and to act as a clearinghouse of information and as a referral agency with respect to State, federal, and private services and programs available to local government; and to facilitate local participation in those programs by furnishing information, education, guidance, and technical assistance with respect to those programs.

(4) To assist in coordinating State and federal activities relating to local government.

(5) To assist local governments in the identification and solution of their problems.

(6) To assist local officials in bringing specific governmental problems to the attention of the appropriate State, federal, and private agencies.

(7) To advise and assist local governments with respect to intergovernmental contracts, joint service agreements, regional service arrangements, and other forms of intergovernmental cooperation.

(8) To inform and advise the Governor on the affairs and problems of local government and on the need for the administrative and legislative action with respect to local government. (1969, c. 1145, s. 1; 1973, c. 1262, s. 51; 1977, c. 70, s. 32; c. 771, s. 4; 1989, c. 727, s. 218(116); c. 751, s. 5; 1997-443, s. 11A.119(a).)

**Legal Periodicals.** — For note on coastal land use development and area-wide zoning, see 49 N.C.L. Rev. 866 (1971).

## § 143-324: Repealed by Session Laws 1973, c. 1262, s. 51.

## § 143-325. Functions of committees.

(a) Repealed by Session Laws 1973, c. 1262, s. 51.

(b) Committee on Law and Order. — The Committee on Law and Order shall have policy-making and supervisory authority over the policies, programs, and activities of the Department in the field of the administration of criminal justice in assisting and participating with State and local law-enforcement agencies, at their request, to improve law enforcement and the administration of criminal justice.

(c) Repealed by Session Laws 1973, c. 1262, s. 51. (1969, c. 1145, s. 1; 1973, c. 1262, s. 51.)

## § 143-326. Transfer of functions, records, property, etc.

(a) All of the powers, duties, functions, records, property, supplies, equipment, personnel, funds, credits, appropriations, quarterly allotments, and executory contracts of the North Carolina Recreation Commission are transferred to the Department of Local Affairs, effective July 1, 1969. All statutory references to the "North Carolina Recreation Commission" or the "Recreation Commission" are amended to read "North Carolina Department of Local Affairs."

(b) All of the powers, duties, functions, records, property, supplies, equipment, personnel, funds, credits, appropriations, quarterly allotments, and executory contracts of the Governor's Committee on Law and Order are transferred to the Department of Local Affairs, effective July 1, 1969. All statutory references to the "Governor's Committee on Law and Order" are amended to read "North Carolina Department of Local Affairs."

(c) All of the powers, duties, functions, records, property, supplies, equipment, personnel, funds, credits, appropriations, quarterly allotments, and executory contracts of the Division of Community Planning of the Department of Conservation and Development are transferred to the Department of Local Affairs.

(d) Such portion of the powers, duties, functions, records, property, supplies, equipment, personnel, funds, credits, appropriations, quarterly allotments, and executory contracts of the State Planning Task Force Division of the Department of Administration as the Governor may designate is transferred to the Department of Local Affairs, effective July 1, 1969.

(e) The transfers directed by subsections (a) through (d), above shall be made under the supervision of the Governor, and he shall be the final arbiter of all differences or disputes arising incident to those transfers.

(f) No transfer of functions to the Department of Local Affairs provided for in this Article shall affect any action, suit, proceeding, prosecution, contract, lease, agreement, or other business transaction involving any of those functions that was initiated, undertaken, or entered into prior to or pending the time of the transfer, except that the Department shall be substituted for the agency from which the function was transferred, and as far as practicable the procedure provided for in this Article shall be employed in completing or disposing of the matter. All rules, regulations, and policies of the agencies from which powers, duties, and functions are herein transferred to the Department of Local Affairs shall continue in force as rules, regulations, and policies of the Department of Local Affairs until altered pursuant to G.S. 143-320(9). (1969, c. 1145, s. 1; 1973, c. 1262, s. 51.)

**Editor's Note.** — It would seem that the reference to G.S. 143-320(9) in subsection (f) of this section should be to G.S. 143-322(9). That section, however, was repealed by Session Laws 1973, c. 1262, s. 51.

### § 143-327: Repealed by Session Laws 1973, c. 1262, s. 51.

### § 143-328: Reserved for future codification purposes.

## ARTICLE 35.

## *Youth Service Commission.*

### §§ 143-329 through 143-333: Expired.

## ARTICLE 36.

## *Department of Administration.*

## Part 1. General Provisions.

### § 143-334. Short title.

This Article may be cited as the Department of Administration Act. (1957, c. 269, s. 1; 2000-140, s. 76(h).)

**Cross References.** — As to the exception of acquisitions of an interest in real property by lease from the provisions of Article 36 of Chapter 143 of the General Statutes and Article 6 of Chapter 146 of the General Statutes, see G.S. 116-31.12.

**State Government Reorganization.** — The Department of Administration was transferred by former G.S. 143A-82, enacted by Session Laws 1971, c. 864 and repealed by Session Laws 1975, c. 879, s. 46. For provisions as to the Department of Administration, see G.S. 143B-366 et seq.

## § 143-335. Department of Administration created.

There is hereby created the Department of Administration. (1957, c. 269, s. 1.)

### CASE NOTES

**Cited** in State v. Core Banks Club Properties, 275 N.C. 328, 167 S.E.2d 385 (1969).

## § 143-336. (Effective until October 1, 2011) Definitions.

(a) As used in this Article:

(1) "Agency" includes every agency, institution, board, commission, bureau, council, department, division, officer, and employee of the State, but does not include counties, municipal corporations, political subdivisions, county and city boards of education, and other local public bodies.

(2) "Community college buildings" means all buildings, utilities, and other property developments located at a community college, which is defined in G.S. 115D-2(2).

(3) "Department" means the Department of Administration, unless the context otherwise requires.

(4) "Public buildings" means all buildings owned or maintained by the State in the City of Raleigh, but does not mean any building that a State agency other than the Department of Administration is required by law to care for and maintain.

(5) "Public buildings and grounds" means all buildings and grounds owned or maintained by the State in the City of Raleigh, but does not mean any building or grounds that a State agency other than the Department of Administration is required by law to care for and maintain.

(6) "Public grounds" means all grounds owned or maintained by the State in the City of Raleigh, but does not mean any grounds that a State agency other than the Department of Administration is required by law to care for and maintain.

(7) "Secretary" means the Secretary of Administration, unless the context otherwise requires.

(8) "State buildings" mean all State buildings, utilities, and other property developments except the State Legislative Building, railroads, highway structures, bridge structures, any buildings, utilities, or property owned or leased by the North Carolina Global TransPark Authority, and performance-based cleanups of environmental damage resulting from the discharge or release of a petroleum product from an underground storage tank pursuant to G.S. 143-215.94B(f) and G.S. 143-215.94D(f).

(b) Under no circumstances shall this Article or any part thereof apply to the judicial or to the legislative branches of the State. (1957, c. 215, s. 2; c. 269, s. 1; 1963, c. 1, s. 6; 1971, c. 1097, s. 1; 1975, c. 879, s. 46; 1989, c. 58, s. 1; 1991, c. 749, s. 5; 1993 (Reg. Sess., 1994), c. 777, s. 4(h); 2001, c. 442, s. 5; 2008-195, s. 11.)

**Section Set Out Twice.** — The section above is effective until October 1, 2011. For the section as effective October 1, 2011, see the following section, also numbered G.S. 143-336.

**Editor's Note.** — Session Laws 2001-442, s. 7, as amended by Session Laws 2003-340, s. 2, provides: "Beginning 1 September 2003, the Secretary of Environment and Natural Resources shall submit an annual report to the Environmental Review Commission on the implementation of Sections 1 through 6 of this act [Session Laws 2001-442, ss. 1-6] as a part of the report required by G.S. 143-215.94M." Session Laws 2001-442, s. 8, provided that Session Laws 2001-442, s. 7, would expire October 1, 2006. Session Laws 2008-195, s. 11, effective retroactively to October 1, 2006, amended Session Laws 2001-442, s. 8, by extending the expiration date to October 1, 2011.

Session Laws 2001-442, s. 8, provided that s. 5 of the act, which amended this section, would expire October 1, 2006. Session Laws 2008-195, s. 11, effective retroactively to October 1, 2006, amended Session Laws 2001-442, s. 8, by extending the expiration date to October 1, 2011.

## § 143-336. (Effective October 1, 2011) Definitions.

As used in this Article:

"Agency" includes every agency, institution, board, commission, bureau, council, department, division, officer, and employee of the State, but does not include counties, municipal corporations, political subdivisions, county and city boards of education, and other local public bodies.

"Community college buildings" means all buildings, utilities, and other property developments located at a community college, which is defined in G.S. 115D-2(2).

"Department" means the Department of Administration, unless the context otherwise requires.

"Public buildings" means all buildings owned or maintained by the State in the City of Raleigh, but does not mean any building which a State agency other than the Department of Administration is required by law to care for and maintain.

"Public buildings and grounds" means all buildings and grounds owned or maintained by the State in the City of Raleigh, but does not mean any building or grounds which a State agency other than the Department of Administration is required by law to care for and maintain.

"Public grounds" means all grounds owned or maintained by the State in the City of Raleigh, but does not mean any grounds which a State agency other than the Department of Administration is required by law to care for and maintain.

"Secretary" means the Secretary of Administration, unless the context otherwise requires.

"State buildings" mean all State buildings, utilities, and other property developments except the State Legislative Building, railroads, highway structures, bridge structures, and any buildings, utilities, or property owned or leased by the North Carolina Global TransPark Authority.

But under no circumstances shall this Article or any part thereof apply to the judicial or to the legislative branches of the State. (1957, c. 215, s. 2; c. 269, s. 1; 1963, c. 1, s. 6; 1971, c. 1097, s. 1; 1975, c. 879, s. 46; 1989, c. 58, s. 1; 1991, c. 749, s. 5; 1993 (Reg. Sess., 1994), c. 777, s. 4(h); 2001, c. 442, ss. 5, 8.)

**Section Set Out Twice.** — The section above is effective October 1, 2011. For the section as in effect until October 1, 2011, see the preceding section, also numbered G.S. 143-336.

**Editor's Note.** — Session Laws 2001-442, s. 7, as amended by Session Laws 2003-340, s. 2, provides: "Beginning 1 September 2003, the Secretary of Environment and Natural Resources shall submit an annual report to the Environmental Review Commission on the implementation of Sections 1 through 6 of this act [ss. 1 to 6 of Session Laws 2001-442] as a part of the report required by G.S. 143-215.94M." Section 8 of Session Laws 2001-442, as amended by Session Laws 2008-195, s. 11, provides that s. 7 expires October 1, 2011.

### CASE NOTES

**Cited** in Cash v. Granville County Board of Educ., 242 F.3d 219, 2001 U.S. App. LEXIS 2976 (4th Cir. 2001).

**§§ 143-337 through 143-339:** Repealed by Session Laws 1975, c. 879, s. 46.

## § 143-340. Powers and duties of Secretary.

The Secretary of Administration has the following powers and duties:

(1) To establish the State Employee Incentive Bonus Program pursuant to Article 36A of this Chapter, with the authority to adopt all rules necessary to implement the program. The Secretary shall serve ex officio on all program committees and shall designate an executive secretary to administer the program.

(2) through (9) Repealed by Session Laws 1975, c. 879, s. 46.

(10) To require reports from any State agency at any time upon any matters within the scope of the responsibilities of the Secretary or the Department.

(11) Repealed by Session Laws 1975, c. 879, s. 46.

(12) To enter the premises of any State agency; to inspect its property; and to examine its books, papers, documents, and all other agency records and copy any of them; and any State agency shall permit such entry, examination, and copying, and upon demand shall produce without unnecessary delay all books, papers, documents, and other records in its office and furnish information respecting its records and other matters pertaining to that agency and related to the responsibilities of the Department.

(13) Repealed by Session Laws 1975, c. 879, s. 46.

(14) Repealed by Session Laws 1989, c. 239, s. 1.

(15), (16) Repealed by Session Laws 1975, c. 879, s. 46.

(17) To supervise the work of janitors appointed by the General Assembly to perform services in connection with the sessions of the General Assembly.

(18) To adopt reasonable rules and regulations with respect to the parking of automobiles on all public grounds, subject to the approval of the Governor and Council of State, and to enforce those rules and regulations. Any person who violates a rule or regulation concerning parking on public grounds is guilty of a Class 1 misdemeanor. Upon the allocation of parking spaces to any agency pursuant to such rules and regulations, the agency shall adopt written guidelines governing the individual assignment of such parking spaces by the agency. Such guidelines shall give first priority treatment to the physically handicapped and to carpoolers and vanpoolers, however, first priority shall be given to those on call for duty at a time other than normal working hours. A copy of said guidelines shall be made available for inspection by any person upon request.

(19) Any motor vehicle parked in a State-owned parking lot, when such lot is clearly designated as such by a sign no smaller than 24 inches by 24 inches prominently displayed at the entrance thereto, in violation of the "Rules and Regulations Governing State-Owned Parking Lots" dated September, 1968 or as amended, may be removed from such lot to a place of storage and the registered owner of that vehicle shall become liable for removal and storage charges. Any person who

removes a vehicle pursuant to this section shall not be held liable for damages for the removal of the vehicle to the owner, lienholder or other person legally entitled to the possession of the vehicle removed; however, any person who intentionally or negligently damages a vehicle in the removal of such vehicle, or intentionally or negligently inflicts injury upon any person in the removal of such vehicle, may be held liable for damages. Any motor vehicle parked without authorization on State-owned public grounds under the control of the Department of Administration other than a designated parking area may be removed from that property to a storage area and the registered owner of the vehicle shall be liable for removal and storage fees.

(20) To use at all times such means as, in his opinion, may be effective in protecting all public buildings and grounds from fire.

(21), (22) Repealed by Session Laws 2009-451, s. 17.3(b), effective July 1, 2009.

(23) Repealed by Session Laws 1975, c. 879, s. 46.

(24) To perform such additional duties as the Governor may direct.

(25) Repealed by Session Laws 1991, c. 542, s. 9.

(26) To establish the State Employees Combined Campaign in the Department of Administration to allow State employees the opportunity to contribute to charitable nonpartisan organizations in an orderly and uniform process, with the authority to adopt all rules necessary to implement the campaign. (1957, c. 215, s. 2; c. 269, s. 1; 1969, c. 627; c. 1267, s. 4; 1971, c. 280; c. 1097, s. 2; 1975, c. 204; c. 879, s. 46; 1977, c. 119; c. 288, s. 2; 1979, c. 901, ss. 1, 2; c. 930; 1981, c. 696; 1981 (Reg. Sess., 1982), c. 1239, s. 4; 1983, c. 406; c. 420, s. 7; 1987, c. 274; 1989, c. 239, s. 1; c. 644, s. 5; 1991, c. 542, s. 9; 1993, c. 539, s. 1029; 1994, Ex. Sess., c. 24, s. 14(c); 1997-513, s. 3; 1999-250, s. 1; 2001-424, s. 7.2(a); 2009-451, s. 17.3(b).)

**Cross References.** — As to post-towing procedures, see G.S. 20-219.9 et seq.

**Editor's Note.** — Session Laws 1997-513, s. 4, states that this act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act. Each State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated to that State agency.

Session Laws 1999-250, s. 2(a), provided that any rule pertaining to the State Employees Combined Campaign adopted prior to the effective date of this act, July 2, 1999, is ratified and affirmed.

Session Laws 1999-250, s. 2(b), provided that this act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. The Secretary of Administration may adopt temporary rules to implement the provisions of subdivision (26), as added by Section 1 of this act.

Session Laws 1999-250, s. 3, provides that this act is effective when it becomes law (July 2, 1999) and applies to any rule-making proceeding initiated by the Department of Administration for the State Employees Combined Campaign before that date.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2009-451, s. 17.3(a), provides: "The State Capitol Police is hereby transferred by a Type I transfer, as defined in G.S. 143A-6, from the Department of Administration to the Department of Crime Control and Public Safety."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2009-451, s. 17.3(b), effective July 1, 2009, repealed subdivisions (21) and (22).

CASE NOTES

**Jurisdiction of State Capitol Police.** — Trial court erred by concluding that the arresting State Capitol Police officer had no jurisdiction to arrest defendant for DWI and by dismissing the charges. State v. Dickerson, 125 N.C. App. 592, 481 S.E.2d 344 (1997).

State Capitol Police officers have the same power of arrest as that of police officers of the City of Raleigh. State v. Dickerson, 125 N.C. App. 592, 481 S.E.2d 344 (1997).

The General Assembly intended to also grant State Capitol Police officers the same territorial jurisdiction as that of police officers of the City of Raleigh. State v. Dickerson, 125 N.C. App. 592, 481 S.E.2d 344 (1997).

OPINIONS OF ATTORNEY GENERAL

**The statute does not provide for participation by retired state employees.** See opinion of Attorney General to Jane Smith Patterson, Secretary, 2 Department of Administration, 53 N.C.A.G. 1 (1983).

## § 143-341. Powers and duties of Department.

The Department of Administration has the following powers and duties:

(1) Repealed by Session Laws 1979, 2nd Session, c. 1137, s. 38.

(2) Purchase and Contract:

a. To exercise those powers and perform those duties which were, at the time of the ratification of this Article, conferred by statute upon the former Division of Purchase and Contract.

(3) Architecture and Engineering:

a. To examine and approve all plans and specifications for the construction or renovation of:

1. All State buildings or buildings located on State lands, except those buildings over which a local building code inspection department has and exercises jurisdiction; and

2. All community college buildings requiring the estimated expenditure for construction or repair work for which public bidding is required under G.S. 143-129 prior to the awarding of a contract for such work; and to examine and approve all changes in those plans and specifications made after the contract for such work has been awarded.

a1. To organize and schedule, within three weeks of designer selection and before the design contract is let, a meeting of the stakeholders for each State capital improvement project to discuss plan review requirements and to define the terms of the memorandum of understanding developed by the State Building Commission pursuant to G.S. 143-135.26(2). The stakeholders shall include the funded agency, each State agency having plan review responsibilities for the project, and the selected designer. Notwithstanding the foregoing, the meeting need not be scheduled if the funded agency so requests.

b. To assist, as necessary, all agencies in the preparation of requests for appropriations for the construction or renovation of all State buildings.

b1. To certify that a statement of needs pursuant to G.S. 143C-3-3 is feasible. For purposes of this sub-subdivision, "feasible" means that the proposed project is sufficiently defined in overall scope; building program; site development; detailed design, construction, and equipment budgets; and comprehensive project scheduling so as to reasonably ensure that it may be completed with the amount of funds requested. At the discretion of the General Assembly, advanced planning funds may be appropriated in support of this certification. This sub-subdivision shall not apply to requests for appropriations of less than one hundred thousand dollars ($100,000).

c. To supervise the letting of all contracts for the design, construction or renovation of all State buildings and all community college buildings whose plans and specifications must be examined and approved under a.2. of this subdivision.

d. To supervise and inspect all work done and materials used in the construction or renovation of all State buildings and all community college buildings whose plans and specifications must be examined and approved under a.2. of this subdivision; to act as the appropriate official inspector or inspection department for purposes of G.S. 143-143.2; and no such work may be accepted by the State or by any State agency until it has been approved by the Department.

e. To require all State agencies to use existing plans and specificiations for construction projects, where feasible. Prior to designing a project, State agencies shall consult with the Department of Administration on the availability of appropriate existing plans and specifications and the feasibility of using them for a project.

Except for sub-subdivisions b., b1., and e. of this subdivision, this subdivision does not apply to the design, construction, or renovation of projects by The University of North Carolina pursuant to G.S. 116-31.11.

(4) Real Property Control:

a. To prepare and keep current a complete and accurate inventory of all land owned or leased by the State or by any State agency. This inventory shall show the location, acreage, description, source of title and current use of all land (including swamplands or marshlands) owned by the State or by any State agency, and the agency to which each tract is currently allocated. Surveys may be made where necessary to obtain information for the purposes of this inventory. Accurate plats or maps of all such land may be prepared, or copies obtained where such maps or plats are available.

b. To prepare and keep current a complete and accurate inventory of all buildings owned or leased (in whole or in part) by the State or by any State agency. This inventory shall show the location, amount of floor space and floor plans of every building owned or leased by the State or by any State agency, and the agency to which each building, or space therein, is currently allocated. Floor plans of every such building shall be prepared or copies obtained where such floor plans are available, where needed for use in the allocation of space therein.

c. To obtain and deposit with the Secretary of State the originals of all deeds and other conveyances of real property to the State or to any State agency, copies of all leases wherein the State or any State agency is lessor or lessee, and certified copies of wills, judgments, and other instruments whereby the State or any State agency has acquired title to real property. Where an original of a deed, lease, or other instrument cannot be found, but has been recorded in the registry of office of the clerk of superior court of any county, a certified copy of such deed, conveyance, or instrument shall be obtained and deposited with the Secretary of State.

d. To acquire, whether by purchase, exercise of the power of eminent domain, lease, or rental, all land, buildings, and space in buildings for all State agencies, subject to the approval of the Governor and Council of State in each instance. The Governor, acting with the approval of the Council of State, may adopt rules (i) exempting from any or all of the requirements of this paragraph such classes of lease, rental, easement, and right-of-way transactions as he deems advisable; and (ii) authorizing any State agency to enter into and/or approve the classes of transactions thus exempted from the requirements of this paragraph; and (iii) delegating to any other State agency the authority to approve the severance of buildings and standing timber from State lands; upon such approval of severance, the buildings and timber so affected shall be treated, for the purposes of this Chapter, as personal property. Any contract entered into or any proceeding instituted contrary to the provisions of this paragraph is voidable in the discretion of the Governor and Council of State.

d1. To require all State departments, institutions, and agencies to use State-owned office space instead of negotiating or renegotiating leases for rental of office space. Any lease entered into contrary to the provisions of this paragraph is voidable in the discretion of the Governor and the Council of State.

The Department of Administration shall report to the Joint Legislative Commission on Governmental Operations and to the Fiscal Research Division no later than May 1 of each year on leased office space.

d2. To purchase or finance the purchase of buildings, utilities, structures, or other facilities or property developments, including streets and landscaping, the acquisition of land, equipment, machinery, and furnishings in connection therewith; additions, extensions, enlargements, renovations, and improvements to existing buildings, utilities, structures, or other facilities or property developments, including streets and landscaping; land or any interest in land; other infrastructure; furniture, fixtures, equipment, vehicles, machinery, and similar items; or any combination of the foregoing, through installment-purchase, lease-purchase, or other similar type installment financing agreements in the manner and to the extent provided in Article 9 of Chapter 142 of the General Statutes. Any contract entered into or any proceeding instituted contrary to the provisions of this paragraph is voidable in the discretion of the Council of State.

e. To make all sales of real property (including marshlands or swamplands) owned by the State or by any State agency, with the approval of the Governor and Council of State in each instance. All conveyances in fee by the State shall be executed in accordance with the provisions of G.S. 146-74 through 146-78. Any conveyance of land made or contract to convey land entered into without the approval of the Governor and Council of State is voidable in the discretion of the Governor and Council of State. The proceeds of all sales of swamplands or marshlands shall be dealt with in the manner required by the Constitution and statutes.

f. With the approval of the Governor and Council of State, to make all leases and rentals of land or buildings owned by the State or by any State agency, and to sublease land or buildings leased by the State or by any State agency from another owner, where such land or building owned or leased by the State or by any State agency is not needed for current use. The Governor, acting with the approval of the Council of State, may adopt rules (i) exempting from any or all of the requirements of this paragraph such classes of lease or rental transactions as he deems advisable; and (ii) authorizing any State agency to enter into and/or approve the classes of transactions thus exempted from the requirements of this paragraph; and (iii) delegating to any other State agency the authority to approve the severance of buildings and standing timber from State lands; upon such approval of severance, the buildings and timber so affected shall be treated, for the purposes of this Chapter, as personal property. Any lease or rental agreement entered into contrary to the provisions of this paragraph is voidable in the discretion of the Governor and Council of State.

g. To allocate and reallocate land, buildings, and space in buildings to the several State agencies, in accordance with rules adopted by the Governor with the approval of the Council of State; provided that if the proposed reallocation is of land with an appraised value of at least twenty-five thousand dollars ($25,000), the reallocation may only be made after consultation with the Joint Legislative Commission on Governmental Operations. The authority granted in this paragraph shall not apply to the State Legislative Building and grounds or to the Legislative Office Building and grounds.

h. To require any State agency to make reports regarding the land and buildings owned by it or allocated to it at such times and in such form as the Department may deem necessary.

i. To determine whether all deeds, judgments, and other instruments whereby title to real estate has been or may be acquired by the State or by any State agency have been properly recorded in the county wherein the real property is situated, and to make or cause to be made proper recordation of such instruments. The Department may have previously recorded instruments which conveyed title to or from the State or any State agency or officer reindexed, where necessary, to show the State of North Carolina or grantor or grantee, as the case may be, and the cost of such reindexing shall be paid from the State Land Fund.

j. To call upon the Attorney General for advice and assistance in the performance of any of the foregoing duties.

k. None of the provisions of this subdivision apply to highway or railroad rights-of-way or other interests or estates in land held for the same or similar purposes, or to the acquisition or disposition of such rights-of-way, interests, or estates in land.

*l.* To manage and control the vacant and unappropriated lands, swamplands, lands acquired by the State by virtue of being sold for taxes, and submerged lands of the State, pursuant to Chapter 146 of the General Statutes.

m. To contract for or approve all contracts for all appraisals and surveys of real property for all State agencies; provided, however, this provision shall not apply to appraisals and surveys obtained in connection with the acquisition of highway rights-of-way, borrow pits, or other interests or estates in land acquired for the same or similar purposes, or to the disposition thereof, by the Board of Transportation.

n. To petition for the annexation of state-owned lands into any municipality.

o. To provide that no fee, other than reimbursement of actual costs incurred and actual revenues lost by the State, shall be charged when State buildings are made available to a production company for a production. As used in this subdivision, the term "production company" has the meaning provided in G.S. 105-164.3.

(5) Administrative Analysis:

a. To study the organization, methods, and procedures of all State agencies, to formulate plans for improvements in the organization, methods, and procedures of any agency studied, and to advise and assist any agency studied in effecting improvements in its organization, methods, and procedures.

b. To report to the Governor its findings and recommendations concerning improvements in the organization, methods, and procedures of any State agency, when such improvements cannot be effected by the cooperative efforts of the Department and the agency concerned.

c. To submit to the Governor for transmittal to the General Assembly recommended legislation where such legislation is necessary to effect improvements in the organization, methods, and procedures of any State agency.

(6) State and Regional Planning:

a. To assist the Director of the Budget in reviewing the capital improvements needs and requests of all State agencies, and in preparing a coordinated biennial capital improvements budget and longer range capital improvements programs.

b. In cooperation with State agencies and other public and private agencies, to collect, analyze, and keep up-to-date a comprehensive collection of economic and social data pertinent to State planning, which shall be available to State and local governmental agencies and private agencies.

c. To coordinate and review all planning activity relative to federal government requirements for general statewide or regional comprehensive program planning.

d. To make economic analyses, studies, and projections and to advise the Governor on courses of action desirable for the maintenance of a sound economy.

e. To encourage and assist in the development of the planning process within State and local governmental agencies.

f. To assist State agencies by providing them with basic information and technical assistance needed in preparing their short-range and long-range programs.

g. To develop and maintain liaison and cooperative arrangements with federal, interstate, State, and private agencies and organizations in the interest of obtaining information and assistance with respect to State and regional planning.

h. To develop and maintain a comprehensive plan for the development of the State, representing the coordinated efforts and contributions of all participating planning groups.

i. In cooperation with the counties, the cities and towns, the federal government, multi-state commissions and private agencies and organizations, to develop a system of multi-county, regional planning districts to cover the entire State, and to assist in

**G.S. 143-341(8)i is set out twice. See note.**

---

preparing for those districts comprehensive development plans coordinated with the comprehensive development plan for the State.

(7) Development Programs:

a. To participate in development programs, to enter into contracts, formulate plans and to do all things necessary to implement development programs in any area of the State.

b. To accept, receive and disburse, in furtherance of its functions, any funds, grants and services made available by the federal government and its agencies, any county, municipality, private or civic sources.

(8) General Services:

a. To locate, maintain and care for public buildings and grounds; to establish, locate, maintain, and care for walks, driveways, trees, shrubs, flowers, fountains, monuments, memorials, markers, and tablets on public grounds; and to beautify the public grounds.

b. To provide necessary and adequate cleaning and janitorial service, elevator operation service, and other operation or maintenance services for the public buildings and grounds.

c. To provide necessary night watchmen for the public buildings and grounds.

d. To make prompt repair of all public buildings and the equipment, furniture, and fixtures thereof; and to establish and operate shops for that purpose.

e. To keep in repair, out of funds appropriated for that purpose, the furniture of the halls of the Senate and House of Representatives and the rooms of the Capitol used by the officers, clerks, and other employees of the General Assembly.

f. Struck out by Session Laws 1959, c. 68, s. 3.

g. To establish and operate a mail service center that shall be used by all State agencies other than the Employment Security Commission, and in connection therewith and in the discretion of the Secretary, to do all things necessary in connection with the maintenance of the mail service center. The Secretary shall allocate and charge against the respective departments and agencies their proportionate parts of the cost of the maintenance of the mail service center. The Secretary shall develop a plan for the efficient operation of the center that meets the needs of State agencies, ensures timely delivery of mail, and ensures no loss of federal funds.

h. To provide necessary and adequate messenger service for the State agencies served by the Department. However, this may not be construed as preventing the employment and control of messengers by any State agency when those messengers are compensated out of the funds of the employing agency.

i. **(Effective until July 1, 2010)** To establish and operate a central motor pool and such subsidiary related facilities as the Secretary may deem necessary, and to that end:

1. To establish and operate central facilities for the maintenance, repair, and storage of state-owned passenger motor vehicles for the use of State agencies; to utilize any available State facilities for that purpose; and to establish such subsidiary facilities as the Secretary may deem necessary.

2. To acquire passenger motor vehicles by transfer from other State agencies and by purchase. All motor vehicles trans-

ferred to or purchased by the Department shall become part of a central motor pool. Every new motor vehicle transferred to or purchased by the Department that is designed to operate on diesel fuel shall be covered by an express manufacturer's warranty that allows the use of B-20 fuel, as defined in G.S. 143-58.4. This sub-sub-subdivision does not apply if the intended use, as determined by the Department, of the new motor vehicle requires a type of vehicle for which an express manufacturer's warranty allows the use of B-20 fuel is not available.

2a. To participate in the energy credit banking and selling program under G.S. 143-58.4. The Division of Motor Fleet Management of the Department of Administration is eligible to receive proceeds from the Alternative Fuel Revolving Fund under G.S. 143-58.5 to purchase alternative fuel, develop alternative fuel refueling infrastructure, or purchase AFVs as defined in G.S. 143-58.4.

3. To require on a schedule determined by the Department all State agencies to transfer ownership, custody or control of any or all passenger motor vehicles within the ownership, custody or control of that agency to the Department, except those motor vehicles under the ownership, custody or control of the Highway Patrol or the State Bureau of Investigation which are used primarily for law-enforcement purposes, and except those motor vehicles under the ownership, custody or control of the Department of Crime Control and Public Safety for Butner Public Safety which are used primarily for law-enforcement, fire, or emergency purposes.

4. To maintain, store, repair, dispose of, and replace state-owned motor vehicles under the control of the Department, using best management practices. The Department shall ensure that state-owned vehicles are replaced when most cost effective using a replacement formula developed by the Department and reviewed periodically for appropriateness of use. The Department shall report semiannually to the cochairs of the Joint Appropriations Subcommittee on General Government, on or before October 15 and March 15, on the effect of any new or revised replacement formula on the cost of operating the central motor pool, including the amount of any savings from use of any new or revised replacement formula.

5. Upon proper requisition, proper showing of need for use on State business only, and proper showing of proof that all persons who will be driving the motor vehicle have valid drivers' licenses, to assign economically suitable transportation, either on a temporary or permanent basis, to any State employee or agency. An agency assigned a motor vehicle may not allow a person to operate that motor vehicle unless that person displays to the agency and allows the agency to copy that person's valid driver's license. Notwithstanding G.S. 20-30(6), persons or agencies requesting assignment of motor vehicles may photostat or otherwise reproduce drivers' licenses for purposes of complying with this subpart.

As used in this subpart, "economically suitable transportation" means the most cost-effective standard vehicle in the

State motor fleet, unless special towing provisions are required by the agency. The Department may not assign any employee or agency a motor vehicle that is not economically suitable. The Department shall not approve requests for vehicle assignment or reassignment when the purpose of that assignment or reassignment is to provide any employee with a newer or lower mileage vehicle because of his or her rank, management authority, or length of service or because of any non-job-related reason. The Department shall not assign "special use" vehicles, such as four-wheel drive vehicles or law enforcement vehicles, to any agency or individual except upon written justification, verified by historical data, and accepted by the Secretary. The Department may provide law enforcement vehicles only to those agencies which have statutory pursuit authority.

6. To allocate and charge against each State agency to which transportation is furnished, on a basis of mileage or of rental, its proportionate part of the cost of maintenance and operation of the motor pool.

The amount allocated and charged by the Department of Administration to State agencies to which transportation is furnished shall be at least as follows:

I. Pursuit vehicles and full size four-wheel drive vehicles $.24/mile.
II. Vans and compact four-wheel drive vehicles — $.22/mile.
III. All other vehicles — $.20/mile.

7. To adopt, with the approval of the Governor, reasonable rules for the efficient and economical operation, maintenance, repair, and replacement, as limited in paragraph 4. of this subdivision, of all state-owned motor vehicles under the control of the Department, and to enforce those rules; and to adopt, with the approval of the Governor, reasonable rules regulating the use of private motor vehicles upon State business by the officers and employees of State agencies, and to enforce those rules. The Department, with the approval of the Governor, may delegate to the respective heads of the agencies to which motor vehicles are permanently assigned by the Department the duty of enforcing the rules adopted by the Department pursuant to this paragraph. Any person who violates a rule adopted by the Department and approved by the Governor is guilty of a Class 1 misdemeanor.

7a. To adopt with the approval of the Governor and to enforce rules and to coordinate State policy regarding (i) the permanent assignment of state-owned passenger motor vehicles and (ii) the use of and reimbursement for those vehicles for the limited commuting permitted by this subdivision. For the purpose of this subdivision 7a, "state-owned passenger motor vehicle" includes any state-owned passenger motor vehicle, whether or not owned, maintained or controlled by the Department of Administration, and regardless of the source of the funds used to purchase it. Notwithstanding the provisions of G.S. 20-190 or any other provisions of law, all state-owned passenger motor vehicles are subject to the provisions of this subdivision 7a; no permanent assignment

**G.S. 143-341(8)i is set out twice. See note.**

shall be made and no one shall be exempt from payment of reimbursement for commuting or from the other provisions of this subdivision 7a except as provided by this subdivision 7a. Commuting, as defined and regulated by this subdivision, is limited to those specific cases in which the Secretary has received and accepted written justification, verified by historical data. The Department shall not assign any state-owned motor vehicle that may be used for commuting other than those authorized by the procedure prescribed in this subdivision.

A State-owned passenger motor vehicle shall not be permanently assigned to an individual who is likely to drive it on official business at a rate of less than 3,150 miles per quarter unless (i) the individual's duties are routinely related to public safety or (ii) the individual's duties are likely to expose the individual routinely to life-threatening situations. A State-owned passenger motor vehicle shall also not be permanently assigned to an agency that is likely to drive it on official business at a rate of less than 3,150 miles per quarter unless the agency can justify to the Division of Motor Fleet Management the need for permanent assignment because of the unique use of the vehicle. Each agency, other than the Department of Transportation, that has a vehicle assigned to it or has an employee to whom a vehicle is assigned shall submit a quarterly report to the Division of Motor Fleet Management on the miles driven during the quarter by the assigned vehicle. The Division of Motor Fleet Management shall review the report to verify that each motor vehicle has been driven at the minimum allowable rate. If it has not and if the department by whom the individual to which the car is assigned is employed or the agency to which the car is assigned cannot justify the lower mileage for the quarter, the permanent assignment shall be revoked immediately. The Department of Transportation shall submit an annual report to the Division of Motor Fleet Management on the miles driven during the year by vehicles assigned to the Department or to employees of the Department. If a vehicle included in this report has not been driven at least 12,600 miles during the year, the Department of Transportation shall review the reasons for the lower mileage and decide whether to terminate the assignment. The Division of Motor Fleet Management may not revoke the assignment of a vehicle to the Department of Transportation or an employee of that Department for failure to meet the minimum mileage requirement unless the Department of Transportation consents to the revocation.

Every individual who uses a State-owned passenger motor vehicle, pickup truck, or van to drive between the individual's official work station and his or her home, shall reimburse the State for these trips at a rate computed by the Department. This rate shall approximate the benefit derived from the use of the vehicle as prescribed by federal law. Reimbursement shall be for 20 days per month regardless of how many days the individual uses the vehicle to commute during the month.

**G.S. 143-341(8)i is set out twice. See note.**

---

Reimbursement shall be made by payroll deduction. Funds derived from reimbursement on vehicles owned by the Motor Fleet Management Division shall be deposited to the credit of the Division; funds derived from reimbursements on vehicles initially purchased with appropriations from the Highway Fund and not owned by the Division shall be deposited in a Special Depository Account in the Department of Transportation, which shall revert to the Highway Fund; funds derived from reimbursement on all other vehicles shall be deposited in a Special Depository Account in the Department of Administration which shall revert to the General Fund. Commuting, for purposes of this paragraph, does not include those individuals whose office is in their home, as determined by the Department of Administration, Division of Motor Fleet Management. Also, this paragraph does not apply to the following vehicles: (i) clearly marked police and fire vehicles, (ii) delivery trucks with seating only for the driver, (iii) flatbed trucks, (iv) cargo carriers with over a 14,000 pound capacity, (v) school and passenger buses with over 20 person capacities, (vi) ambulances, (vii) [Repealed]. (viii) bucket trucks, (ix) cranes and derricks, (x) forklifts, (xi) cement mixers, (xii) dump trucks, (xiii) garbage trucks, (xiv) specialized utility repair trucks (except vans and pickup trucks), (xv) tractors, (xvi) unmarked law-enforcement vehicles that are used in undercover work and are operated by full-time, fully sworn law-enforcement officers whose primary duties include carrying a firearm, executing search warrants, and making arrests, and (xvii) any other vehicle exempted under Section 274(d) of the Internal Revenue Code of 1954, and Federal Internal Revenue Services regulations based thereon. The Department of Administration, Division of Motor Fleet Management, shall report quarterly to the Joint Legislative Commission on Governmental Operations and to the Fiscal Research Division of the Legislative Services Office on individuals who use State-owned passenger motor vehicles, pickup trucks, or vans between their official work stations and their homes, who are not required to reimburse the State for these trips.

The Department of Administration shall revoke the assignment or require the Department owning the vehicle to revoke the assignment of a State-owned passenger motor vehicle, pickup truck or van to any individual who:

I. Uses the vehicle for other than official business except in accordance with the commuting rules;

II. Fails to supply required reports to the Department of Administration, or supplies incomplete reports, or supplies reports in a form unacceptable to the Department of Administration and does not cure the deficiency within 30 days of receiving a request to do so;

III. Knowingly and willfully supplies false information to the Department of Administration on applications for permanent assignments, commuting reimbursement forms, or other required reports or forms;

IV. Does not personally sign all reports on forms submitted for vehicles permanently assigned to him or her and does

**G.S. 143-341(8)i is set out twice. See note.**

---

not cure the deficiency within 30 days of receiving a request to do so;

V. Abuses the vehicle; or

VI. Violates other rules or policy promulgated by the Department of Administration not in conflict with this act.

A new requisition shall not be honored until the Secretary of the Department of Administration is assured that the violation for which a vehicle was previously revoked will not recur.

The Department of Administration, with the approval of the Governor, may delegate, or conditionally delegate, to the respective heads of agencies which own passenger motor vehicles or to which passenger motor vehicles are permanently assigned by the Department, the duty of enforcing all or part of the rules adopted by the Department of Administration pursuant to this subdivision 7a. The Department of Administration, with the approval of the Governor, may revoke this delegation of authority.

Notwithstanding the provisions of this section and G.S. 14-247, the Department of Administration may allow the organization sanctioned by the Governor's Council on Physical Fitness to conduct the North Carolina State Games to use State trucks and vans for the State Games of North Carolina. The Department of Administration shall not charge any fees for the use of the vehicles for the State Games. The State shall incur no liability for any damages resulting from the use of vehicles under this provision. The organization that conducts the State Games shall carry liability insurance of not less than one million dollars ($1,000,000) covering such vehicles while in its use and shall be responsible for the full cost of repairs to these vehicles if they are damaged while used for the State Games.

8. To adopt and administer rules for the control of all state-owned passenger motor vehicles and to require State agencies to keep all records and make all reports regarding motor vehicle use as the Secretary deems necessary.
9. To acquire motor vehicle liability insurance on all State-owned motor vehicles under the control of the Department.
10. To contract with the appropriate State prison authorities for the furnishing, upon such conditions as may be agreed upon from time to time between such State prison authorities and the Secretary, of prison labor for use in connection with the operation of a central motor pool and related activities.
11. To report annually to the General Assembly on any rules adopted, amended or repealed under paragraphs 3, 7, or 7a of this subdivision.

i. **(Effective July 1, 2010)** To establish and operate a central motor pool and such subsidiary related facilities as the Secretary may deem necessary, and to that end:

1. To establish and operate central facilities for the maintenance, repair, and storage of state-owned passenger motor vehicles for the use of State agencies; to utilize any available State facilities for that purpose; and to establish such subsidiary facilities as the Secretary may deem necessary.

**G.S. 143-341(8)i is set out twice. See note.**

2. To acquire passenger motor vehicles by transfer from other State agencies and by purchase. All motor vehicles transferred to or purchased by the Department shall become part of a central motor pool.

2a. Every new motor vehicle transferred to or purchased by the Department that is designed to operate on diesel fuel shall be covered by an express manufacturer's warranty that allows the use of B-20 fuel, as defined in G.S. 143-58.4. This sub-sub-subdivision does not apply if the intended use, as determined by the Department, of the new motor vehicle requires a type of vehicle for which an express manufacturer's warranty allows the use of B-20 fuel is not available.

2b. As used in this sub-sub-subdivision, "fuel economy" and "class of comparable automobiles" have the same meaning as in Part 600 of Title 40 of the Code of Federal Regulations (July 1, 2008 Edition). As used in this sub-sub-subdivision, "passenger motor vehicle" has the same meaning as "private passenger vehicle" as defined in G.S. 20-4.01. Notwithstanding the requirements of sub-sub-subdivision 2a. of this sub-subdivision, every request for proposals for new passenger motor vehicles to be purchased by the Department shall state a preference for vehicles that have a fuel economy for the new vehicle's model year that is in the top fifteen percent (15%) of its class of comparable automobiles. The award for every new passenger motor vehicle that is purchased by the Department shall be based on the Department's evaluation of the best value for the State, taking into account fuel economy ratings and life cycle cost that reasonably consider both projected fuel costs and acquisition costs. This sub-sub-subdivision does not apply to vehicles used in law enforcement, emergency medical response, and firefighting. The Department shall report the number of new passenger motor vehicles that are purchased as required by this sub-sub-subdivision, the savings or costs for the purchase of vehicles to comply with this sub-sub-subdivision, and the quantity and cost of fuel saved for the previous fiscal year on or before October 1 of each year to the Joint Legislative Commission on Governmental Operations and the Environmental Review Commission.

2c. To participate in the energy credit banking and selling program under G.S. 143-58.4. The Division of Motor Fleet Management of the Department of Administration is eligible to receive proceeds from the Alternative Fuel Revolving Fund under G.S. 143-58.5 to purchase alternative fuel, develop alternative fuel refueling infrastructure, or purchase AFVs as defined in G.S. 143-58.4.

3. To require on a schedule determined by the Department all State agencies to transfer ownership, custody or control of any or all passenger motor vehicles within the ownership, custody or control of that agency to the Department, except those motor vehicles under the ownership, custody or control of the Highway Patrol or the State Bureau of Investigation which are used primarily for law-enforcement purposes, and except those motor vehicles under the ownership, custody or

**G.S. 143-341(8)i is set out twice. See note.**

---

control of the Department of Crime Control and Public Safety for Butner Public Safety which are used primarily for law-enforcement, fire, or emergency purposes.

4. To maintain, store, repair, dispose of, and replace state-owned motor vehicles under the control of the Department, using best management practices. The Department shall ensure that state-owned vehicles are replaced when most cost effective using a replacement formula developed by the Department and reviewed periodically for appropriateness of use. The Department shall report semiannually to the cochairs of the Joint Appropriations Subcommittee on General Government, on or before October 15 and March 15, on the effect of any new or revised replacement formula on the cost of operating the central motor pool, including the amount of any savings from use of any new or revised replacement formula.
5. Upon proper requisition, proper showing of need for use on State business only, and proper showing of proof that all persons who will be driving the motor vehicle have valid drivers' licenses, to assign economically suitable transportation, either on a temporary or permanent basis, to any State employee or agency. An agency assigned a motor vehicle may not allow a person to operate that motor vehicle unless that person displays to the agency and allows the agency to copy that person's valid driver's license. Notwithstanding G.S. 20-30(6), persons or agencies requesting assignment of motor vehicles may photostat or otherwise reproduce drivers' licenses for purposes of complying with this subpart.

   As used in this subpart, "economically suitable transportation" means the most cost-effective standard vehicle in the State motor fleet, unless special towing provisions are required by the agency. The Department may not assign any employee or agency a motor vehicle that is not economically suitable. The Department shall not approve requests for vehicle assignment or reassignment when the purpose of that assignment or reassignment is to provide any employee with a newer or lower mileage vehicle because of his or her rank, management authority, or length of service or because of any non-job-related reason. The Department shall not assign "special use" vehicles, such as four-wheel drive vehicles or law enforcement vehicles, to any agency or individual except upon written justification, verified by historical data, and accepted by the Secretary. The Department may provide law enforcement vehicles only to those agencies which have statutory pursuit authority.
6. To allocate and charge against each State agency to which transportation is furnished, on a basis of mileage or of rental, its proportionate part of the cost of maintenance and operation of the motor pool.

   The amount allocated and charged by the Department of Administration to State agencies to which transportation is furnished shall be at least as follows:

   I. Pursuit vehicles and full size four-wheel drive vehicles $.24/mile.
   II. Vans and compact four-wheel drive vehicles — $.22/mile.
   III. All other vehicles — $.20/mile.

**G.S. 143-341(8)i is set out twice. See note.**

---

7. To adopt, with the approval of the Governor, reasonable rules for the efficient and economical operation, maintenance, repair, and replacement, as limited in paragraph 4. of this subdivision, of all state-owned motor vehicles under the control of the Department, and to enforce those rules; and to adopt, with the approval of the Governor, reasonable rules regulating the use of private motor vehicles upon State business by the officers and employees of State agencies, and to enforce those rules. The Department, with the approval of the Governor, may delegate to the respective heads of the agencies to which motor vehicles are permanently assigned by the Department the duty of enforcing the rules adopted by the Department pursuant to this paragraph. Any person who violates a rule adopted by the Department and approved by the Governor is guilty of a Class 1 misdemeanor.

7a. To adopt with the approval of the Governor and to enforce rules and to coordinate State policy regarding (i) the permanent assignment of state-owned passenger motor vehicles and (ii) the use of and reimbursement for those vehicles for the limited commuting permitted by this subdivision. For the purpose of this subdivision 7a, "state-owned passenger motor vehicle" includes any state-owned passenger motor vehicle, whether or not owned, maintained or controlled by the Department of Administration, and regardless of the source of the funds used to purchase it. Notwithstanding the provisions of G.S. 20-190 or any other provisions of law, all state-owned passenger motor vehicles are subject to the provisions of this subdivision 7a; no permanent assignment shall be made and no one shall be exempt from payment of reimbursement for commuting or from the other provisions of this subdivision 7a except as provided by this subdivision 7a. Commuting, as defined and regulated by this subdivision, is limited to those specific cases in which the Secretary has received and accepted written justification, verified by historical data. The Department shall not assign any state-owned motor vehicle that may be used for commuting other than those authorized by the procedure prescribed in this subdivision.

A State-owned passenger motor vehicle shall not be permanently assigned to an individual who is likely to drive it on official business at a rate of less than 3,150 miles per quarter unless (i) the individual's duties are routinely related to public safety or (ii) the individual's duties are likely to expose the individual routinely to life-threatening situations. A State-owned passenger motor vehicle shall also not be permanently assigned to an agency that is likely to drive it on official business at a rate of less than 3,150 miles per quarter unless the agency can justify to the Division of Motor Fleet Management the need for permanent assignment because of the unique use of the vehicle. Each agency, other than the Department of Transportation, that has a vehicle assigned to it or has an employee to whom a vehicle is assigned shall submit a quarterly report to the Division of Motor Fleet Management on the miles driven during the quarter by the assigned vehicle. The Division of Motor Fleet Management shall review the report to verify that each motor vehicle has been driven at the minimum allowable rate. If it has not and if the department by whom the individual to which the car is assigned is employed or the agency to which the car is assigned cannot justify the lower mileage for the quarter, the permanent assignment shall be revoked immediately. The Department of Transportation shall submit an annual report to the Division of Motor Fleet Management on the miles driven during the year by vehicles assigned to the Department or to employees of the Department. If a vehicle included in this report has not been driven at least 12,600 miles during the year, the Department of Transportation shall review the reasons for the lower mileage and decide whether to terminate the assignment. The Division of Motor Fleet Management may not revoke the assignment of a vehicle to the Department of Transportation or an employee of that Department for failure to meet the minimum mileage requirement unless the Department of Transportation consents to the revocation.

Every individual who uses a State-owned passenger motor vehicle, pickup truck, or van to drive between the individual's official work station and his or her home, shall reimburse the State for these trips at a rate computed by the Department. This rate shall approximate the benefit derived from the use of the vehicle as prescribed by federal law. Reimbursement shall be for 20 days per month regardless of how many days the individual uses the vehicle to commute during the month. Reimbursement shall be made by payroll deduction. Funds derived from reimbursement on vehicles owned by the Motor Fleet Management Division shall be deposited to the credit of the Division; funds derived from reimbursements on vehicles initially purchased with appropriations from the Highway Fund and not owned by the Division shall be deposited in a Special Depository Account in the Department of Transportation, which shall revert to the Highway Fund; funds derived from reimbursement on all other vehicles shall be deposited in a Special Depository Account in the Department of Administration which shall revert to the General Fund. Commuting, for purposes of this paragraph, does not include those individuals whose office is in their home, as determined by the Department of Administration, Division of Motor Fleet Management. Also, this paragraph does not apply to the following vehicles: (i) clearly marked police and fire vehicles, (ii) delivery trucks with seating only for the driver, (iii) flatbed trucks, (iv) cargo carriers with over a 14,000 pound capacity, (v) school and passenger buses with over 20 person capacities, (vi) ambulances, (vii) [Repealed]. (viii) bucket trucks, (ix) cranes and derricks, (x) forklifts, (xi) cement mixers, (xii) dump trucks, (xiii) garbage trucks, (xiv) specialized utility repair trucks (except vans and pickup trucks), (xv) tractors, (xvi) unmarked law-enforcement vehicles that are used in undercover work and are operated by full-time, fully sworn law-enforcement officers whose primary duties

**G.S. 143-341(8)i is set out twice. See note.**

---

include carrying a firearm, executing search warrants, and making arrests, and (xvii) any other vehicle exempted under Section 274(d) of the Internal Revenue Code of 1954, and Federal Internal Revenue Services regulations based thereon. The Department of Administration, Division of Motor Fleet Management, shall report quarterly to the Joint Legislative Commission on Governmental Operations and to the Fiscal Research Division of the Legislative Services Office on individuals who use State-owned passenger motor vehicles, pickup trucks, or vans between their official work stations and their homes, who are not required to reimburse the State for these trips.

The Department of Administration shall revoke the assignment or require the Department owning the vehicle to revoke the assignment of a State-owned passenger motor vehicle, pickup truck or van to any individual who:

I. Uses the vehicle for other than official business except in accordance with the commuting rules;

II. Fails to supply required reports to the Department of Administration, or supplies incomplete reports, or supplies reports in a form unacceptable to the Department of Administration and does not cure the deficiency within 30 days of receiving a request to do so;

III. Knowingly and willfully supplies false information to the Department of Administration on applications for permanent assignments, commuting reimbursement forms, or other required reports or forms;

IV. Does not personally sign all reports on forms submitted for vehicles permanently assigned to him or her and does not cure the deficiency within 30 days of receiving a request to do so;

V. Abuses the vehicle; or

VI. Violates other rules or policy promulgated by the Department of Administration not in conflict with this act.

A new requisition shall not be honored until the Secretary of the Department of Administration is assured that the violation for which a vehicle was previously revoked will not recur.

The Department of Administration, with the approval of the Governor, may delegate, or conditionally delegate, to the respective heads of agencies which own passenger motor vehicles or to which passenger motor vehicles are permanently assigned by the Department, the duty of enforcing all or part of the rules adopted by the Department of Administration pursuant to this subdivision 7a. The Department of Administration, with the approval of the Governor, may revoke this delegation of authority.

Notwithstanding the provisions of this section and G.S. 14-247, the Department of Administration may allow the organization sanctioned by the Governor's Council on Physical Fitness to conduct the North Carolina State Games to use State trucks and vans for the State Games of North Carolina. The Department of Administration shall not charge any fees for the use of the vehicles for the State Games. The

**G.S. 143-341(8)i is set out twice. See note.**

State shall incur no liability for any damages resulting from the use of vehicles under this provision. The organization that conducts the State Games shall carry liability insurance of not less than one million dollars ($1,000,000) covering such vehicles while in its use and shall be responsible for the full cost of repairs to these vehicles if they are damaged while used for the State Games.

8. To adopt and administer rules for the control of all state-owned passenger motor vehicles and to require State agencies to keep all records and make all reports regarding motor vehicle use as the Secretary deems necessary.
9. To acquire motor vehicle liability insurance on all State-owned motor vehicles under the control of the Department.
10. To contract with the appropriate State prison authorities for the furnishing, upon such conditions as may be agreed upon from time to time between such State prison authorities and the Secretary, of prison labor for use in connection with the operation of a central motor pool and related activities.
11. To report annually to the General Assembly on any rules adopted, amended or repealed under paragraphs 3, 7, or 7a of this subdivision.

j. To establish and operate central mimeographing and duplicating services, central stenographical and clerical pools, and other central services, if the Governor after appropriate investigation deems it advisable from the standpoint of efficiency and economy in operation to establish any or all such services. The Secretary may allocate and charge against the respective agencies their proportionate part of the cost of maintenance and operation of the central services which are established, in accordance with the rules adopted by him and approved by the Governor and Council of State pursuant to paragraph k, below. Upon the establishment of central mimeographing and duplicating services, the Secretary may, with the approval of the Governor, require any State agency to be served by those central services to transfer to the Department ownership, custody, and control of any or all mimeographing and duplicating equipment and supplies within the ownership, custody, or control of such agency.

k. To require the State agencies and their officers and employees to utilize the central facilities and services which are established; and to adopt, with the approval of the Governor and Council of State, reasonable rules and procedures requiring the utilization of such central facilities and services, and governing their operation and the charges to be made for their services.

*l*. To provide necessary information service for visitors to the Capitol.

m. To perform such additional duties and exercise such additional powers as may be assigned to it by statute or by the Governor.

(9) Repealed by Session Laws 1989, c. 239, s. 2.

(10) Block Grants. — To establish and maintain a block grants manual that will ensure uniform administration of block grant funds. The manual shall be a comprehensive source of reference for all general and statewide administrative procedures for block grant funds. The manual shall contain the applicable procedures for: the contents of an application, which shall be as simple as possible; the awarding of or contracting with block grant funds; auditing, which shall, to the

extent possible, promote the use of single audits of grantees; the ensuring of civil rights compliance by grantees; and monitoring.

(11) Energy-related matters. — To exercise those powers and perform those duties prescribed in Article 1 of Chapter 113B and Part 1 of Article 3B of Chapter 143 of the General Statutes and Parts 2 and 3 of this Article. (1957, c. 215, s. 2; c. 269, s. 1; 1959, c. 683, ss. 2-4; c. 1326; 1963, c. 1, s. 5; 1965, c. 1023; 1969, c. 1144, s. 2; 1971, c. 1097, s. 3; 1975, c. 399, ss. 1, 2; c. 879, s. 46; 1979, c. 136, s. 1; c. 544; 1979, 2nd Sess., c. 1137, s. 38; 1981, c. 300; c. 859, ss. 48-51; 1981 (Reg. Sess., 1982), c. 1282, s. 62; 1983, c. 267, s. 1; c. 717, s. 74; c. 761, ss. 58, 151, 173, 174; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, s. 122; 1985, c. 479, ss. 168, 170, 174; c. 757, ss. 174, 175, 177; c. 791, s. 51; 1985 (Reg. Sess., 1986), c. 955, ss. 94, 94.1; 1987, c. 738, ss. 43-45, 47(a); c. 827, s. 220; c. 874; 1987 (Reg. Sess., 1988), c. 1086, s. 34(b); 1989, c. 58, s. 2; c. 239, s. 2; 1991, c. 542, s. 10; c. 689, s. 22; 1993, c. 539, s. 1030; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 97, s. 1; c. 402, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 10.2; 1997-412, s. 6; 1998-45, s. 1; 2000-140, s. 76(g); 2000-153, s. 2; 2001-424, s. 7.4; 2001-496, s. 8(d); 2002-126, s. 19.2; 2003-177, s. 1; 2003-284, ss. 18.1, 46.3; 2003-314, s. 1.2; 2005-276, s. 6.25(b); 2005-300, s. 1; 2005-413, s. 3; 2006-203, ss. 96, 97; 2006-217, s. 1.1; 2007-420, s. 2; 2007-446, s. 5; 2009-241, s. 1; 2009-474, s. 5.)

**Subdivision (8)i Set Out Twice.** — The first version of subdivision (8)i set out above is effective until July 1, 2010. The second version of subdivision (8)i set out above is effective July 1, 2010.

**Local Modification.** — Burke: 2007-35, s. 1 (expires December 31, 2011); City of Laurinburg: 2008-72, s. 1 (expires December 31, 2011); Board of Trustees of Beaufort County Community College: 2009-168, s. 1.1; Cleveland and Cleveland Community College: 2009-35, s. 1; Piedmont Community College: 2007-35, s. 1 (expires December 31, 2011); Richmond Community College: 2008-72, s. 1 (expires December 31, 2011).

**Cross References.** — For provision that State officers and employees who perform computerized data processing functions pursuant to subdivision (9) of this section for the Department of Revenue are authorized to receive and process for the Department information in reports and returns and are subject to certain criminal provisions, see G.S. 105-259. For provision that the State is not liable for North Carolina Amateur Sports use of State vehicles, see G.S. 143-299.3.

**State Government Reorganization.** — The General Services Division was transferred to the Department of Administration by former G.S. 143A-82, enacted by Session Laws 1971, c. 864, and repealed by Session Laws 1975, c. 879, s. 46. For present provisions as to the powers and duties of the Department of Administration, see G.S. 143B-367, 143B-368.

**Triangle J Guidelines Pilot Program.** — Session Laws 2001-415, ss. 7(a) to (e), provides: "(a) Triangle J Guidelines Pilot Program. — The General Assembly recognizes the State's need to understand how energy conservation measures are utilized in the construction or renovation of State facilities and how these measures benefit the State through cost savings and the protection of our natural resources. The General Assembly promotes the use of the Triangle J Council of Governments' High Performance Guidelines to achieve these goals and encourages any State entity to rate itself in accordance with these guidelines for the design, construction, operation, maintenance, or renovation of any State-assisted or State-owned facility.

"(b) To accomplish the goals described in Section 7(a) of this act, the Department of Administration shall implement a pilot program to review the use of the Triangle J Council of Governments' High Performance Guidelines in projects for the renovation or construction of State facilities.

"The Board of Governors of The University of North Carolina shall select at least four projects to participate in the pilot program, and the State Board of Community Colleges and the Office of State Budget, Planning, and Management shall select at least three projects each to participate in the program. One-third of the projects participating in this program shall be projects for the repair or renovation of a State facility, and the remaining projects shall be projects for the construction of State facilities.

"(c) The Department of Administration shall oversee the pilot program, and each entity involved shall submit all applicable information to the Department as it deems necessary, including compiling and submitting energy usage and cost data. The program shall include a one-year postoccupancy evaluation that shall be included as part of the evaluation of the Triangle J Council of Governments' High Performance Guidelines for each facility. The entities participating in this program shall explore the concept of a 'high performing facility' in assessing the use of the Triangle J Guidelines for these projects. For purposes of this section, 'high performing facility' means a building and surrounding environs designed using features that are energy efficient, incorporate reusable and renewable resources, provide natural lighting, are nontoxic, require low maintenance, are congruent with the natural characteristics of the site, incorporate water conservation measures, and cause minimum adverse impact to the environment as enacted in Section 2(11) of S.L. 2000-143.

"(d) The Department of Administration shall submit an interim report on the implementation of this program to the Senate and House of Representatives' Chairs of the Appropriations Committees, Chairs of General Government Appropriations Subcommittee, and the Joint Legislative Commission on Governmental Operations not later than December 15, 2002. The report shall discuss the benefits of using the Triangle J Council of Governments' High Performance Guidelines and make recommendations regarding the use of the Triangle J Guidelines in the projects participating in the program and other projects. The Department of Administration shall submit a final report to the Senate and House of Representatives' Chairs of the Appropriations Committees, Chairs of General Government Appropriations Subcommittee, and the Joint Legislative Commission on Governmental Operations not later than 18 months after completion of the last project participating in this program, if practicable.

"(e) This act shall not be construed to obligate the General Assembly to appropriate funds to implement the Triangle J Guidelines pilot program."

**Editor's Note.** — Session Laws 1971, c. 1097, which amended this section, in s. 5.1, provided: "This act shall not apply to the Police Information Network established under Chapter 114 of the General Statutes."

Session Laws 2000-3, s. 3(f), provides that notwithstanding G.S. 143-341(3)a.2., G.S. 143-341(3) applies only to funds provided by Session Laws 2000-3, the Michael K. Hooker Higher Education Facilities Financing Act, for construction or renovation of community college buildings requiring an estimated expenditure of more than two hundred fifty thousand dollars ($250,000). The Michael K. Hooker Higher Education Facilities Financing Act, in part, authorizes the issuance of general obligation bonds of the state to provide grants to community colleges for capital improvements.

Session Laws 2001-496, s. 13.1 is a severability clause.

Session Laws 2001-496, s. 14, which provided that the amendments to subdivision (3) of this section by Session Laws 2001-496, s. 8(d), would expire December 31, 2006, was subsequently amended by Session Laws 2005-300, s. 1, to delete the expiration clause.

Session Laws 2003-284, s. 6.20, effective July 1, 2003, provides: "Notwithstanding G.S. 143-341(4)g. or any other provision of law, the property currently allocated to the Department of Administration and previously allocated to the Department of Health and Human Services for the Central School for the Deaf at Greensboro is hereby reallocated to the Board of Governors of The University of North Carolina. This property shall be used for the establishment of Millennium Campuses of the University of North Carolina at Greensboro and North Carolina Agricultural and Technical State University."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2003-314, ss. 4.1(a) through (c), provide: "Interpretation of Act. (a) Additional Method. — This act provides an additional and alternative method for the doing of the things authorized by this act and shall be regarded as supplemental and additional to powers conferred by other laws. Except where expressly provided, this act shall not be regarded as in derogation of any powers now existing. The authority granted in this act is in addition to other laws now or hereinafter enacted authorizing the State to issue or incur indebtedness.

"(b) Statutory References. — References in this act to specific sections or Chapters of the General Statutes are intended to be references to those sections or Chapters as they may be amended from time to time by the General Assembly.

"(c) Liberal Construction. — This act, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect its purposes."

Session Laws 2003-314, s. 4.1(d), contains a severability clause.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, ss. 19.5(a)-(c), as amended by Session Laws 2009-451, ss. 14.14(a) and (b), provide: "(a) All State agencies, universities, and community colleges that have State-owned vehicle fleets shall develop and implement plans to improve the State's use of alternative fuels, synthetic lubricants, and efficient vehicles. The plans shall achieve a twenty percent (20%) reduction or displacement of the current petroleum products consumed by July 1, 2011. Before implementation of any plan, all affected agencies shall report their plan to the State Energy Office within the Department of Commerce. The State Energy Office shall compile a report on the plans submitted and report to the Joint Legislative Commission on Governmental Operations. Agencies shall implement their plans by January 1, 2006. Reductions may be met by petroleum or oils displaced through the use of biodiesel, ethanol, synthetic oils or lubricants, other alternative fuels, the use of hybrid electric vehicles, other fuel-efficient or low-emission vehicles, or additional methods as may be approved by the State Energy Office, thereby reducing the amount of harmful emissions. The plan shall not impede mission fulfillment of the agency and shall specifically address a long-term cost-benefit analysis, allowances for changes in vehicle usage, total miles driven, and exceptions due to technology, budgetary limitations, and emergencies.

"(b) For the purposes of this section, a State-owned vehicle fleet consists of more than 10 motor vehicles, as defined by G.S. 20-4.01, that are designed for highway use and titled to one of the aforementioned entities. Specialty vehicles, as defined by G.S. 20-4.01, that are used for educational purposes, and vehicles exempted under U.S. Executive Order 13149 are subject to ten percent (10%) reductions.

"(c) Agencies shall report by September 1, 2006, and annually thereafter through September 1, 2011, to the State Energy Office within the Department of Commerce on the efforts undertaken to achieve the reductions. The State Energy Office shall compile and forward a report to the Joint Legislative Commission on Governmental Operations by November 1, 2006, and annually thereafter through November 1, 2011, on the agencies' progress in meeting their plans."

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2006-206, s. 1, provides: "In order to promote attainment of the twenty percent (20%) reduction or displacement of petroleum products consumed in State-owned vehicle fleets by January 1, 2010, as required by Section 19.5 of S.L. 2005-276, the Department of Administration shall develop a plan for the targeted conversion of fuel dispensing facilities to provide greater availability of biodiesel, ethanol, and other alternative fuels. The Department shall consult with affected State agencies to identify measures to increase the efficiency and cost-effective utilization of resources and consider this information in the development of the plan. The Department of Administration shall submit the plan to the Joint Legislative Commission on Governmental Operations no later than November 1, 2006, and shall include updates on the progress in implementing the plan as part of the report required under Section 19.5(c) of S.L. 2005-276."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Session Laws 2009-241, s. 2, provides: "The first report required under G.S. 143-341(8)i.2b. shall be due on or before October 1, 2011."

Session Laws 2009-446, s. 1(a), provides: "The State Energy Office is transferred from the Department of Administration to the Department of Commerce. This transfer shall have all of the elements of a Type I transfer, as defined in G.S. 143A-6."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

Session Laws 2009-474, s. 6, provides: "The North Carolina Code Officials Qualification Board shall issue a Level III standard certificate for the exercise of duties pursuant to G.S. 143-341(3) to any person who (i) was employed by the Department of Administration on the day this act became effective; (ii) successfully completes a course, developed pursuant to this section, relating to the State Building Code regulations and Code-enforcement administration; (iii) successfully completes all examinations required by the North Carolina Code Officials Qualification Board; and (iv) possesses a valid license to practice as an architect, registered pursuant to Chapter 83A of the General Statutes, or a professional engineer, registered pursuant to Chapter 89C of the General Statutes. The North Carolina Code Officials Qualification Board, in consultation with the Departments of Administration and Insurance, shall develop an expedited course of training on State Building Code regulations and Code-enforcement administration to facilitate persons obtaining Level III standard certification in accordance with this section."

**Effect of Amendments.** — Session Laws 2009-241, s. 1, effective July 1, 2010, and applicable to contracts to purchase passenger motor vehicles on or after that date, designated former subdivision (8)i.2. as present subdivisions (8)i.2. and (8)i.2a.; added subdivision (8)i.2b; and redesignated former subdivision (8)i.2a as subdivision (8)i.2c.

Session Laws 2009-474, s. 5, effective October 1, 2009, inserted "to act as the appropriate official inspector or inspection department for purposes of G.S. 143 143.2" in subdivision (3)d.

**Legal Periodicals.** — For note on coastal land use development and area-wide zoning, see 49 N.C.L. Rev. 866 (1971).

For 1997 legislative survey, see 20 Campbell L. Rev. 437.

## CASE NOTES

**Department Not Required to Negotiate When Lease Proposal Is Submitted.** — Once the Department of Administration has submitted to the Council of State the lowest lease proposal in accordance with requirements set forth in lease specifications, the Council of State does not have the authority to examine all lease proposals and to require the Department of Administration to negotiate and enter a lease other than the lease proposal submitted by the Department of Administration. Martin v. Thornburg, 320 N.C. 533, 359 S.E.2d 472 (1987).

**No Carte Blanche to Condemn Property.** — For case holding that G.S. 146-22 et seq. and subdivision (4)d of this section did not give the Department (with the approval of the Governor and Council of State) carte blanche to condemn property, see State v. Core Banks Club Properties, Inc., 275 N.C. 328, 167 S.E.2d 385 (1969).

**Applied** in Lewis v. White, 287 N.C. 625, 216 S.E.2d 134 (1975).

**Cited** in State v. Coastland Corp., 134 N.C. App. 269, 517 S.E.2d 655, 1999 N.C. App. LEXIS 749 (1999).

## OPINIONS OF ATTORNEY GENERAL

**Highway Rest Area Structures.** — The provisions of this section are not applicable to the construction of rest area buildings on a highway right-of-way as highway structures are specifically excepted by G.S. 143-336. The buildings in the rest area located on a highway right-of-way are highway structures and therefore the Department of Administration is not required to approve such plans and specifications. See opinion of Attorney General to Mr. John Davis, Chief Engineer, State Highway Commission, 40 N.C.A.G. 541 (1970).

## § 143-341.1: Repealed by Session Laws 2009-451, s. 17.3(c), effective July 1, 2009.

**Editor's Note.** — Former § 143-341.1, Evacuation of State buildings and grounds, was enacted by Session Laws 1997-112, s. 1.

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.5 is a severability clause.

## § 143-342. Rules governing allocation of property and space.

The Governor, with the approval of the Council of State, shall adopt such reasonable rules, regulations, and procedures as he deems necessary concerning the allocation and reallocation by the Department of land, buildings, and space within buildings to and among the several State agencies. (1957, c. 269, s. 1.)

## § 143-342.1. State-owned office space; fees for use by self-supporting agencies.

The Department shall determine equitable fees for the use of State owned and operated office space, and it shall assess the Department of State Treasurer, the Department of Insurance, and all self-supporting agencies using any of this office space for payment of these fees. For the purposes of this section, self-supporting agencies are those agencies designated by the Director of the Budget as being primarily funded from sources other than State appropriations. Fees assessed under this section shall be paid to the General Fund. (1977, 2nd Sess., c. 1219, s. 48; 1983, c. 717, ss. 76, 77; 1997-443, s. 27.4.)

## § 143-343. General Services Division.

If the Governor and Council of State at any time determine, pursuant to G.S. 129-11, that the General Services Division should be made a part of the Department of Administration, the powers and duties given the Director of General Services by statute shall thereafter be deemed a part of the statutory powers and duties of the Director of Administration, and the powers and duties given the General Services Division by statute shall thereafter be deemed a part of the statutory powers and duties of the Department of Administration. The head of the General Services Division shall thereafter be appointed and removed, and his salary shall be fixed, in the same manner prescribed for other division heads. Upon the accomplishment of such transfer, the General Services Division shall thereafter be in all respects a part of the Department of Administration and subject to the supervision and control of the Director of Administration. (1957, c. 269, s. 1.)

**Editor's Note.** — Section 129-11, referred to in this section, was repealed by Session Laws 1971, c. 1097, s. 5.

Because this section relates to past events, no changes have been made in it pursuant to Session Laws 1975, c. 879, s. 46.

## § 143-344. Transfer of functions, property, records, etc.

(a) Repealed by Session Laws 1979, 2nd Session, c. 1137, s. 39.

(b) All of the powers, duties, functions, records, property, supplies, equipment, personnel, funds, credits, appropriations, quarterly allotments, and executory contracts of the Division of Purchase and Contract are hereby transferred to the Department of Administration, effective July 1, 1957. All statutory references to the "Division of Purchase and Contract" or the "Purchase and Contract Division" shall be deemed to refer to the Department of Administration.

(c) The transfers directed by subsections (a) and (b) above, shall be made under the supervision of the Governor, and he shall be the final arbiter of all differences or disputes arising incident to such transfers.

(d) Repealed by Session Laws 2006-203, s. 98, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter. (1957, c. 269, s. 1; 1979, 2nd Sess., c. 1137, s. 39; 2006-203, s. 98.)

**Editor's Note.** — Because this section relates to past events, no changes have been made in it pursuant to Session Laws 1975, c. 879, s. 46.

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 98, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, repealed subsection (d).

## § 143-345. Saving clause.

No transfer of functions to the Department of Administration provided for in this Article shall affect any action, suit, proceeding, prosecution, contract, lease, or other business transaction involving such a function which was initiated, undertaken, or entered into prior to or pending the time of the transfer, except that the Department shall be substituted for the agency from which the function was transferred, and so far as practicable the procedure provided for in this Article shall be employed in completing or disposing of the matter. (1957, c. 269, s. 1.)

## § 143-345.1. Rules and regulations.

The Governor, with the approval of the Council of State, shall adopt reasonable rules and regulations governing the use, care, protection, and maintenance of the public buildings and grounds (other than parking). Any person who violates a rule or regulation adopted by the Governor with the approval of the Council of State is guilty of a Class 1 misdemeanor. (1957, c. 215, s. 2; 1971, c. 1097, s. 4; 1993, c. 539, s. 1031; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — The above section was formerly G.S. 129-6. It was transferred and renumbered G.S. 143-343 by Session Laws 1971, c. 1097, s. 4. Since a G.S. 143-343 already existed, the section transferred by the 1971 act has been renumbered G.S. 143-345.1.

## § 143-345.2. Disorderly conduct in and injury to public buildings and grounds.

Any person who commits a nuisance or conducts himself in a disorderly manner in or around any public building or grounds, or defaces or injures any public building or grounds, is guilty of a Class 1 misdemeanor. (1957, c. 215, s. 2; 1971, c. 1097, s. 4; 1993, c. 539, s. 1032; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — The above section was formerly G.S. 129-7. It was transferred and renumbered G.S. 143-344 by Session Laws 1971, c. 1097, s. 4. Since a G.S. 143-344 already existed, the section transferred by the 1971 act has been renumbered G.S. 143-345.2.

## § 143-345.3. Construction and repair of public buildings; use of Contingency and Emergency Fund.

It is lawful to resort to the Contingency and Emergency Fund provided in the Appropriation Act for financial aid in the construction, alteration, renovation, or repair of any public building, when in the opinion of the Governor and Council of State it is necessary to construct, alter, renovate, or repair such building. (1957, c. 215, s. 2; 1971, c. 1097, s. 4.)

**Editor's Note.** — The above section was formerly G.S. 129-8. It was transferred and renumbered G.S. 143-345 by Session Laws 1971, c. 1097, s. 4. Since a G.S. 143-345 already existed, the section transferred by the 1971 act has been renumbered G.S. 143-345.3.

## § 143-345.4. Moore and Nash squares and other public lots.

The governing body of the City of Raleigh is authorized, at its own expense, to grade, to lay out in walks, to plant with trees, shrubbery, and flowers and otherwise to adorn Moore and Nash squares and to that end has the general charge and management of these squares. The governing body may manage and improve in like manner any of the vacant lots within the city limits which belong to the State and which are not otherwise appropriated, subject to the approval of the Governor and Council of State. The governing body may not prevent the free access of the public to such squares or lots during reasonable hours.

Whenever, in the opinion of the Secretary, the governing body is not properly keeping the squares or lots which it has taken in charge under this section, the Secretary shall call the matter to the attention of the governing body, and if the governing body then fails for a period of 60 days to begin to take proper care of the squares or lots, the Governor and Council of State may repossess them and proceed to manage and control them for the preservation of such property.

In the event that the use of these squares and lots is at any time needed by the State, the license of the City of Raleigh to control and manage them shall terminate six months after notice given by the Governor and Council of State to the governing body of the city, and possession shall be promptly surrendered to the State. (1957, c. 215, s. 2; 1971, c. 1097, s. 4; 1975, c. 879, s. 46.)

**Editor's Note.** — The above section was formerly G.S. 129-9. It was transferred and renumbered G.S. 143-345.1 by Session Laws 1971, c. 1097, s. 4, and has been renumbered G.S. 143-345.4. See Editor's Notes under G.S. 143-345.1 through 143-345.3.

## § 143-345.5. Program for location and construction of future public buildings.

The Department of Administration is hereby authorized, empowered, and directed to formulate a long range building policy program and shall cooperate with the governing board of the City of Raleigh in zoning property adjacent to or in the vicinity of the Capitol Square when and if the City of Raleigh desires to zone said property. If the Department of Administration is of opinion that property adjacent to or in the vicinity of the Capitol Square will, in the future, be needed for State building purposes, it shall so advise the governing body of the City of Raleigh. At such times as the governing body of the City of Raleigh shall rezone property adjacent to or within four blocks of the State Capitol, it shall request an opinion from the Department of Administration as to whether the Department finds a future need for such property for State building purposes. In the event that the governing board of the City of Raleigh is informed by the Department of Administration that any property herein covered be needed for building purposes by the State in the future, the governing body of the City of Raleigh shall give full consideration to such opinion of the Department before making any rezoning order. Notwithstanding any other provision of law, no local zoning ordinance shall apply to any State-owned building built or to be built on any State-owned land within six blocks of the State Capitol without the consent of the Council of State. (1951, c. 1132; 1957, c. 215, s. 2; 1971, c. 1097, s. 4; 2007-482, s. 1.)

**Editor's Note.** — The above section was formerly G.S. 129-12. It was transferred and renumbered G.S. 143-345.2 by Session Laws 1971, c. 1097, s. 4, and has been renumbered G.S. 143-345.5. See Editor's Notes under G.S. 143-345.1 through 143-345.4.

### § 143-345.6: Recodified as § 147-54.3 by Session Laws 1991, c. 689, s. 181(b).

### § 143-345.7. Repair and reconstruction of the Western Residence of the Governor.

If the Western Residence of the Governor in Asheville is damaged or destroyed by fire or other disaster, it shall be repaired or reconstructed. Funds from the Contingency and Emergency Fund may be used for this purpose with the approval of the Director of the Budget if insurance coverage on the property should be inadequate. Insurance on the Western Governor's mansion shall be as adequate as possible and used in case of a fire or devastation of the mansion for the purpose of rebuilding or repairing the mansion. (1983, c. 602.)

### § 143-345.8. North Carolina Purchase Directory.

The Division of Purchase and Contract of the Department of Administration shall electronically advertise information on contract and purchase requirements from the Division of Purchase and Contract, the Office of State Construction, the Department of Transportation, and other agencies of State government which make direct purchases from private suppliers. The Division shall coordinate with the other departments of State government to ensure that the electronic advertisement is meeting the goals of disseminating as widely as possible and in a timely manner information on those State contracts which are open for bids. A printed copy of any information that is electronically advertised shall be made available to any party upon request. The Secretary of the Department of Administration may adopt rules governing the routine and procedures to be followed in advertising information on contract and purchase opportunities, what contracts and purchases will be advertised, and under what conditions exceptions to the electronic advertisement may occur. (1983, c. 839; 1999-417, s. 1.)

**Editor's Note.** — Session Laws 1999-417, s. 2, declared the amendment of this section by Session Laws 1999-417, s. 1, to be a recent act, and provided that the Secretary of the Department of Administration may adopt temporary rules to implement the provisions of this act, pursuant to G.S. 150B-21.1, and that under such rules the Division may advertise information regarding contract and purchase requirements in both print and electronic format for 12 months following August 5, 1999, the effective date of Session Laws 1999-417.

### § 143-345.9. Official "Prisoner of War/Missing in Action" flag to be flown over the State Capitol.

The Department of Administration is authorized to fly the official "Prisoner of War/Missing in Action (POW/MIA)" flag over the State Capitol on Veterans Day, Memorial Day, Armed Forces Day, and all other national holidays honoring veterans. (1989, c. 613, s. 1.)

### § 143-345.10. Parking of maintenance vehicles.

Maintenance vehicles of the Department of Administration may park without charge at any metered parking space located on the street blocks bordering the State's Capitol Square when performing work at or on the State's

Capitol Square. No maintenance vehicle shall be parked upon the State's Capitol Square in a location that obstructs the view of or access to any monument on the Square, unless the vehicle itself is needed to perform some maintenance function or duty required by this Article. (2009-262, s. 1.)

**Editor's Note.** — Session Laws 2009-262, s. 2, made this section effective July 10, 2009.

## § 143-345.11. Secretary's approval of plans for State buildings required.

(a) No agency or other person authorized or directed by law to select a plan and erect a building for the use of the State or any State institution shall receive and approve of the plan until it is submitted to and approved by the Secretary as to State construction standards and at a minimum as to the safety of the proposed building from fire, including the property's occupants or contents.

(b) Any plan submitted to the Commissioner of Insurance and approved prior to October 1, 2009 shall be deemed to have been approved jointly by the Commissioner of Insurance and the Secretary.

(c) Except as provided in subsection (a) of this section, nothing in this section shall be construed to abrogate the authority of the Commissioner of Insurance under G.S. 58-31-40 or any other provision of law.

(d) The Secretary shall provide quarterly written reports on plans reviewed and approved under this section to the Commissioner of Insurance. The reports shall be made in a form approved by the Commissioner of Insurance and the Secretary. (2009-474, s. 2.)

**Editor's Note.** — Session Laws 2009-474, s. 10, made this section effective October 1, 2009.

## § 143-345.12: Reserved for future codification purposes.

## Part 2. Stocks of Coal and Petroleum Fuels.

## § 143-345.13. Reporting of stocks of coal and petroleum fuels.

The Department of Administration may, with the prior express approval of the Energy Policy Council and the Governor, require that all coal and petroleum suppliers in North Carolina supplying coal, motor gasoline, middle distillates, residual oils, and propane for resale within the State, file with the Department of Administration, on forms prepared by the Department, accurate reports as to the stocks of coal and petroleum products and storage capacities maintained by the supplier, including the supplier's current inventory and stock of coal, motor gasoline, middle distillates, residual oils and propane, the expected time such supplies will last under ordinary distribution demand and the schedule for receiving additional or replacement stocks. The reports and the information contained therein shall be proprietary information available only to regular employees of the Department of Administration, except that aggregate tables or schedules consolidating information from the reports may be released if they do not reveal individual report data for any named supplier. It is further the intent of this section that no information shall be required from coal and petroleum suppliers, that is, at the time the reports are requested, already on file with any agency, commission, or department of State government.

It is the intent of this section that the reports be filed only at such times as the Energy Policy Council and the Governor determine that an energy crisis as defined in G.S. 113B-20 exists or may be imminent.

If any petroleum or coal supplier fails to file the accurate reports as may be required by this section for more than 10 days after the date on which any such report is due, the Secretary of Administration is authorized and empowered to petition the district court, Division of the General Court of Justice, in the county in which the principal office or place of business of the supplier is located, for a mandatory injunction compelling the supplier to file the report. (2000-140, s. 76(i).)

## § 143-345.14. Authority to collect data; administration and enforcement; confidentiality.

(a) The Department of Administration shall have the authority to obtain from prime suppliers of petroleum products specific petroleum supply data concerning State-level sales and projected sales by month for North Carolina that is currently reported on the federal Form EIA-782C, "Monthly Report of Petroleum Products Sold in States for Consumption" or its successor, at such time that these data requirements are not being met through any federal reporting procedure. The petroleum products subject to this reporting requirement are: finished gasoline (all grades), #1 distillate, kerosene, #2 fuel oil, #2 diesel fuel, aviation gasoline (finished), kerosene-type jet fuel, naphtha-type jet fuel, #4 fuel, residual fuel oil (less than or equal to one percent sulfur), residual fuel oil (greater than one percent sulfur), propane (consumer grade). The authority to collect energy data from suppliers of petroleum products into North Carolina, that is granted to the Department of Administration in this section, shall be limited to the petroleum volume data that is reported on the Form EIA-782C or its successor.

(b) "Prime suppliers" shall be defined as those suppliers which make the first sale of the named product into North Carolina, excluding jobbers, distributors, and retail dealers.

(c) The Department of Administration shall adopt rules and regulations for the administration of this data collection program and the Attorney General and the law enforcement authorities of the State and its political subdivisions shall enforce the provisions of this section and all orders, rules, and regulations promulgated thereunder. Any enforcement action may be brought upon the relation of the Department of Administration or the direction of the Attorney General.

(d) Any person or corporation who willfully refuses to provide the petroleum supply data in accordance with the conditions described herein, or who knowingly or willfully submits false information in any reports required herein or refuses to file any reports shall be guilty of a Class 1 misdemeanor.

(e) Any civil action brought to enforce the provisions of this section shall be brought in the Superior Court of Wake County or in the superior court of the county in which the acts or practices constituting a violation occurred or are occurring.

(f) The Department of Administration shall keep confidential any individually identifiable energy information to the extent necessary to comply with the confidentiality requirements of the reporting agency, and any such information shall not be subject to the public disclosure requirements of G.S. 132-6. "Individually identifiable energy information" shall be defined as any individual record or portion of a record or aggregated data containing energy information about a person or persons obtained from any source, the disclosure of which could reasonably be expected to reveal information about a specific person. (2000-140, s. 76(i).)

**§ 143-345.15:** Reserved for future codification purposes.

## Part 3. Energy Loan Fund.

### § 143-345.16. Short title.

This Part shall be known as the Energy Loan Fund. (2000-140, s. 76(i); 2001-338, s. 1; 2009-475, s. 13.)

**Editor's Note.** — Session Laws 2009-475, s. 13, effective February 17, 2009, substituted "Energy Loan Fund" for "Energy Improvement Loan Program" in the Part 3 heading.

Session Laws 2009-475, s. 15, provides: "The General Assembly finds that it is in the public interest of the State of North Carolina to ensure expeditious awards of ARRA funds to maximize the economic recovery impact of the ARRA. It is the policy of the State to provide fair regulation, oversight, and transparency for the use of ARRA funds and to quickly and efficiently complete the awards of grants and contracts under the ARRA. It is also the policy of this State that, due to the historic level of federal and State oversight of ARRA grant and contract awards, restraint should be exercised in the granting of legal and injunctive relief that might forestall awards to programs and contractors."

**Effect of Amendments.** — Session Laws 2009-475, s. 13, effective February 17, 2009, substituted "Energy Loan Fund" for "Energy Improvement Loan Program."

### § 143-345.17. Legislative findings and purpose.

The General Assembly finds and declares that it is in the best interest of the citizens of North Carolina to promote and encourage energy efficiency within the State in order to conserve energy, promote economic competitiveness, and expand employment in the State. (2000-140, s. 76(i); 2001-338, s. 1.)

### § 143-345.18. Lead agency; powers and duties.

(a) For the purposes of this Part, the Department of Commerce, State Energy Office, is designated as the lead State agency in matters pertaining to energy efficiency.

(b) The Department shall have the following powers and duties with respect to this Part:

(1) To provide industrial and commercial concerns doing business in North Carolina, local governmental units, nonprofit organizations, and residents in North Carolina with information and assistance in undertaking energy conserving capital improvement projects to enhance efficiency.

(2) To establish one or more revolving funds within the Department for the purpose of providing secured loans in amounts not greater than one million dollars ($1,000,000) per entity to install or to an entity that installs energy-efficient and renewable energy improvements (i) within business or nonprofit organizations located within or translocating to North Carolina, (ii) within local governmental units, (iii) within buildings classified as multifamily residential, (iv) within buildings designated as multiuse that include residential units, and (v) within single family residences, however, in this instance the amount of the loan shall not exceed fifty thousand dollars ($50,000). In providing these loans, priority shall be given to entities already located in the State.

(2a) To develop and adopt rules to allow State-regulated financial institutions to provide secured loans to corporate entities, nonprofit organizations, and local governmental units and residents in accordance with terms and criteria established by the State Energy Office.

(3) To work with appropriate State and federal agencies to develop and implement rules and regulations to facilitate this program.

(4) To contract with persons or entities, including other State agencies and United States Treasury certified Community Development Financial Institutions (CDFI), to administer the Energy Loan Fund. Contracts for the procurement of services to manage, administer, and operate the Energy Loan Fund shall be awarded on a competitive basis through the solicitation of proposals and through the procedures established by statute and the Division of Purchase and Contract.

(c) The annual interest rate charged for the use of the funds from the revolving fund established pursuant to subdivision (b)(2) of this section shall be a percentage not to exceed three percent (3%) per annum, to be established by the State Energy Office, excluding other fees required for loan application review and origination. The term of any loan originated under this section may not be greater than 20 years.

(c1) Notwithstanding subsection (c) of this section, the State Energy Office shall adopt rules to allow loans to be made from the revolving loan fund and by State-regulated financial institutions at interest rates as low as zero percent (0%) per annum for certain renewable energy, recycling, and energy efficient and conservation projects to encourage their development and use.

(d) In accordance with the terms of the Stripper Well Settlement, administrative expenses for activities under this section that are subject to the Stripper Well Settlement shall be limited to five percent (5%) of funds allocated for this purpose. In accordance with the provisions of the American Recovery and Reinvestment Act of 2009 (ARRA) (Public Law 111-5), administrative expenses for activities under this section that are subject to the ARRA shall be limited to ten percent (10%) of funds allocated for this purpose.

(e) For purposes of this section:

(1) "Local governmental unit" means any board or governing body of a political subdivision of the State, including any board of a community college, any school board, or an agency, commission, or authority of a political subdivision of the State.

(2) "Nonprofit organization" means an organization that is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code. (2000-140, s. 76(i); 2001-338, s. 1; 2009-446, s. 1(b); 2009-475, s. 13.)

**Editor's Note.** — Session Laws 2009-446, s. 1(a), provides: "The State Energy Office is transferred from the Department of Administration to the Department of Commerce. This transfer shall have all of the elements of a Type I transfer, as defined in G.S. 143A-6."

Session Laws 2009-475, s. 15, provides: "The General Assembly finds that it is in the public interest of the State of North Carolina to ensure expeditious awards of ARRA funds to maximize the economic recovery impact of the ARRA. It is the policy of the State to provide fair regulation, oversight, and transparency for the use of ARRA funds and to quickly and efficiently complete the awards of grants and contracts under the ARRA. It is also the policy of this State that, due to the historic level of federal and State oversight of ARRA grant and contract awards, restraint should be exercised in the granting of legal and injunctive relief that might forestall awards to programs and contractors."

**Effect of Amendments.** — Session Laws 2009-446, s. 1(b), effective August 7, 2009, substituted "Commerce" for "Administration" in subsection (a).

Session Laws 2009-475, s. 13, effective February 17, 2009, rewrote subsections (b) through (d).

## ARTICLE 36A.

## *State Employee Incentive Bonus Program.*

### § 143-345.20. Definitions.

The following definitions apply in this Article:

(1) Baseline reversion. — The two-year historical average of reversions by a State department, agency, or institution.

(2) Repealed by Session Laws 2001-424, s. 7.2(b), effective July 1, 2001.

(2a) Participating agency. — Any State department, agency, or institution, or any local school administrative unit that employs State employees eligible to participate in the State Employee Incentive Bonus Program. The term includes the North Carolina Community Colleges System, The University of North Carolina and its constituent institutions, and charter schools. The term does not include federal or local government agencies.

(2b) SEIBP. — Acronym for the State Employee Incentive Bonus Program.

(3) State employee. — Any of the following:

a. A person who is a contributing member of the Teachers' and State Employees' Retirement System of North Carolina, the Consolidated Judicial Retirement System of North Carolina, or the Optional Program.

b. A person who receives wages from the State as a part-time or temporary worker, but is not otherwise a contributing member of one of the retirement programs listed in sub-subdivision a. of this subdivision. (1997-513, s. 2; 2001-424, s. 7.2(b).)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1997-513, s. 2 having been 143-345.10.

Session Laws 1997-513, s. 4 states that this act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act. Each State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated to that State agency.

### § 143-345.21. State employee incentive bonus.

(a) A State employee or team of State employees may receive an incentive bonus or bonuses in reward for suggestions or innovations resulting in monetary savings to the State, increased revenues to the State, or improved quality of services delivered to the public.

(b) Repealed by Session Laws 2001-424, s. 7.2(c), effective July 1, 2001.

(b1) The amount of savings generated by suggestions and innovations shall be determined after a 12-month period of implementation. No incentive bonus shall be paid prior to the expiration of 12 months, and payment may be delayed further as reasonably required to ensure that a complete cost implementation cycle is evaluated fully.

(c) Any savings are to be calculated using the actual expenditures for a program, activity, or service compared to the budgeted amount for the same, if an amount has been budgeted for the program, activity, or service. The savings calculation shall include the amount of any reversions in excess of the baseline reversion. Any savings realized through the State Employee Incentive Bonus Program shall be weighed against continued service to the public and the assurance that there is not a negative impact on State programs.

(d) If a suggestion or innovation affects a program, activity, or service for which no separate budgeted amount has been made, the State Coordinator, in conjunction with the agency evaluator or agency fiscal officer, or both for that suggestion or innovation, shall determine the budgetary impact of the suggestion or innovation.

(e) Federal and local government funds and corporate and foundation grant funds are excluded from the SEIBP.

(f) The Department of Administration shall establish the SEIBP reserve fund in which all savings for all suggestions shall be deposited as earned. Each participating agency shall be responsible for transferring savings to the SEIBP reserve fund. The funds may be encumbered as needed to ensure payment to the General Fund, to the suggester, and for distribution as required by G.S. 143-345.22. The Department of Administration shall provide the SEIBP reserve fund summary at the close of each fiscal year to the Office of State Budget and Management and to the participating agencies. The Office of State Budget and Management shall have oversight responsibility for ensuring that the required reversions and transfers are made to the General Fund, and that all encumbered funds are accounted for and paid as required by law.

(g) No distribution of suggester awards shall occur until reversion requirements to the General Fund are met and distributions as required by G.S. 143-345.22 are satisfied and verified by the Office of State Budget and Management. When all of the requirements of G.S. 143-345.22 are fulfilled, the Department of Administration shall transfer to the suggester's agency funds required to award the suggester. The suggester's agency shall make the suggestion award and ensure that all taxes and withholding requirements are met.

(h) Implementation costs may be prorated over a maximum of three years for suggestions or innovations that are capital intensive, involve leading-edge technology, or involve unconventional processes that require longer than 12 months for implementation. The amount of the average annual savings minus the average annual implementation cost shall be used as the basis for the agency to recommend a suggester award. The State Review Committee shall consult the Office of State Budget and Management to make the final award determination in these cases.

(i) There is established in the Department of Administration a nonreverting fund to be administered by the Office of State Personnel for the training and education of permanent State employees to address specific mission critical needs and objectives. Funds shall be credited from the SEIBP to the fund as provided by this Article. (1997-513, s. 2; 1998-181, s. 5; 2001-424, s. 7.2(c).)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1997-513, s. 2 having been 143-345.11.

## § 143-345.22. Allocation of incentive bonus funds; nonmonetary recognition.

(a) If a State employee's suggestion or innovation results in a monetary savings or increased revenue to the State, the funds saved or increased shall be distributed according to the following scale or subject to guidelines as set forth by the funding source:

(1) Twenty percent (20%) of the annualized savings or increased revenues, up to a maximum of twenty thousand dollars ($20,000) for any one State employee, to constitute gainsharing. If a team of State employees is the suggester, the bonus provided in this subdivision shall be divided equally among the team members, except that no team member shall receive in excess of twenty thousand dollars ($20,000), nor shall the team receive an aggregate amount in excess of one hundred thousand dollars ($100,000). These funds shall not revert.

(2) Thirty percent (30%) allocated as follows:

a. Ten percent (10%) to the implementing agency for nonrecurring budget items to be used (i) by the implementing agency to provide equipment, supplies, training, and limited but appropriate recognition for the division, section, or group responsible for the implementation of the cost-saving measure and (ii) to meet other similar needs within the agency.

b. Ten percent (10%) to the Department of Administration for augmenting funding for the management and administration of the SEIBP. These funds shall not revert.

c. Ten percent (10%) to the State employee education and training fund administered by the Office of State Personnel under G.S. 143-342.21(i). These funds shall not revert.

(3) The remainder to the General Fund for nonrecurring budget items.

(a1) Of the pool of funds identified in subsection (a) of this section, only the General Fund appropriations shall be subject to reversion, except during declared budget emergencies. Under nonemergency budget conditions, SEIBP funds arising from savings at The University of North Carolina, the North Carolina Community Colleges System, the Highway Trust Fund, enterprise funds, and receipt-supported organizations shall be exempt from the General Fund reversion requirements.

(b) The budget of a State agency shall not be reduced in the following fiscal year by an amount similar to the monetary savings or increased revenues realized by the State Employee Incentive Bonus Program. The agency budget shall be reduced in subsequent years only if structural or organizational changes are made that warrant the reductions, including the transfer of responsibility for an activity or service to another agency or the elimination of some function of State government.

(c) If a suggestion or innovation results in improved quality of services to the public or to other State agencies, departments, and institutions, but not in monetary savings to the State, the suggester shall receive a nonmonetary award in the form of a certificate, leave with pay, or other similar recognition. (1997-513, s. 2; 1998-181, s. 6; 2001-424, s. 7.2(d).)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1997-513, s. 2, having been 143-345.12.

### OPINIONS OF ATTORNEY GENERAL

**Allocation of Savings That Result from Sources Funded Under Special Funds Statutes.** — The allocation of savings that result from sources funded under the special funds statutes should be distributed in accordance with the specific statutory provisions creating the particular special fund; however, in those allocations where the special fund is silent as to proceeds of this type, this section is controlling and the savings must be distributed to the General Fund. See opinion of Attorney General to T. Brooks Skinner, Jr., General Counsel, N. C. Department of Administration, 2001 N.C. AG LEXIS 21 (6/5/2001).

## § 143-345.23. Suggestion and review process; role of agency coordinator and agency evaluator.

(a) The process for a State employee or team of State employees to submit a cost-saving or revenue-increasing proposal shall begin with the employee or team of employees submitting the suggestion or innovation to an agency coordinator. The agency coordinator, in conjunction with an agency evaluator, shall review the suggestion or innovation for submission to the State Review Committee established in G.S. 143-345.24.

(b) An agency coordinator shall be appointed by the head of each participating agency to serve as liaison between the agency, the suggester, the agency evaluator, and the SEIBP office. The duties of the agency coordinator shall include:

(1) Serving as an information source and maintaining sufficient forms necessary to submit suggestions.
(2) Presenting, in conjunction with the agency evaluator, the recommendation for an award to the State Review Committee.
(3) Working in conjunction with the agency evaluator to process a particular suggestion or innovation within 180 days, except when there are extenuating circumstances.

An agency may have more than one coordinator if required to provide sufficient services to State employees.

(c) An agency evaluator shall be designated by the management of the implementing agency to evaluate one or more suggestions. The duties of an agency evaluator shall include:

(1) Receiving from the agency coordinator and reviewing within 90 days, when possible, the feasibility and effectiveness of cost-saving or revenue-increasing measures suggested by State employees.
(2) Being knowledgeable of the subject program, activity, or service.
(3) Determining, in conjunction with the agency fiscal officer, the budgetary impact of a suggestion or innovation.
(4) Judging impartially both the positive and negative effects of a suggestion or innovation on the current functions of the subject program, activity, or service.

(d) The executive secretary shall be responsible for general oversight and coordination of the State Employee Incentive Bonus Program. The State coordinator shall be an employee of the Department of Administration. The State coordinator shall be responsible for day-to-day SEIBP program management and administration of the technical aspects of the program. The State coordinator shall be an ex officio voting member of the State Review Committee. (1997-513, s. 2; 1998-181, s. 7; 2001-424, s. 7.2(e).)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1997-513, s. 2, having been 143-345.13.

## § 143-345.24. Incentive Bonus Review Committee.

(a) The Incentive Bonus Review Committee, hereinafter "State Review Committee", shall consist of nine members, as follows:

(1) The State Coordinator.
(2) A representative of the Office of State Budget and Management.
(3) A representative of the Office of State Personnel.
(4) A representative of The University of North Carolina.
(5) A representative of the Department of Justice.
(6) A representative of the Department of Labor.
(7) One State employee appointed by the Speaker of the House of Representatives.
(8) One State employee appointed by the President Pro Tempore of the Senate.
(9) One State employee appointed by the Governor upon the recommendation of the State Employees Association of North Carolina, Inc.

(b) The duties of the State Review Committee shall include:

(1) Receiving from the various agency coordinators recommendations on suggestions and innovations.
(2) Determining the impact of a suggestion or innovation on State government services by judging the monetary savings, increased

revenues, or improved quality of services generated by a suggestion or innovation.

(3) Ensuring that the State employee incentive bonus process does not result in a negative impact on services provided to taxpayers by State government.

(c) All administrative, management, clerical, and other functions and services required by the State Review Committee shall be supplied by the Department of Administration. The Department of Administration and the State Review Committee shall report annually to the Joint Legislative Commission on Governmental Operations on the administration of the State Employee Incentive Bonus Program. (1997-513, s. 2; 2000-140, s. 93.1(a); 2001-424, ss. 7.2(f), 12.2(b).)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1997-513, s. 2, having been 143-345.14.

## § 143-345.25. Innovations deemed property of the State; effect of decisions regarding bonuses.

(a) All suggestions or innovations submitted by State employees pursuant to this Article are the property of the State, and all related intellectual property rights shall be assigned to the State. By January 1, 2002, the Office of State Personnel shall establish a policy regarding intellectual property rights that arise from the SEIBP.

(b) Decisions regarding the award of bonuses by the agency coordinator and the State Review Committee are final and are not subject to review under the contested case procedures of Chapter 150B of the General Statutes. (1997-513, s. 2; 2001-424, s. 7.2(g).)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1997-513, s. 2, having been 143-345.15.

## ARTICLE 37.

## *Salt Marsh Mosquito Control.*

**§ 143-346:** Repealed by Session Laws 1973, c. 476, s. 183.

**§ 143-347:** Repealed by Session Laws 1995, c. 123, s. 1.

## ARTICLE 37A.

## *Marine Science Council.*

**§§ 143-347.1 through 143-347.9:** Repealed by Session Laws 1975, c. 879, s. 33.

**Cross References.** — For present provisions as to the North Carolina Council on Ocean Affairs, see G.S. 143B-390.10 et seq.

**Editor's Note.** — Former sections 143-347.6 through 143-347.9 had been reserved for future codification purposes.

## ARTICLE 37B.

## *Marine Resources Center Administrative Board.*

### §§ 143-347.10 through 143-347.14: Repealed by Session Laws 1985, c. 202, s. 4.

**Cross References.** — As to the North Carolina Council on Ocean Affairs, see G.S. 143B-390.10 et seq. As to the Office of Marine Affairs, see G.S. 143B-390.1 and 143B-390.2.

## ARTICLE 38.

## *Water Resources.*

### §§ 143-348, 143-349: Repealed by Session Laws 1967, c. 892, s. 2.

**Cross References.** — For present provisions as to water and air resources, see G.S. 143-211 et seq.

### § 143-350. Definitions.

As used in this Article:

(1) "Commission" means the Environmental Management Commission.

(2) "Department" means the Department of Environment and Natural Resources.

(3) "Essential water use" means the use of water necessary for firefighting, health, and safety; water needed to sustain human and animal life; and water necessary to satisfy federal, State, and local laws for the protection of public health, safety, welfare, the environment, and natural resources; and a minimum amount of water necessary to maintain the economy of the State, region, or area.

(4) "Large community water system" means a community water system, as defined in G.S. 130A-313(10), that regularly serves 1,000 or more service connections or 3,000 or more individuals.

(5) "Unit of local government" means a county, city, consolidated city-county, sanitary district, or other local political subdivision or authority or agency of local government.

(6) "U.S. Drought Monitor" means the national drought map that designates areas of drought using the following categories D0-Abnormally Dry, D1-Moderate, D2-Severe, D3-Extreme, and D4-Exceptional. The U.S. Drought Monitor is developed and maintained by the Joint Agricultural Weather Facility, the Climate Prediction Center, the National Climatic Data Center, and the National Drought Mitigation Center with input from the United States Geological Survey, the National Water and Climate Center, the Climate Diagnostics Center, the National Weather Service, state climatologists, and state water resource agencies.

(7) "Water shortage emergency" means a water shortage resulting from prolonged drought, contamination of the water supply, damage to water infrastructure, or other unforeseen causes that presents an imminent threat to public health, safety, and welfare or to the environment. (1959, c. 779, s. 1; 1967, c. 892, s. 12; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1989, c. 727, s. 218(117); 1989 (Reg. Sess., 1990), c.

1004, s. 18; c. 1024, s. 34; 1991, c. 342, s. 15(a); 1997-443, s. 11A.119(a); 2008-143, s. 3.)

**Editor's Note.** — As to creation of the Department of Environment and Natural Resources, see G.S. 143-279.1.

Session Laws 2008-143, s. 20, provides: "Nothing in this act shall be construed to expand or limit the authority of a unit of government or public water supply system to regulate water use from a well located outside of its jurisdiction, a well not connected to its water system, or any other private well."

**Effect of Amendments.** — Session Laws 2008-143, s. 3, effective July 31, 2008, added subdivisions (3) through (7).

**State Government Reorganization.** — The former Board of Water and Air Resources was transferred to the Department of Natural and Economic Resources (now the Department of Environment and Natural Resources) by former G.S. 143A-120, enacted by Session Laws 1971, c. 864, and repealed by Session Laws 1973, c. 1262, s. 86.

The former Department of Water and Air Resources was transferred to the Department of Natural and Economic Resources (now the Department of Environment and Natural Resources) by former G.S. 143A-119, enacted by Session Laws 1971, c. 864, and repealed by Session Laws 1973, c. 1262, s. 86.

**Legal Periodicals.** — For article, "Introduction to Water Use Law in North Carolina," see 46 N.C.L. Rev. 1 (1967).

For article, "The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation," see 29 Campbell L. Rev. 535 (2007).

## § **143-351:** Repealed by Session Laws 1967, c. 892, s. 2.

## § 143-352. Purpose of Article.

The purpose of this Article is to create a State agency to coordinate the State's water resource activities; to devise plans and policies and to perform the research and administrative functions necessary for a more beneficial use of the water resources of the State, in order to insure improvements in the methods of conserving, developing and using those resources. (1959, c. 779, s. 1.)

## § **143-353:** Repealed by Session Laws 1967, c. 892, s. 2.

## § 143-354. Ordinary powers and duties of the Commission.

(a) Powers and Duties in General. — Except as otherwise specified in this Article, the powers and duties of the Commission shall be as follows:

(1) The Commission shall carry out a program of planning and education concerning the most beneficial long-range conservation and use of the water resources of the State. It shall investigate the long-range needs of counties and municipalities and other local governments for water supply storage available in federal projects.

(2) The Commission shall advise the Governor as to how the State's present water research activities might be coordinated.

(3) Repealed by Session Laws 2008-143, s. 4, effective July 31, 2008.

(4) The Commission is authorized to call upon the Attorney General for such legal advice as is necessary to the functioning of the Commission.

(5) Recognizing the complexity and difficulties attendant upon the recommendation of the General Assembly of fair and beneficial legislation affecting the use and conservation of water, the Commission shall solicit from the various water interests of the State their suggestions thereon.

(6) The Commission may hold public hearings for the purpose of obtaining evidence and information and permitting discussion relative to water

resources legislation and shall have the power to subpoena witnesses therefor.

(7) All recommendations for proposed legislation made by the Commission shall be available to the public.

(8) The Commission shall adopt such rules and regulations as may be necessary to carry out the purposes of this Article.

(9) Any member of the Commission or any person authorized by it, shall have the right to enter upon any private or public lands or waters for the purpose of making investigations and studies reasonably necessary in the gathering of facts concerning streams and watersheds, subject to responsibility for any damage done to property entered.

(10) The Commission is authorized to provide to federal agencies the required assurances, subject to availability of appropriations by the General Assembly or applicable funds or assurances from local governments, of nonfederal cooperation for water supply storage and other congressionally authorized purposes in federal projects.

(11) The Commission is authorized to assign or transfer to any county or municipality or other local government having a need for water supply storage in federal projects any interest held by the State in such storage, upon the assumption of repayment obligation therefor, or compensation to the State, by such local government. The Commission shall also have the authority to reassign or transfer interests in such storage held by local governments, if indicated by the investigation of needs made pursuant to subdivision (1) of subsection (a) of this section, subject to equitable adjustment of financial responsibility.

(b) through (e). Repealed by Session Laws 2008-143, s. 4, effective July 31, 2008. (1959, c. 779, s. 1; 1967, c. 1071, ss. 1, 2; 1973, c. 1262, s. 23; 1991, c. 342, s. 15(b); 1993, c. 539, s. 1033; 1994, Ex. Sess., c. 24, s. 14(c); 2008-143, s. 4.)

**Cross References.** — As to the powers of the Environmental Management Commission, G.S. 143-215.3.

**Editor's Note.** — Session Laws 2002-167, s. 3(a) to (c), as amended by Session Laws 2004-195, s. 4, provides: "(a) Pursuant to subdivisions (1) and (8) of G.S. 143-354(a), the Environmental Management Commission shall develop and implement rules governing water conservation and water reuse during drought and water emergency situations. The rules shall establish minimum standards and practices for water conservation and water reuse for all of the following classes of water users:

"(1) Publicly owned and privately owned water supply systems.

"(2) State agencies.

"(3) Local governments.

"(4) Business and industrial users of water.

"(5) Agricultural and horticultural users of water.

"(b) In developing the rules authorized by subsection (a) of this section, the Environmental Management Commission shall consult with representatives of water users and advocacy groups listed in subsection (a) of Section 5 of this act.

"(c) Rules adopted pursuant to subsection (a) of this section shall not supercede or modify existing rules governing water used in the generation of electricity. This section shall not be construed to authorize the Commission to adopt temporary rules. The Commission shall adopt permanent rules so that the rules will become effective following legislative review pursuant to G.S. 150B-21.3(b) by the 2006 Regular Session of the 2005 General Assembly."

Session Laws 2008-143, s. 20, provides: "Nothing in this act shall be construed to expand or limit the authority of a unit of government or public water supply system to regulate water use from a well located outside of its jurisdiction, a well not connected to its water system, or any other private well."

**Effect of Amendments.** — Session Laws 2008-143, s. 4, effective July 31, 2008, deleted subdivision (a)(3), relating to the duty of the Commission to notify any municipality or other governmental unit of potential water shortages or emergencies; and deleted subsections (b) through (e), relating to declaration of water emergency, water emergency powers and duties of the commission, temporary rights of way, and compensation for water allocated during water emergency and temporary rights of way.

## § 143-355. Powers and duties of the Department.

(a) Repealed by Session Laws 1989, c. 603, s. 1.

(b) Functions to Be Performed. — The Department shall:

(1) Request the North Carolina Congressional Delegation to apply to the Congress of the United States whenever deemed necessary for appropriations for protecting and improving any harbor or waterway in the State and for accomplishing needed flood control, shore-erosion prevention, and water-resources development for water supply, water quality control, and other purposes.

(2) Initiate, plan, and execute a long-range program for the preservation, development and improvement of rivers, harbors, and inland ports, and to promote the public interest therein.

(3) Prepare and recommend to the Governor and the General Assembly any legislation which may be deemed proper for the preservation and improvement of rivers, harbors, dredging of small inlets, provision for safe harbor facilities, and public tidewaters of the State.

(4) Make engineering studies, hydraulic computations, hydrographic surveys, and reports regarding shore-erosion projects, dams, reservoirs, and river-channel improvements; to develop, for budget and planning purposes, estimates of the costs of proposed new projects; to prepare bidding documents, plans, and specifications for harbor, coastal, and river projects, and to inspect materials, workmanship, and practices of contractors to assure compliance with plans and specifications.

(5) Cooperate with the United States Army Corps of Engineers in causing to be removed any wrecked, sunken or abandoned vessel or unauthorized obstructions and encroachments in public harbors, channels, waterways, and tidewaters of the State.

(6) Cooperate with the United States Coast Guard in marking out and establishing harbor lines and in placing buoys and structures for marking navigable channels.

(7) Cooperate with federal and interstate agencies in planning and developing water-resource projects for navigation, flood control, hurricane protection, shore-erosion prevention, and other purposes.

(8) Provide professional advice to public and private agencies, and to citizens of the State, on matters relating to tidewater development, river works, and watershed development.

(9) Discuss with federal, State, and municipal officials and other interested persons a program of development of rivers, harbors, and related resources.

(10) Make investigations and render reports requested by the Governor and the General Assembly.

(11) Participate in activity of the National Rivers and Harbors Congress, the American Shore and Beach Preservation Association, the American Watershed Council, the American Water Works Association, the American Society of Civil Engineers, the Council of State Governments, the Conservation Foundation, and other national agencies concerned with conservation and development of water resources.

(12) Prepare and maintain climatological and water-resources records and files as a source of information easily accessible to the citizens of the State and to the public generally.

(13) Formulate and administer a program of dune rebuilding, hurricane protection, and shore-erosion prevention.

(14) Include in the biennial budget the cost of performing the additional functions indicated above.

(15) Initiate, plan, study, and execute a long-range floodplain management program for the promotion of health, safety, and welfare of the

public. In carrying out the purposes of this subsection, the primary responsibility of floodplain management rests with the local levels of government and it is, therefore, the policy of this State and of this Department to provide guidance, coordination, and other means of assistance, along with the other agencies of this State and with the local levels of government, to effectuate adequate floodplain management programs.

(b1) The Department is directed to pursue an active educational program of floodplain management measures, to include in each biennial report a statement of flood damages, location where floodplain management is desirable, and suggested legislation, if deemed desirable, and within its capacities to provide advice and assistance to State agencies and local levels of government.

(c) Repealed by Session Laws 1961, c. 315.

(d) Investigation of Coasts, Ports and Waterways of State. — The Department is designated as the official State agency to investigate and cause investigations to be made of the coasts, ports and waterways of North Carolina and to cooperate with agencies of the federal and State government and other political subdivisions in making such investigations. The provisions of this section shall not be construed as in any way interfering with the powers and duties of the Utilities Commission, relating to the acquiring of rights-of-way for the Intra-Coastal Waterway; or to authorize the Department to represent the State in connection with such duties.

(e) Repealed by Session Laws 1998-129, s. 1, effective January 1, 2000.

(f) Samples of Cuttings to Be Furnished the Department When Requested. — Every person, firm or corporation engaged in the business of drilling, boring, coring or constructing wells in any manner by the use of power machinery shall furnish the Department samples of cuttings from such depths as the Department may require from all wells constructed by such person, firm or corporation, when such samples are requested by the Department. The Department shall bear the expense of delivering such samples. The Department shall, after an analysis of the samples submitted, furnish a copy of such analysis to the owner of the property on which the well was constructed; the Department shall not report the results of any such analysis to any other person whatsoever until the person legally authorized to do so authorizes in writing the release of the results of the analysis.

(g) Reports of Each Well Required. — Every person, firm or corporation engaged in the business of drilling, boring, coring, or constructing wells with power machinery within the State of North Carolina shall, within 30 days of the completion of each well, report to the Department on forms furnished by the Department the location, size, depth, number of feet of casing used, method of finishing, and formation log information of each such well. In addition such person, firm or corporation shall report any tests made of each such well including the method of testing, length of test, draw-down in feet and yield in gallons per minute. The person, firm or corporation making such report to the Department shall at the time such report is made also furnish a copy thereof to the owner of the property on which the well was constructed.

(h) Drilling for Petroleum and Minerals Excepted. — The provisions of this Article shall not apply to drillings for petroleum and minerals.

(i) Penalty for Violation. — Any person violating the provisions of subsections (e), (f) and (g) of G.S. 143-355 shall be guilty of a Class 3 misdemeanor and, upon conviction, shall only be punished by a fine of fifty dollars ($50.00). Each violation shall constitute a separate offense.

(j) Miscellaneous Duties. — The Department shall make investigations of water supplies and water powers, prepare and maintain a general inventory of the water resources of the State and take such measures as it may consider necessary to promote their development; and to supervise, guide, and control the performance of the duties set forth in subsection (b) of this section and to hold hearings with regard thereto. In connection with administration of the well-drilling law the Department may prepare analyses of well cuttings for mineral and petroleum content.

(k) Water Use Information. — Any person using, withdrawing, diverting or obtaining water from surface streams, lakes and underground water sources shall, upon the request of the Department, file a monthly report with the Department showing the amount of water used, withdrawn, diverted or obtained from such sources. Such report shall be on a form supplied by the Department and shall show the identification of the water well or other withdrawal facility, location, withdrawal rate (measured in gallons per minute), and total gallons withdrawn during the month. Reports required to be filed under this subsection shall be filed on or before the fifteenth day of the month succeeding the month during which the using, withdrawing, diverting or obtaining water required to be reported occurred. This subsection does not apply to withdrawals or uses by individuals or families for household, livestock, or gardens. All reports required under this subsection are provided solely for the purpose of the Department. Within the meaning of this subsection the term "person" means any and all persons, including individuals, firms, partnerships, associations, public or private institutions, municipalities or political subdivisions, governmental agencies, and private or public corporations organized or existing under the laws of this State or any other state or country. In the event of extreme or exceptional drought or other water shortage, the Department may require each local government water system and each large community water system in the affected area to report the amount of water used, withdrawn, diverted, or obtained on a weekly basis and may require the reporting of additional information necessary to assess and manage the drought or water shortage.

(*l*) Local Water Supply Plans. — Each unit of local government that provides public water service or that plans to provide public water service and each large community water system shall, either individually or together with other units of local government and large community water systems, prepare a local water supply plan and submit it to the Department for approval. The Department shall provide technical assistance with the preparation of plans to units of local government and large community water systems upon request and to the extent that the Department has resources available to provide assistance. At a minimum, each unit of local government and large community water system shall include in local water supply plans all information that is readily available to it. Plans shall include present and projected population, industrial development, and water use within the service area; present and future water supplies; an estimate of the technical assistance that may be needed at the local level to address projected water needs; current and future water conservation and water reuse programs; a description of how the local government or large community water system will respond to drought and other water shortage emergencies and continue to meet essential public water supply needs during the emergency; and any other related information as the Department may require in the preparation of a State water supply plan. Local plans shall be revised to reflect changes in relevant data and projections at least once each five years unless the Department requests more frequent revisions. The revised plan shall include the current and anticipated reliance by the local government unit or large community water system on surface water transfers as defined by G.S. 143-215.22G. Local plans and revised plans shall be submitted to the Department once they have been approved by each unit of local government and large community water system that participated in the preparation of the plan.

(m) In order to assure the availability of adequate supplies of good quality water to protect the public health and to support desirable economic growth, the Department shall develop a State water supply plan. The State water supply plan shall include the information and projections required to be included in local plans, a summary of water conservation and water reuse programs described in local plans, a summary of the technical assistance needs indicated by local plans, and shall indicate the extent to which the various local plans are compatible. The State plan shall identify potential conflicts among the various local plans and ways in which local water supply programs could be better coordinated.

(n) The Department of Environment and Natural Resources shall report to the Environmental Review Commission on the implementation of this section and the development of the State water supply plan on or before 1 September of each year. (1959, c. 779, s. 3; 1961, c. 315; 1967, c. 1069, ss. 1-3; c. 1070, s. 1; c. 1071, ss. 3, 4; c. 1117, s. 1; 1973, c. 1262, ss. 23, 28, 86; 1977, c. 771, s. 4; 1981, c. 514, ss. 2, 3; 1989, c. 603, s. 1; 1993, c. 513, s. 7(a); c. 539, s. 1034; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 509, s. 85; 1997-358, ss. 5, 6; 1998-129, s. 1; 1998-168, s. 5; 2001-452, s. 2.7; 2002-167, ss. 1, 2; 2003-387, s. 1; 2008-143, s. 7.)

**Editor's Note.** — Session Laws 2001-452, s. 1.2, effective October 28, 2001, repealed Session Laws 1989, c. 603, s. 3, as amended by Session Laws 1989, c. 727, s. 222, and Session Laws 1991 (Reg. Sess., 1992), c. 990, s. 3, which had provided for the Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] to report on an annual basis to the Environmental Review Commission as to progress in the implementation of the 1989 act."

Session Laws 1998-168, s. 7 provides that by 1 January 1999, each unit of local government that provides public water service shall prepare a local water supply plan and submit it to the Department in compliance with G.S. 143-355(l) and by 1 January 2000, the Department of Environment and Natural Resources shall develop a State water supply plan in compliance with G.S. 143-355(m). It further provides that the Department shall identify in the plan any area in the State that appears to face existing or future water shortages, conflicts among water users, or depletion of water resources and shall review the plan at least every five years thereafter to determine whether any other areas are facing these problems within a 10-year period from the date of review.

Session Laws 2008-143, s. 20, provides: "Nothing in this act shall be construed to expand or limit the authority of a unit of government or public water supply system to regulate water use from a well located outside of its jurisdiction, a well not connected to its water system, or any other private well."

**Effect of Amendments.** — Session Laws 2008-143, s. 7, effective July 31, 2008, in subsection (k), added the last sentence; and in subsection (*l*), substituted "Local Water Supply Plans. —" for "For purposes of this subsection, 'community water system' means a community water system, as defined in G.S. 130A-313(10), that regularly serves 1,000 or more service connections or 3,000 or more individuals" at the beginning, inserted "for approval" at the end of the first sentence, and inserted "large" preceding "community water system" each time that it appears.

## § 143-355.1. Drought Management Advisory Council; drought advisories.

(a) The Department shall establish a Drought Management Advisory Council. The purposes of the Council are:

(1) To improve coordination among local, State, and federal agencies; public water systems, as defined in G.S. 130A-313(10); and water users to improve the management and mitigation of the harmful effects of drought.

(2) To provide consistent and accurate information on drought conditions in the State to the U.S. Drought Monitor, the Environmental Management Commission, the Secretary, the Environmental Review Commission, and the public.

(b) The Department shall invite each of the following organizations to designate a representative to serve on the Council:

(1) North Carolina Cooperative Extension Service.
(2) State Climate Office at North Carolina State University.
(3) Public Staff of the Utilities Commission.
(4) Wildlife Resources Commission.
(5) Department of Agriculture and Consumer Services.
(6) Department of Commerce.
(7) Department of Crime Control and Public Safety.
(8) National Weather Service of the National Oceanic and Atmospheric Administration of the United States Department of Commerce.
(9) United States Geological Survey of the United States Department of the Interior.
(10) United States Army Corps of Engineers.
(11) United States Department of Agriculture.
(12) Federal Emergency Management Agency of the United States Department of Homeland Security.

(b1) Representatives designated under subsection (b) of this section shall have expertise or responsibility in meteorology, groundwater and surface water hydrology, water system operation and management, reservoir management, emergency response, or another subject area related to assessment and management of drought impacts.

(c) The Department shall also invite other agencies and organizations that represent water users, including local governments, agriculture, agribusiness, forestry, manufacturing, investor-owned water utilities regulated by the North Carolina Utilities Commission, and others as appropriate, to participate in the work of the Council with respect to particular drought related issues.

(d) The Department shall designate an employee of the Department to serve as Chair of the Council. The Council shall meet at least once in each calendar year in order to maintain appropriate agency readiness and participation. In addition, the Council shall meet on the call of the Chair to respond to drought conditions. The provisions of Article 33C of this Chapter apply to meetings of the Council.

(e) In order to provide accurate and consistent information to assist State agencies, local governments, and other water users in taking appropriate drought response actions, the Council may issue drought advisories that designate:

(1) Specific areas of the State in which drought conditions are impending.
(2) Specific areas of the State that are suffering from drought conditions.
(3) The level of severity of drought conditions based on the drought categories used in the U.S. Drought Monitor or the drought designation approved by the Secretary under subsection (f) of this section.

(f) Drought designations by the U.S. Drought Monitor shall be the default designations for drought advisories issued under subsection (e) of this section. The Council shall publish those drought designations for each county. If more than one drought designation applies to a county, the drought designation for the county shall be the highest drought designation that applies to at least twenty-five percent (25%) of the land area of the county. The Council may recommend a drought designation for a county that is different from the designation based on the U.S. Drought Monitor if the U.S. Drought Monitor does not accurately reflect localized conditions because of differences in scale or because the U.S. Drought Monitor does not consider one or more of the indicators of drought identified in this subsection. In recommending a drought designation that differs from the U.S. Drought Monitor designation, the Council shall consider stream flows, ground water levels, the amount of water stored in reservoirs, weather forecasts, the time of year, and other factors that are relevant to determining the location and severity of drought conditions.

(f1) The Secretary shall accept the Council's recommendation to adopt a drought designation for a county that is different from the designation based on the U.S. Drought Monitor if the Secretary finds that the indicators of drought identified by the Council under subsection (f) of this section support the designation recommended by the Council.

(g) The Council shall report on the implementation of this section to the Secretary, the Governor, and the Environmental Review Commission no later than 1 October of each year. The report shall include a review of drought advisories issued by the Council and any recommendations to improve coordination among local, State, and federal agencies; public water systems; and water users to improve the management and mitigation of the harmful effects of drought. (2003-387, s. 2; 2004-195, s. 2.5; 2008-143, s. 16.)

**Editor's Note.** — Session Laws 2008-143, s. 20, provides: "Nothing in this act shall be construed to expand or limit the authority of a unit of government or public water supply system to regulate water use from a well located outside of its jurisdiction, a well not connected to its water system, or any other private well."

**Effect of Amendments.** — Session Laws 2008-143, s. 16, effective July 31, 2008, rewrote subdivision (a)(2); added subsection (b1); in subsection (c), substituted "investor-owned water utilities regulated by the North Carolina Utilities Commission, and others as appropriate" for "and others as appropriate, to designate a representative to serve on the Council or"; in the introductory language of subsection (e), substituted "State agencies, local governments" for "local governments"; in subdivision (e)(3), added "based on the drought categories used in the U.S. Drought Monitor or the drought designation approved by the Secretary under subsection (f) of this section"; rewrote subsection (f); and added subsection (f1).

## § 143-355.2. Water conservation measures for drought.

(a) Each unit of local government that provides public water service and each large community water system shall develop and implement water conservation measures to respond to drought or other water shortage conditions as provided in this section. Pursuant to G.S. 143-355(*l*), water conservation measures to respond to drought or other water shortage conditions shall be set out in a water shortage response plan and submitted to the Department for review and approval. The Department shall approve the water shortage response plan if the plan meets all of the following criteria:

(1) The plan includes tiered levels of water conservation measures or other response actions based on the severity of water shortage conditions.

(2) Each tier of water conservation measures shall be based on increased severity of drought or water shortage conditions and will result in more stringent water conservation measures.

(3) All other requirements of rules adopted by the Commission pursuant to S.L. 2002-167.

(4) Does not contain any provision that meters or regulates private drinking water wells, as defined in G.S. 87-85.

(b) The Department may require a unit of local government that provides public water service or a large community water system to implement the more stringent water conservation measures described in subsection (d) of this section if the Department makes written findings that any county, as determined by subsection (e) of this section, in which the source of water for the public water system operated by the unit of local government or by a large community water system is in:

(1) Severe, extreme, or exceptional drought, and the Department finds all of the following:

a. The unit of local government that provides water service or large community water system has not begun implementation of any level of water conservation measures set out in the water shortage response plan.

b. Implementation of measures is necessary to minimize the harmful impacts of drought on public health, safety, and the environment, including the potential impacts of drought or other water shortage on interconnected water systems and other water systems withdrawing from the same water source, or

(2) Extreme or exceptional drought, and the Department finds that the unit of local government that provides water service or large community water system has implemented the measures required under the water shortage response plan for the appropriate tier of water conservation measure for 30 days or more and that implementation of the measures required has not reduced water use in an amount sufficient to minimize the harmful impacts of drought on public health, safety, and the environment, including the potential impact of drought or other water shortage on interconnected water systems and other water systems withdrawing from the same water source.

(c) In making the findings required under subsection (b) of this section, the Department shall consider the:

(1) Hydrological drought conditions.

(2) Drought forecast.

(3) Reductions in water use achieved under water conservation measures in effect.

(4) Availability of other water supply sources and other indicators of the extent and severity of drought impacts.

(5) Economic impacts on the community to implement more stringent water conservation measures.

(6) Conservation measures of all registered water withdrawals within the same 8 digit hydrologic unit code established by the U.S. Geological Survey to the extent the Department is able to document those measures.

(d) Based on the findings required under subsection (b) of this section, the Department may require the unit of local government that provides public water service or the large community water system to begin implementation of its plan or to implement the next tier of water shortage response measures. If, after consultation with the unit of local government or the large community water system, the Department makes a written finding that the next tier of measures set out in the plan, together with any other reasonable steps that may be available to reduce water use, will not reduce water use in an amount sufficient to minimize the harmful impacts of drought on public health, safety, and the environment, including the potential impact of drought or other water shortage on interconnected water systems and other water systems drawing from the same water source, then the Department may require implementation of the tier that is two levels more stringent than the tier being implemented.

(e) For purposes of this section, the drought designation for an area shall be the U.S. Drought Monitor designation for the county in which the water source is located as published by the Drought Management Advisory Council. The Secretary may approve a county drought designation that is different from the U.S. Drought Monitor designation pursuant to G.S. 143-355.1(f1). If the water source is located in more than one county and the counties have different drought designations, the Council shall recommend to the Secretary the drought designation to be applied to water systems that withdraw water from the water source. The recommendation of the Council shall be based on the drought indicators identified in G.S. 143-355.1(f) as applied to the water source.

(f) A unit of local government that provides public water service or a large community water system that does not have a water shortage response plan shall implement the default water conservation measures for extreme and exceptional drought set out in the rules adopted by the Commission pursuant to S.L. 2002-167.

(g) A unit of local government that provides water service or a large community water system that does not have an approved water shortage response plan shall implement the default water conservation measures specified in subsection (f) of this section within 10 days following a drought designation that requires implementation of water conservation measures. A water shortage response plan is presumed to be approved until the Department notifies the unit of local government or large community water system that the plan has been disapproved. A unit of local government that provides public water service and a large community water system shall be deemed to be in compliance with this section if, within 10 days after water shortage conditions identified in the plan require implementation of water conservation measures, the water system begins implementation of the water conservation measures required by the plan.

(h) Water conservation measures imposed by a unit of local government that provides public water service or by a large community water system may be more stringent than the minimum water conservation measures required under this section.

(h1) A trade or professional organization representing commercial car washes may establish a voluntary water conservation and water use efficiency certification program to encourage and promote the use of year-round water conservation and water use efficiency measures as follows:

(1) A water conservation and water use efficiency certification may only be issued to a person that demonstrates that water use from its water consuming processes is reduced by and maintained at twenty percent (20%) or more below the yearly average water use for the calendar year preceding application for certification. In order to receive and maintain certification, a person must have its facility inspected on an annual basis by a licensed plumbing contractor who will confirm that the applicant is in compliance with the standards of the certification program.

(2) A unit of local government that provides public water service or a large community water system shall recognize and credit a commercial car wash that has met the standards of a certification program for at least six months prior to the most recent extreme drought designation for water conservation achieved under the program. To the extent that a tiered response stage in the water shortage response plan requires commercial or industrial users to implement a percentage reduction in use, a car wash certified under a program shall be credited with the percentage reduction achieved by measures implemented under the program. Car washes certified under a program shall not be required to reduce consumption more than any other class of commercial or industrial water users during a water shortage emergency.

(3) To qualify as an approved water conservation and water use efficiency certification program, the Department of Environment and Natural Resources shall determine that the program effectively utilizes industry best management practices for the efficient use of water and achieves year-round reductions in water use. Best management practices may include, but are not limited to, recycling, reclaiming, or reusing a portion of the water in the consuming processes. If a unit of local government that provides public water service or a large community water system determines that a person certified under such a program is not complying with the terms and standards of the certification program, it may refuse to recognize and credit the conservation measures.

(i) A unit of local government that provides public water service and a large community water system shall report that the water system has begun implementation of water conservation measures set out in the water system's water shortage response plan or the default water conservation measures to the Department within 72 hours after beginning implementation.

(j) This section shall not be construed to authorize or require the implementation of water conservation management measures that conflict with or are superseded by the provisions of any order of a federal or State court or administrative agency. any interstate agreement governing the allocation of water to which the State is a party, or any license for a hydroelectric generating facility issued by the Federal Energy Regulatory Commission; including, without limitation, any protocol or subsidiary agreement that may be part of or incorporated in any such order, interstate agreement, or operating license. (2008-143, s. 5; 2009-480, s. 1.)

**Editor's Note.** — Session Laws 2008-143, s. 21, which made this section effective July 31, 2008, provides in part: "Water Shortage Response Plans revised to comply with G.S. 143-355.2, as enacted by Section 5 of this act, shall be submitted no later than 1 July 2009."

Session Laws 2008-143, s. 20, provides: "Nothing in this act shall be construed to expand or limit the authority of a unit of government or public water supply system to regulate water use from a well located outside of its jurisdiction, a well not connected to its water system, or any other private well."

The preamble to Session Laws 2009-480, provides: "AN ACT to promote voluntary, year-round water conservation and water use efficiency measures by commercial Car washes.

"Whereas, North Carolina recognizes that water is our most basic and precious natural resource; and

"Whereas, North Carolina has experienced extreme drought in the past several years and expects to experience extreme drought in the future; and

"Whereas, the efficient use of water is of utmost importance; and

"Whereas, the best and least expensive source of 'new' water is improved efficiency in water use; and

"Whereas, North Carolina should reward and promote best management practices and leadership efforts in water efficiency; and

"Whereas, there are voluntary efforts underway that encourage and promote water use efficiency; and

"Whereas, there are commercial car washes that are currently utilizing water conservation measures to the maximum extent possible; Now, therefore."

**Effect of Amendments.** — Session Laws 2009-480, s. 1, effective January 1, 2010, added subsection (h1).

## § 143-355.3. Water shortage emergency powers.

(a) Declaration of Water Shortage Emergency. — If, after consultation with the affected water system and the unit of local government with jurisdiction over the area served by the water system, the Secretary determines that the needs of human consumption, necessary sanitation, and public safety require emergency action, the Secretary shall provide the Governor with written findings setting out the basis for declaration of a water shortage emergency. The Governor shall have the authority to declare a water shortage emergency in the area affected by the water shortage emergency, which may include both the water system experiencing a water shortage emergency and the area served by a water system required under subdivision (1) of subsection (b) of this section to provide water in response to the water shortage emergency. No emergency period shall exceed 30 days, but the Governor may declare successive emergencies based upon the written findings of the Secretary.

(b) Water Shortage Emergency Powers and Duties. — Whenever, pursuant to this Article, the Governor declares the existence of a water shortage emergency within a particular area of the State, the Secretary shall have the powers and duties set out in subdivisions (1), (2), and (3) of this subsection. These powers may only be exercised within the designated water shortage emergency area, after the Secretary has consulted with the affected water systems and determined that the water shortage emergency cannot be effectively managed in the absence of exercising these powers, and only for the period of the water shortage emergency. Under these circumstances, the Secretary has the power and duty to:

(1) Require any water system that has water supply in excess of that required to meet the essential water uses of its customers to provide water to a water system experiencing a water shortage emergency. The Secretary shall give preference to diversion of water from a water system within the same river basin as the water system that is experiencing a water shortage emergency. A diversion of water that requires a certificate under G.S. 143-215.22L shall meet the requirements of that section. The amount required to be supplied shall be limited to the amount necessary to supply essential water uses within the receiving system. The required diversion of waters shall cease upon the termination of the water shortage emergency.

(2) Adopt rules governing the conservation and use of water within the water shortage emergency area as shall be necessary to maintain essential water use within the water shortage emergency area. Before such rules and regulations shall become effective, they shall be published in two consecutive issues of a daily newspaper generally circulated in the emergency area.

(3) Adopt rules governing conservation and use of water within the service area of the water system from which water is being diverted as shall be necessary to maintain essential water uses in the system while supplying water to the water shortage emergency area.

(c) Temporary Rights-of-Way. — A water system that is affected by a water shortage emergency is authorized to lay necessary temporary waterlines for the period of a declared water shortage emergency across, under, or above any and all properties to connect the water system experiencing a water shortage emergency to an emergency intake in a new water source or to interconnect the water system to a supplying water or wastewater system without first acquiring right-of-way. The Department shall expedite the approval of temporary waterlines needed to provide emergency water supply under this section. Temporary waterlines installed under this section shall be removed within 90 days following the end of the emergency period except that the Secretary may, for good cause, authorize a 30-day extension.

(d) Compensation for Water Allocated During Water Shortage Emergency and Temporary Rights-of-Way. — Whenever the Secretary, pursuant to this Article, has ordered any diversion of water, the receiving water or wastewater system shall reimburse the supplying water system for the cost of the water. The cost charged to the receiving system shall not exceed one hundred ten percent (110%) of the retail cost that would be charged to a customer of the supplying system for an equivalent amount of water and any additional costs incurred by the supplying system for alterations to its infrastructure or water treatment to effectuate the diversion except as provided under an interlocal agreement. Unless liability is otherwise assigned in an interlocal agreement, the receiving water system shall be liable to all persons suffering any loss or damage caused by or resulting from the laying of temporary waterlines to effectuate the diversion. Within 10 days of placing the temporary waterlines, the water system that is liable shall institute a civil action in accordance with the procedures set out under Article 9 of Chapter 136 of the General Statutes to compensate the property owners for any taking caused by or resulting from the laying of temporary waterlines, with the water system that is liable having the role of the Department of Transportation and the governing board of the water system that is liable having the role of the Secretary of Transportation under Article 9 of Chapter 136 of the General Statutes. The placing of temporary waterlines pursuant to this section is not subject to the provisions of G.S. 153A-15.

(e) This section shall not be construed to authorize or require any actions that conflict with or are superseded by the provisions of any order of a federal or State court or administrative agency, any interstate agreement governing the allocation of water to which the State is a party, or any license for a hydroelectric generating facility issued by the Federal Energy Regulatory Commission; including, without limitation, any protocol or subsidiary agreement that may be part of or incorporated in any such order, interstate agreement, or operating license. (2008-143, s. 8.)

**Editor's Note.** — Session Laws 2008-143, s. 21, made this section effective July 31, 2008.

Session Laws 2008-143, s. 20, provides: "Nothing in this act shall be construed to expand or limit the authority of a unit of government or public water supply system to regulate water use from a well located outside of its jurisdiction, a well not connected to its water system, or any other private well."

## § 143-355.4. Water system efficiency.

(a) Local government water systems and large community water systems shall require separate meters for new in-ground irrigation systems that are connected to their systems.

(b) To be eligible for State water infrastructure funds from the Drinking Water Revolving Fund or the Drinking Water Reserve Fund or any other grant or loan of funds allocated by the General Assembly whether the allocation of funds is to a State agency or to a nonprofit organization for the purpose of extending waterlines or expanding water treatment capacity, a local government or large community water system must demonstrate that the system:

(1) Has established a water rate structure that is adequate to pay the cost of maintaining, repairing, and operating the system, including reserves for payment of principal and interest on indebtedness incurred for maintenance or improvement of the water system during periods of normal use and periods of reduced water use due to implementation of water conservation measures. The funding agency shall apply guidelines developed by the State Water Infrastructure Commission in determining the adequacy of the water rate structure to support operation and maintenance of the system.

(2) Has implemented a leak detection and repair program.

(3) Has an approved water supply plan pursuant to G.S. 143-355.

(4) Meters all water use except for water use that is impractical to meter, including, but not limited to, use of water for firefighting and to flush waterlines.

(5) Does not use a rate structure that gives residential water customers a lower per-unit water rate as water use increases.

(6) Has evaluated the extent to which the future water needs of the water system can be met by reclaimed water.

(7) Has implemented a consumer education program that emphasizes the importance of water conservation. (2008-143, s. 9.)

**Editor's Note.** — Session Laws 2008-143, s. 21, made this section effective July 1, 2009.

Session Laws 2008-143, s. 18, provides: "The Department of Environment and Natural Resources shall develop recommendations, in consultation with the technical working group that consists of scientists from the University of North Carolina and industry experts, for water efficiency standards for water-using fixtures in residential and commercial building and in-ground irrigation systems. The Department shall also develop recommendations for efficient metering of water use by local government and large community water systems. The Department shall submit its recommendations to the Commissioner of Insurance, the Chair of the Building Code Council, and the Environmental Review Commission no later than January 1, 2009."

Session Laws 2008-143, s. 20, provides: "Nothing in this act shall be construed to expand or limit the authority of a unit of government or public water supply system to regulate water use from a well located outside of its jurisdiction, a well not connected to its water system, or any other private well.”

## § 143-355.5. Water reuse; policy; rule making.

(a) Water Reuse Policy. — It is the public policy of the State that the reuse of treated wastewater or reclaimed water is critical to meeting the existing and future water supply needs of the State. The General Assembly finds that reclaimed water systems permitted and operated under G.S. 143-215.1(d2) in an approved wastewater reuse program can provide water for many beneficial purposes in a way that is both environmentally acceptable and protective of public health.

(b) Rule Making. — The Commission shall encourage and promote safe and beneficial reuse of treated wastewater as an alternative to surface water discharge. The Commission shall adopt rules to:

(1) Identify acceptable uses of reclaimed water, including toilet flushing, fire protection, decorative water features, and landscape irrigation.

(2) Facilitate the permitting of reclaimed water systems.

(3) Establish standards for reclaimed water systems that are adequate to prevent the direct distribution of reclaimed water as potable water. (2008-143, s. 10.)

**Editor's Note.** — Session Laws 2008-143, s. 21, made this section effective July 31, 2008.

Session Laws 2008-143, s. 21, made Session Laws 2008-143, s. 14, which is noted below, effective July 31, 2008, and provided in part: “Subsection (c) of Section 14 of this act [2008-143] expireswhen rules adopted pursuant to subsection (b) of Section 14 of this act become effective.”

Session Laws 2008-143, s. 14, provides: “(a) For purposes of this section, ‘gray water’ means wastewater removed from household wash basins, bathtubs, and showers.

“(b) The Commission for Health Services shall adopt rules to authorize the use of gray water during periods of drought to hand water trees, shrubs, and inedible plants on single-family residential property. The rules shall encourage the use of gray water as provided in this section while protecting public health, safety, welfare, and the environment. In developing the rules, the Commission shall review the provisions set out in subsection (c) of this section.

“(c) Notwithstanding G.S. 130A-335(a), untreated gray water may be used in periods of drought to hand water trees, shrubs, and inedible plants on single-family residential property under the following conditions:

“(1) Gray water shall be applied as soon as practicable. Untreated gray water should not be stored for later use.

“(2) Gray water containing hazardous chemicals including, but not limited to, residue from solvents shall not be used.

“(3) Use of untreated gray water is restricted to the residential property where the gray water originates. Untreated gray water shall not be allowed to run off onto adjoining property, roadways, or into drainage features such as ditches and storm drains.

“(4) Untreated gray water shall be applied using buckets, watering cans, or other handheld containers. Gray water may not be used in an irrigation system unless the gray water has been treated in accordance with standards set out in the State Plumbing Code.

“(5) Gray water shall not be applied closer than 100 feet to surface waters or a water supply well.”

Session Laws 2008-143, s. 20, provides: “Nothing in this act shall be construed to expand or limit the authority of a unit of government or public water supply system to regulate water use from a well located outside of its jurisdiction, a well not connected to its water system, or any other private well.”

## § 143-355.6. Enforcement.

(a) The Secretary may assess a civil penalty of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) against any person who:

(1) Fails to report water use or other information required under G.S. 143-355(k).

(2) Fails to act in accordance with the terms, conditions, or requirements of an order issued by the Secretary under G.S. 143-355.3.

(3) Violates any provision of this Article or any rule adopted by the Commission, the Department, or the Secretary implementing this Article.

(b) For each willful action or failure to act for which a penalty may be assessed under this section, the Secretary may consider each day the action or inaction continues after notice is given of the violation as a separate violation. A separate penalty may be assessed for each separate violation.

(c) The Secretary may assess a civil penalty of not more than ten thousand dollars ($10,000) per month against a unit of local government that provides public water service or a large community water system that fails to implement the water conservation measures set out in the water shortage response plan approved by the Department under G.S. 143-355.2, measures required by the Department under subsections (b) and (d) of G.S. 143-355.2, or the default measures required under rules adopted by the Commission under S.L. 2002-167. The amount of the civil penalty shall be based on the factors set out in G.S. 143B-282.1(b). The Secretary may remit a civil penalty based on the factors set out in G.S. 143B-282.1(c)(1).

(d) The violation of emergency water conservation rules adopted by the Secretary pursuant to G.S. 143-355.3(b) is a Class 1 misdemeanor.

(e) The Secretary shall notify any person assessed a civil penalty of the assessment and the specific reasons for the assessment by registered or certified mail or by any means authorized by G.S. 1A-1, Rule 4. Contested case petitions shall be filed within 30 days of receipt of the notice of assessment. (2008-143, s. 11.)

**Editor's Note.** — Session Laws 2008-143, s. 21, made this section effective December 1, 2008, and applicable to offenses committed on or after that date.

Session Laws 2008-143, s. 20, provides: "Nothing in this act shall be construed to expand or limit the authority of a unit of government or public water supply system to regulate water use from a well located outside of its jurisdiction, a well not connected to its water system, or any other private well."

### §§ 143-356, 143-357: Repealed by Session Laws 1983, c. 222, ss. 1, 2.

### § 143-358. Cooperation of State officials and agencies.

All State agencies and officials shall cooperate with and assist the Commission in enforcing and carrying out the provisions of this Article and rules adopted by the Commission under this Article. (1959, c. 779, s. 6; 1973, c. 1262, s. 23; 1991, c. 342, s. 15(b); 1991 (Reg. Sess., 1992), c. 890, s. 19.)

### § 143-359: Repealed by Session Laws 2001-452, s. 1.1, effective October 28, 2001.

## ARTICLE 39.

## *U.S.S. North Carolina Battleship Commission.*

### §§ 143-360 through 143-362: Repealed by Session Laws 1977, c. 741, s. 5.

**Cross References.** — For present provisions as to the U.S.S. North Carolina Battleship Commission, see G.S. 143B-73 through 143B-74.3. As to transfer of functions, etc., to Department of Cultural Resources, see G.S. 143B-51.

**§§ 143-363 through 143-365:** Repealed by Session Laws 1973, c. 476, s. 59.

**§ 143-366:** Recodified as § 143B-73.1 by Session Laws 1977, c. 741, s. 8.

**§§ 143-367 through 143-369:** Recodified as §§ 143B-74.1 through 143B-74.3 by Session Laws 1977, c. 741, s. 8.

## ARTICLE 39A.

## *Frying Pan Lightship Marine Museum Commission.*

**§§ 143-369.1 through 143-369.3:** Repealed by Session Laws 1973, c. 476, s. 116.

**Cross References.** — As to transfer of functions of the Commission to the Department of Cultural Resources, see G.S. 143B-51.

## ARTICLE 40.

## *Advisory Commission for State Museum of Natural History.*

**§§ 143-370 through 143-373:** Recodified as §§ 143B-344.18 through 143B-344.21 by Session Laws 1993, c. 561, s. 116.

## ARTICLE 41.

## *Science and Technology Research Center.*

**§§ 143-374 through 143-377:** Recodified as §§ 143B-442 through 143B-445 by Session Laws 1977, c. 198, s. 26.

## ARTICLE 42.

## *Board of Science and Technology.*

**§§ 143-378 through 143-383:** Repealed by Session Laws 1973, c. 1262, s. 79.

**Cross References.** — As to the North Carolina Board of Science and Technology, see now G.S. 90-210.104, 90-210.105.

## ARTICLE 43.

## *North Carolina Seashore Commission.*

**§§ 143-384 through 143-391:** Repealed by Session Laws 1969, c. 1143, s. 1.

## ARTICLE 44.

## *North Carolina Traffic Safety Authority.*

**§§ 143-392 through 143-395:** Repealed by Session Laws 1981, c. 90, s. 1.

## ARTICLE 45.

## *North Carolina American Revolution Bicentennial Commission.*

**§§ 143-396 through 143-399:** Repealed by Session Laws 1973, c. 476, s. 70.

## ARTICLE 46.

## *Governor's Committee on Law and Order.*

**§§ 143-400 through 143-402.2:** Repealed by Session Laws 1969, c. 1145, s. 4.

**Cross References.** — As to transfer of functions, property, etc., of the Governor's Committee on Law and Order to the Department of Local Affairs, see G.S. 143-326.

## ARTICLE 47.

## *Promotion of Arts.*

### § 143-403. "Arts" defined.

The term "arts" includes, but is not limited to: music, dance, drama, creative writing, architecture and allied fields, painting, sculpture, photography, crafts, television, radio, and the execution and exhibition of such major art forms. (1967, c. 164, s. 1; 1973, c. 476, s. 79.)

**Cross References.** — As to the North Carolina Arts Council, see G.S. 143B-87 and 143B-88.

**§§ 143-404, 143-405:** Repealed by Session Laws 1973, c. 476, s. 79.

## § 143-406. Duties of Department of Cultural Resources.

The Department of Cultural Resources shall take action to carry out the following purposes as funds and staff permit:

(1) Study, collect, maintain, and otherwise disseminate factual data and pertinent information relative to the arts;

(2) Assist local organizations and the community at large with needs, resources and opportunities in the arts;

(3) Serve as an agency through which various public and nonpublic organizations concerned with the arts can exchange information, coordinate programs and stimulate joint endeavors;

(4) Identify research needs, encourage research and assist in obtaining funds for research;

(5) Assist in bringing the highest obtainable quality in the arts to the State; promote the maximum opportunity for the people to experience, enjoy, and profit from those arts.

The Department of Cultural Resources shall, in addition to such other recommendations, studies and plans as it may submit from time to time, submit a biennial report of progress to the Governor, and thus, to the General Assembly. (1967, c. 164, s. 4; 1973, c. 476, s. 79.)

## § 143-407. Appropriations; funds.

In addition to the appropriations out of the general fund of the State, the Department may accept gifts, bequests, devises, matching funds, or other considerations for use in promoting the arts. (1967, c. 164, s. 5; 1973, c. 476, s. 79.)

## § 143-407.1. Composer laureate.

(a) The Governor of North Carolina may appoint a distinguished living composer as "Composer-Laureate for the State of North Carolina."

(b) Any person appointed "Composer-Laureate for the State of North Carolina" shall be appointed for life but may voluntarily resign at any time. (1991, c. 56, ss. 1, 2.)

**Editor's Note.** — The enacting clause of this section reads: "Whereas music has had an important place in North Carolina culture; and

Whereas this State has produced many composers of music of lasting value; and

Whereas, there is a need to recognize the contributions of these composers; Now, therefore."

The State also has a poet laureate, appointed under the authority of Session Laws 1935, Joint Resolutions 60, effective May 11, 1935, which reads: "That the Governor of this State be and he is hereby authorized and empowered to name and appoint some outstanding and distinguished man of letters as Poet-Laureate for the State of North Carolina."

Resolutions are not normally codified.

**§ 143-408:** Repealed by Session Laws 1973, c. 476, s. 79.

## ARTICLE 47A.

## *Art Works in State Buildings.*

**§§ 143-408.1 through 143-408.7:** Repealed by Session Laws 1995, c. 324, s. 12.2.

**Cross References.** — As to legislation regarding construction of juvenile facilities, see the editor's note under G.S. 7B-1500.

## ARTICLE 48.

## *Executive Mansion.*

### § 143-409: Repealed by Session Laws 1973, c. 476, s. 67.

### § 143-410. Purpose.

The purpose of the Department of Cultural Resources shall be:

(1) To preserve and maintain the Executive Mansion, located at 200 North Blount Street, Raleigh, North Carolina, as a structure having historical significance and value to the State of North Carolina;

(2) To improve the furnishing of the Executive Mansion by encouraging gifts and objects of art, furniture and articles which may have historical value, and to approve major changes in the furnishings of the Mansion;

(3) To recommend to the Department of Administration any major renovations to the Executive Mansion which the Department of Cultural Resources deems necessary to preserve and maintain the structure;

(4) To keep a complete list of all gifts and articles received, together with their history and value; and

(5) To publicize work of the Executive Mansion Fine Arts Committee. (1967, c. 273, s. 2; 1973, c. 476, s. 67.)

**Cross References.** — As to the Executive Mansion Fine Arts Committee, see G.S. 143B-79 and 143B-80.

### § 143-411. Powers of Department of Cultural Resources.

The Department of Cultural Resources is hereby empowered on behalf of the State of North Carolina to receive gifts, contributions of money and objects of art consistent with the purpose for which the Department is created. Title to all gifts, articles and moneys received by the Department shall be vested in the State of North Carolina and shall remain in the custody and control of the Department. The Department is authorized to accept loans of furniture and other objects as, in its discretion, it deems suitable. The Department is empowered to employ clerical assistance on such basis as it may deem reasonable. Provided, however, that the salary of such person shall be paid out of funds the Department has received in the conduct of its work, and it is specifically provided that no other funds belonging to the State of North Carolina shall be used for this purpose. (1967, c. 273, s. 3; 1973, c. 476, s. 67.)

### §§ 143-412 through 143-414: Repealed by Session Laws 1973, c. 476, s. 67.

### § 143-415. Authority, etc., of Department of Administration not affected.

This Article shall not be construed as divesting the Department of Administration of any powers, duties and authority relating to the budget or the operation and maintenance of the Executive Mansion. (1967, c. 273, s. 7.)

## ARTICLE 49.

## *North Carolina Human Relations Commission.*

### §§ 143-416 through 143-422: Repealed by Session Laws 1975, c. 879, s. 36.

**Cross References.** — For present provisions as to the North Carolina Human Relations Commission, see G.S. 143B-391 and 143B-392.

## ARTICLE 49A.

## *Equal Employment Practices.*

### § 143-422.1. Short title.

This Article shall be known and may be cited as the Equal Employment Practices Act. (1977, c. 726, s. 1.)

**Legal Periodicals.** — For survey of 1977 law on employment regulation, see 56 N.C.L. Rev. 854 (1978).

For article, "North Carolina Employment Law After *Coman*: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

For note, "Coman v. Thomas Manufacturing Co.: Recognizing a Public Policy Exception to the At-Will Employment Doctrine," see 68 N.C.L. Rev. 1178 (1990).

For article, "Wrongful Discharge and the North Carolina Equal Employment Practices Act: The Localization of Federal Discrimination Law", see 21 N.C. Cent. L.J. 54 (1995).

#### CASE NOTES

**This Article does not prohibit discrimination within the meaning of 29 U.S.C. § 633(b).** It merely declares that such discrimination is against the "public policy" of North Carolina. Spagnuolo v. Whirlpool Corp., 467 F. Supp. 364 (W.D.N.C. 1979), aff'd in part and rev'd in part, 641 F.2d 1109 (4th Cir. 1981).

**There is no North Carolina statute analogous to Title VII.** Harrison v. Edison Bros. Apparel Stores, 924 F.2d 530 (4th Cir. 1991).

**Effect of Failure to Establish Claim Under Title VII.** — Where former employee, who was a bank branch manager responsible for ensuring that all necessary loan documentation was completed after a loan closing, failed to establish that he was terminated due to race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-2(a) because there was no evidence that the employee was performing satisfactorily when terminated, he was also unable to establish his wrongful termination claim under the North Carolina Equal Employment Practices Act, G.S. 143-422.1 et seq., which applied the same standard of proof. Ellerby v. Branch Banking & Trust Co., — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 26729 (W.D.N.C. Nov. 3, 2005).

**Private Right of Action.** — The North Carolina Equal Employment Practices Act does not provide a plaintiff with a private right of action for intentional discrimination or retaliatory discharge. Mullis v. Mechanics & Farmers Bank, 994 F. Supp. 680 (M.D.N.C. 1997); Ridenhour v. Concord Screen Printers, Inc., 40 F. Supp. 2d 598 (M.D.N.C. 1999).

Although the North Carolina Equal Employment Practices Act (NCEEPA), G.S. 143-422.1 et seq., had been applied to common law claims by North Carolina courts, the courts had not recognized the tort of wrongful constructive discharge, and thus, the employee's claim for wrongful discharge under the NCEEPA was dismissed. Helmstetler v. Borden Chem., Inc., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 13795 (M.D.N.C. June 13, 2002).

Former employee's racial discrimination claim under the North Carolina Equal Employment Practices Act was dismissed by the United States District Court for the Western District of North Carolina, Asheville Division, because the Act did not provide for a private right of action. Hazel v. Med. Action Indus., Inc., 216 F. Supp. 2d 541, 2002 U.S. Dist. LEXIS 16072 (W.D.N.C. 2002).

There is no outlined private right of action under the North Carolina Equal Employment

Practices Act; however, plaintiffs can properly allege a wrongful discharge in violation of public policy, with that public policy being the anti-discrimination policy of the Act. Jackson v. Blue Dolphin Communications of N.C., L.L.C., 226 F. Supp. 2d 785, 2002 U.S. Dist. LEXIS 19337 (W.D.N.C. 2002).

In an action in which an employee filed suit against her employer alleging claims of race discrimination and retaliation in violation of North Carolina's Equal Employment Practices Act (NCEEPA), G.S. 143-422.1 et seq., the court found that because the NCEEPA did not provide a private right of action, the employee could not maintain a claim under it. Addison v. Wal-Mart Stores, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 10778 (M.D.N.C. June 23, 2003).

Plaintiff's wrongful discharge claim failed as a matter of law, because North Carolina did not recognize plaintiff's tort claims under the North Carolina Equal Employment Practices Act, G.S. 143-422.1 et seq., for wrongful constructive discharge or wrongful discharge in retaliation for complaints of sexual harassment. Lowe v. Unifi, Inc., 292 F. Supp. 2d 773, 2003 U.S. Dist. LEXIS 20887 (M.D.N.C. 2003).

Employee's request that a court enjoin defendants, an employer and a corporation, from engaging in future discrimination based on race in the spirit of G.S. 143-422.1 was dismissed because if the court granted the requested relief under G.S. 143-422.1, then the court would have been creating a private cause of action, and such a private cause of action would have contradicted North Carolina law because neither the North Carolina Supreme Court nor the North Carolina Court of Appeals had recognized a private cause of action under G.S. 143-422.1. Roberts v. Wal-Mart Stores, Inc., 503 F. Supp. 2d 787, 2007 U.S. Dist. LEXIS 64857 (E.D.N.C. 2007).

**Plaintiff in Federal Age Discrimination Suit Need Not Seek Relief from Human Relations Council (now Commission) as Jurisdictional Prerequisite.** — Recourse by a plaintiff to the North Carolina Human Relations Council (now Commission) is not a jurisdictional prerequisite to filing a suit in federal court under the Age Discrimination in Employment Act, 29 U.S.C. § 201 through 219, since this Article is not "a law prohibiting discrimination in employment because of age" and the Council (now Commission) is not a "state authority established or authorized to grant or seek relief from such discriminatory practice" within the meaning of 29 U.S.C. § 633(b). Spagnuolo v. Whirlpool Corp., 467 F. Supp. 364 (W.D.N.C. 1979), aff'd in part and rev'd in part, 641 F.2d 1109 (4th Cir. 1981).

In an action in which former employees filed suit against their former employer pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and the North Carolina Equal Employment Practices Act (NCEEPA), G.S. 143-422.1 et seq., the employer was granted summary judgment on the employees' NCEEPA claims; North Carolina courts and federal courts applying North Carolina law have found repeatedly that no private cause of action exists for retaliation, hostile work environment, disparate treatment, or constructive discharge in violation of public policy. Swann v. Roadway Express, Inc., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 9448 (M.D.N.C. May 14, 2004).

**Cited** in Russell v. Buchanan, 129 N.C. App. 519, 500 S.E.2d 728 (1998); Brewer v. Cabarrus Plastics, Inc., 130 N.C. App. 681, 504 S.E.2d 580 (1998); Lemons v. US Air Group, Inc., 43 F. Supp. 2d 571 (M.D.N.C. 1999); Buser v. Southern Food Serv., 73 F. Supp. 2d 556 (M.D.N.C. 1999); Wells v. N.C. Dep't of Corr., 152 N.C. App. 307, 567 S.E.2d 803, 2002 N.C. App. LEXIS 929 (2002); Arbia v. Owens-Illinois, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 9429 (M.D.N.C. June 4, 2003).

## § 143-422.2. Legislative declaration.

It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely affects the interests of employees, employers, and the public in general. (1977, c. 726, s. 1.)

**Legal Periodicals.** — For survey of 1977 law on employment regulation, see 56 N.C.L. Rev. 854 (1978).

For article discussing evidentiary standards in employment discrimination suits in light of Department of Cor. v. Gibson, 308 N.C. 131, 301 S.E.2d 78 (1983), see 6 Campbell L. Rev. 163 (1984).

For article, "North Carolina Employment Law After *Coman*: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

For article, "Wrongful Discharge and the North Carolina Equal Employment Practices Act: The Localization of Federal Discrimination Law", see 21 N.C. Cent. L.J. 54 (1995).

## CASE NOTES

**The ultimate purpose of § 126-36, this section, and Title VII** (42 U.S.C. 2000e et seq.) is the same; that is, the elimination of discriminatory practices in employment. North Carolina Dep't of Cor. v. Gibson, 308 N.C. 131, 301 S.E.2d 78 (1983).

**Relationship to Federal Law.** — The evidentiary standards for wrongful or bad faith discharge claims under this section are the same as for claims under 42 U.S.C. § 1981; because plaintiff failed to present substantial evidence to support her G.S. 1981 claims, she could not prevail on her wrongful or bad faith discharge claims under this section. Hawkins v. Pepsico, Inc., 10 F. Supp. 2d 548 (M.D.N.C. 1998), aff'd, 203 F.3d 274 (4th Cir. 2000).

Because a former employee could not establish a prima facie case of racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., given that the employee failed to meet the employer's reasonable productivity standards, the employee's North Carolina wrongful discharge claim also failed. Pettiford v. N.C. Dep't of Health & Human Servs., 228 F. Supp. 2d 677, 2002 U.S. Dist. LEXIS 18879 (M.D.N.C. 2002).

Insurance investigator's wrongful-discharge claim on the basis of age under North Carolina law failed because his claim had failed under the identical standards of the Age Discrimination in Employment Act (ADEA), 29 U.S.C.S. §§ 621-634. Rishel v. Nationwide Mut. Ins. Co., 297 F. Supp. 2d 854, 2003 U.S. Dist. LEXIS 23463 (M.D.N.C. 2003).

Terminated employee's federal suit found that the employee was not discriminated against on the basis of her age and disability and that the employer's reasons for discharging her (violations of its policies) were not pretextual. If there was no discrimination, then there was no state suit violation of state public policy against discrimination under G.S. 143-422.2 and no negligent infliction of emotional distress based on that alleged violation; therefore, lower court properly applied collateral estoppel principles to bar those two state suit claims. Youse v. Duke Energy Corp., 171 N.C. App. 187, 614 S.E.2d 396, 2005 N.C. App. LEXIS 1209 (2005).

Terminated employee's claim under North Carolina public policy, G.S. 143-422.2, failed because he was unable to state a claim of age discrimination under the Age Discrimination in Employment Act as a matter of law. Holtz v. Jefferson Smurfit Corp., 408 F. Supp. 2d 193, 2006 U.S. Dist. LEXIS 545 (M.D.N.C. Jan. 4, 2006).

**The plain language of this statute provides no guidance concerning the requisite elements** to establish a prima facie case of a claim under it and there is no basis in the decisional or statutory law of North Carolina for determining even such crucial matters as the burden of proof, which party is to bear that burden, whether there is a defense to a claim flowing from this section, or even whether damages may be compensatory only or punitive. Newton v. Lat Purser & Assocs., 843 F. Supp. 1022 (W.D.N.C. 1994).

**North Carolina Supreme Court looks to federal decisions for guidance in establishing evidentiary standards** and principles of law to be applied in discrimination cases. North Carolina Dep't of Cor. v. Gibson, 308 N.C. 131, 301 S.E.2d 78 (1983).

For discussion of standards applicable to Title VII cases (42 U.S.C. 2000e et seq.) as promulgated by United States Supreme Court and adopted by North Carolina Supreme Court (insofar as they do not conflict with State statute and case law), see North Carolina Dep't of Cor. v. Gibson, 308 N.C. 131, 301 S.E.2d 78 (1983).

**Use of Title VII Evidentiary Standards.** — Given the similarity of the language of this section and Title VII of the Civil Rights Act of 1964, and the underlying policy of these statutes, it is appropriate for the commission to use Title VII evidentiary standards in an employment discrimination case. North Carolina Dep't of Cor. v. Gibson, 58 N.C. App. 241, 293 S.E.2d 664 (1982), rev'd on other grounds, 308 N.C. 131, 301 S.E.2d 78 (1982).

**Inapplicable to Employer With Fewer Than 15 Employees.** — Where former employee, age 52, was discharged due to her age, trial court properly dismissed the age discrimination action alleging that the discharge violated public policy under G.S. 143-422.2; the employer did not have 15 full-time employees, and G.S. 143-422.2, which constituted the public policy of North Carolina, imposed a 15-employee minimum in order for the discrimination laws to apply. Jarman v. Deason, 173 N.C. App. 297, 618 S.E.2d 776, 2005 N.C. App. LEXIS 2038 (2005).

In an employment discrimination action filed against a local union that had fewer that 15 employees, the respective employees of the local union and an international union could not be combined to satisfy the number of employees requirements of 42 USCS § 2000e(b) of Title VII of the 1964 Civil Rights Act and G.S. 143-422.2 because the unions were distinct, autonomous entities. Hoyle v. UAW Local Union 5285, 444 F. Supp. 2d 467, 2006 U.S. Dist. LEXIS 54422 (W.D.N.C. 2006).

**Retaliation.** — There is no private right of action under North Carolina law for discriminatory retaliation under G.S. 143-422.2. McLean v. Patten Cmtys., Inc., 332 F.3d 714, 2003 U.S. App. LEXIS 11914 (4th Cir. 2003).

Court granted defendant employer's motion to dismiss under Fed. R. Civ. P. 12(b)(6) in plaintiff employee's retaliatory discharge suit against the employer, under 42 U.S.C.S § 2000e-3 of Title VII of the Civil Rights Act of 1964 (Title VII) and G.S. 143-422.2 of the North Carolina Equal Employment Protection Act (Act), G.S. 143-422.1 to 143-422.3 (using the Title VII framework in analyzing claims under the Act), as, inter alia, the employee's failure to pay costs taxed against the employee in a prior Title VII suit against the employer was not participation under Title VII; non-payment of costs was not essential to the machinery set up by Title VII, and holding that non-payment of costs was not participation for Title VII purposes did not interfere with employees' access to statutory remedial mechanisms, since the employee already had an opportunity to file the original action. Settle v. Elixir Indus., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 22296 (M.D.N.C. Dec. 3, 2003).

Court granted defendant employer's motion to dismiss under Fed. R. Civ. P. 12(b)(6) in plaintiff employee's retaliatory discharge suit against the employer, under 42 U.S.C.S § 2000e-3 of Title VII of the Civil Rights Act of 1964 (Title VII) and the North Carolina Equal Employment Protection Act (Act), G.S. 143-422.1 to 143-422.3 (using the Title VII framework when analyzing claims under the Act), as, inter alia, the employee's failure to pay costs taxed against the employee in a prior Title VII suit against the employer was not protected as opposition under Title VII; non-payment of costs was not similar to complaining informally to the employer or participating in an internal grievance proceeding, and disciplining an employee for failing to pay a sum that was effectively a debt owed to the employee's employer was the type of reasonable control Congress intended to leave in the hands of employers. Settle v. Elixir Indus., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 22296 (M.D.N.C. Dec. 3, 2003).

Terminated deputy sheriff's claim for wrongful discharge in violation of public policy was based on retaliatory discharge; thus, she did not state a claim for wrongful discharge. Efird v. Riley, 342 F. Supp. 2d 413, 2004 U.S. Dist. LEXIS 22140 (M.D.N.C. 2004).

North Carolina does not recognize a claim for wrongful discharge in violation of public policy grounded in a retaliation theory under the Equal Employment Practices Act, G.S. 143-422.2. Haley v. Wal-Mart Stores East, L.P., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 95322 (E.D.N.C. Nov. 17, 2008).

**Public Policy Exception to At-Will Employment.** — This section did not assist a plaintiff in establishing a claim based on the "public policy exception" to North Carolina's general rule of at-will employment. DeWitt v. Mecklenburg County, 73 F. Supp. 2d 589 (W.D.N.C. 1999).

Court declined to hold, in the absence of North Carolina precedent, that discharge in violation of the medical-examination-and-inquiry provisions of the North Carolina Equal Employment Practices Act, G.S. 143-422.1 to 143-422.3, or the Americans with Disabilities Act rose to the level of a public policy concern to justify creating a new and distinct Coman claim. Moreover, in light of the fact that the public policy exception to the employment-at-will doctrine was a narrow one, any expansion of public policy in this area was better left to the legislature of North Carolina or its courts, therefore the former employee's wrongful discharge in violation of public policy claim was dismissed. Sabrowski v. Albani-Bayeux, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 23242 (M.D.N.C. Dec. 19, 2003).

Appellate court held that North Carolina recognized a claim for wrongful discharge in violation of public policy even though the discharge was constructive, and it reversed the trial court's judgment granting an employer's motion for a directed verdict on a former employee's claim that the employer tolerated a hostile work environment and was responsible for her decision to quit her job. Whitt v. Harris Teeter, Inc., 165 N.C. App. 32, 598 S.E.2d 151, 2004 N.C. App. LEXIS 1160 (2004), cert. denied, 359 N.C. 75, 605 S.E.2d 151 (2004).

Employer was granted summary judgment on an employee's wrongful discharge in violation of public policy claim brought pursuant to G.S. 143-422.2 where the employee failed to show that he was meeting the employer's legitimate job expectations given, inter alia, the problems with various machines and engineering projects for which he was responsible. Reed v. Buckeye Fire Equip. Co., 422 F. Supp. 2d 570, 2006 U.S. Dist. LEXIS 21968 (W.D.N.C. 2006), aff'd in part, rev'd in part, 2007 U.S. App. LEXIS 18120 (4th Cir. N.C. July 30, 2007).

Former at-will employee could proceed on a common law claim for wrongful discharge based on a violation of the public policy of G.S. 143-422.2, which provided the employee an adequate remedy for discrimination for age and handicap; however, § 143-422.2 applies only to employers and does not apply the corporate officers of the employer. Hardin v. Belmont

Textile Mach., Co., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 54452 (W.D.N.C. Aug. 3, 2006).

**North Carolina does not recognize a claim against a supervisor in his or her individual capacity** under this section. Cox v. Indian Head Indus., 187 F.R.D. 531 (W.D.N.C. 1999).

**Discharge Based on Race.** — Cause of action for wrongful discharge was stated under G.S. 143-422.2 by a claim that an employee was separated from employment because of the employee's race. McLean v. Patten Cmtys., Inc., 332 F.3d 714, 2003 U.S. App. LEXIS 11914 (4th Cir. 2003).

**No Cause of Action for Wrongful Discharge.** — In enacting the Equal Employment Practices Act, the North Carolina legislature chose not to provide any remedies beyond those available under federal discrimination statutes. It is unlikely that the North Carolina Courts would disturb this legislative decision by providing a common law remedy for wrongful discharge beyond the procedure envisioned by Title VII. Percell v. IBM, Inc., 765 F. Supp. 297 (E.D.N.C. 1991), aff'd, 23 F.3d 402 (4th Cir. 1994).

Because plaintiff stated a claim for sexual harassment and wrongful discharge under Title VII, she stated a claim for wrongful discharge in violation of the public policy expressed in this section, which was sufficient to withstand a motion to dismiss. Of course, insofar as plaintiff's claim was characterized as wrongful discharge in bad faith, that claim was dismissed because North Carolina courts do not recognize a separate and distinct bad faith exception to employment at will. Phillips v. J.P. Stevens & Co., 827 F. Supp. 349 (M.D.N.C. 1993).

The court declined to recognize a private cause of action under this section and, as a result, dismissed the plaintiff's state common-law claim for constructive discharge in violation of public policy. McFadden v. Trend Community Health Servs., 114 F. Supp. 2d 427, 2000 U.S. Dist. LEXIS 19340 (W.D.N.C. 2000).

Given that North Carolina courts have not recognized a private cause of action under the North Carolina Equal Employment Practices Act (NCEEPA), G.S. 143-422.1 et seq., the federal court dismissed the employee's wrongful discharge claim under the NCEEPA. McNeil v. Scotland County, 213 F. Supp. 2d 559, 2002 U.S. Dist. LEXIS 17873 (M.D.N.C. 2002).

**Evidence Insufficient.** — The plaintiff who suffered from rhinitis was unable to prove that he was handicapped and that he was terminated based upon the alleged handicap pursuant to this section where the defendant submitted evidence that his termination was based upon work performance. Simmons v. Chemol Corp., 137 N.C. App. 319, 528 S.E.2d 368, 2000 N.C. App. LEXIS 311 (2000).

**Sexual Harassment.** — A complaint alleging that an employer sexually harassed an employee by conditioning continued employment on having sex stated a claim for wrongful discharge under the public policy exception to employment at will. Harrison v. Edison Bros. Apparel Stores, 924 F.2d 530 (4th Cir. 1991).

Employee's allegations that she was terminated because of her opposition to what she believed in good faith to be a number of sexually discriminatory employment practices by employer did not implicate the public policy concerns expressed in this section. Leach v. Northern Telecom, Inc., 141 F.R.D. 420 (E.D.N.C. 1991).

Given the provisions of G.S. 143-422.2, 115C-335.5, 115C-325 and 14-395.1, there was no question that the right to be free of sexual harassment in the workplace was implicated in declaration of North Carolina's public policy. Whitt v. Harris Teeter, Inc., 165 N.C. App. 32, 598 S.E.2d 151, 2004 N.C. App. LEXIS 1160 (2004), cert. denied, 359 N.C. 75, 605 S.E.2d 151 (2004).

In an action in which a former employee filed suit against her former employer alleging a hostile work environment based on sexual harassment and retaliatory discharge, each in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., as well as wrongful discharge in violation of North Carolina public policy, codified at G.S. 143-422.2, the employer was granted summary judgment on the wrongful discharge claim; North Carolina did not recognize tort claims for wrongful discharge in retaliation for complaints of sexual harassment. Hayes v. Lowe's Food Stores, Inc., — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 11210 (M.D.N.C. May 26, 2005).

**Plaintiff's claim of sexual harassment on the job was denied** under this section because neither the North Carolina Supreme Court nor the North Carolina Court of Appeals has recognized a private cause of action under the North Carolina Equal Employment Practices Act (NEEPA). Most courts have applied the NCEEPA only to common law wrongful discharge claims or in connection with other specific statutory remedies. Smith v. First Union Nat'l Bank, 202 F.3d 234, 2000 U.S. App. LEXIS 683 (4th Cir. 2000).

**Discharge for Refusal of Sexual Favors.** — Cause of action for wrongful discharge was stated under G.S. 143-422.2 by a claim that an employee was separated from employment because of gender when the cause of separation was the employee's refusal of sexual favors to a supervisor. McLean v. Patten Cmtys., Inc., 332 F.3d 714, 2003 U.S. App. LEXIS 11914 (4th Cir. 2003).

**Two Tests Applicable to Employment Decisions Based on Inherently Subjective Criteria.** — When reviewing hiring and promotion decisions based on exercise of personal judgment or application of inherently subjective criteria, court may employ either "disparate treatment" test or "disparate impact" test, or both. North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

**Disparate Treatment Test.** — When employee alleges that employer treated him or her in particular less favorably than other employees, employee raises claim of "disparate treatment." North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

According to "disparate treatment" analysis, employee has initial burden of proving, by preponderance of evidence, prima facie case of discrimination. [1] He applied for and was qualified for an available position, [2] he was rejected, and [3] after he was rejected, employer filled position with white employee. Once employee establishes prima facie case, inference of discrimination arises. To rebut this inference, employer must present evidence that employee was rejected, or other applicant was chosen, for a legitimate, nondiscriminatory reason. Employee retains final burden of persuading jury of intentional discrimination. North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

In order to demonstrate a prima facie case of disparate treatment under this section, employee must show by a preponderance of the evidence that: (1) she is a member of a protected class; (2) she was qualified for her job and her job performance was satisfactory; (3) she was fired; and (4) other employees who are not members of the protected class were retained under apparently similar circumstances. Hughes v. Bedsole, 48 F.3d 1376 (4th Cir.), cert. denied, 516 U.S. 870, 116 S. Ct. 190, 133 L. Ed. 2d 126 (1995).

In order to demonstrate a prima facie case of disparate treatment, employee must eliminate concerns that she was fired because of her performance or qualifications, two of the most common nondiscriminatory reasons for any adverse employment decision. Hughes v. Bedsole, 48 F.3d 1376 (4th Cir.), cert. denied, 516 U.S. 870, 116 S. Ct. 190, 133 L. Ed. 2d 126 (1995).

**Construction.** — The Employment Act, enacted in 1977, and The Handicapped Act, enacted in 1985, although enacted at different times, relate to the same subject matter, employment discrimination against handicapped persons, and must be construed together to ascertain legislative intent. McCullough v. Branch Banking & Trust Co., 136 N.C. App. 340, 524 S.E.2d 569 (2000).

Whether North Carolina courts would extend the public policy wrongful discharge doctrine to employers with less than 15 employees was manifestly an issue for the state, not the federal courts, to resolve. Jarman v. Deason, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 14330 (W.D.N.C. Aug. 18, 2003).

**Sexual Discrimination.** — Employer was not entitled to dismissal under Fed. R. Civ. P. 12(b)(6) of an employee's wrongful termination action where the employee's complaint alleged that she was discharged from her employment and that the discharge was unlawful or in violation of the express public policy of North Carolina; employment termination due to a person's sex was a violation of North Carolina public policy, as defined in G.S. 143-422.2. United States EEOC v. Bojangles Rests., Inc., 284 F. Supp. 2d 320, 2003 U.S. Dist. LEXIS 16834 (M.D.N.C. 2003).

**Sexual Discrimination — County Employee.** — Where employee alleged that employer wrongfully discharged her on the basis of her sex in violation of the public policy enunciated in this act, the statute did not provide for a specific statutory remedy, and the court would analyze her claim under the common law of wrongful discharge; the specific statutory remedy for state employees did not apply to plaintiff because she was a county employee. Hughes v. Bedsole, 48 F.3d 1376 (4th Cir.), cert. denied, 516 U.S. 870, 116 S. Ct. 190, 133 L. Ed. 2d 126 (1995).

**Pregnancy Discrimination.** — Because there was no evidence that the corporate president was aware of the employee's pregnancy until after the decision to terminate her had been made, the employee could not prove that her pregnancy was a factor in the decision to include her in the reduction in force; as such, the employee could not make a prima facie case of pregnancy discrimination, and the employee's pregnancy discrimination claim under state law — to the extent that such a claim existed — failed. Sweeney v. MARC Global, Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 11490 (W.D.N.C. Feb. 4, 2008).

**Employer's Legitimate Nondiscriminatory Reason.** — A legitimate nondiscriminatory reason is an employer's promotion of an employee better qualified than complainant. North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

**Pretext.** — After employer rebuts employee's prima facie showing, employee has opportunity to demonstrate that employer's proffered reasons for its decision were not its true reasons. North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

Employee may use various forms of evidence to demonstrate that state's proffered reason was not its true reason. Employee might seek to demonstrate that employer's claim to have promoted better qualified applicant was pretextual by showing that he was in fact better qualified than person chosen for position. North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

**No Cause of Action for Constructive Discharge.** — Summary judgment was granted for defendant on plaintiff's claim that he was constructively discharged on the basis of race in violation of the public policy of North Carolina as articulated in the North Carolina Equal Employment Practices Act, G.S. 143-422.1 through G.S. 143-422.3, because North Carolina only recognized the public-policy exception to the employment-at-will doctrine in cases of actual, as opposed to constructive, discharge. Mosley v. Bojangles' Rests., Inc., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 5469 (M.D.N.C. Mar. 30, 2004).

**Private State Law Cause of Action.** — The court assumed without deciding that this statute created a private state law cause of action for the forms of employment discrimination embraced by it, rather than a mere policy statement and given this assumption, the court believed it must abstain from hearing both counts one and two and dismiss them under Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943). Newton v. Lat Purser & Assocs., 843 F. Supp. 1022 (W.D.N.C. 1994).

**Private Right of Action**. — In an action in which an employee filed suit against her employer alleging claims of race discrimination and retaliation in violation of North Carolina's Equal Employment Practices Act (NCEEPA), G.S. 143-422.1 et seq., the court found that because the NCEEPA did not provide a private right of action, the employee could not maintain a claim under it. Addison v. Wal-Mart Stores, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 10778 (M.D.N.C. June 23, 2003).

Plaintiff's wrongful discharge claim failed as a matter of law, because North Carolina did not recognize plaintiff's tort claims under the North Carolina Equal Employment Practices Act, G.S. 143-422.1 et seq., for wrongful constructive discharge or wrongful discharge in retaliation for complaints of sexual harassment. Lowe v. Unifi, Inc., 292 F. Supp. 2d 773, 2003 U.S. Dist. LEXIS 20887 (M.D.N.C. 2003).

In an action in which former employees filed suit against their former employer pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and the North Carolina Equal Employment Practices Act (NCEEPA), G.S. 143-422.1 et seq., the employer was granted summary judgment on the employees' NCEEPA claims; North Carolina courts and federal courts applying North Carolina law have found repeatedly that no private cause of action exists for retaliation, hostile work environment, disparate treatment, or constructive discharge in violation of public policy. Swann v. Roadway Express, Inc., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 9448 (M.D.N.C. May 14, 2004).

Former employee who asserted claims against her former employer for retaliation and discrimination on the basis of age, race, and sex failed to state a claim under the North Carolina Equal Employment Practices Act (NCEEPA), G.S. 143-422.2, because North Carolina did not recognize a private cause of action under the NCEEPA. Bratcher v. Pharm. Prod. Dev., Inc., 545 F. Supp. 2d 533, 2008 U.S. Dist. LEXIS 28276 (E.D.N.C. 2008).

Employee's retaliation claim under North Carolina's Equal Employment Practices Act (NCEEPA),G.S. 143-422.2, encountered a fatal flaw because the NCEEPA did not create a private right of action, it was only applicable to common law wrongful discharge claims or in connection with other specific statutory remedies. In addition, even if the NCEEPA did provide a private right of action, the statute did not express a public policy with respect to retaliation for opposition to any form of discriminatory practice. Strickland v. Jewell, 562 F. Supp. 2d 661, 2007 U.S. Dist. LEXIS 84612 (M.D.N.C. 2007).

**A discussion of reasonable accommodations under N.C. Gen. Stat. § 168A-3(9) and (10) is irrelevant** where plaintiff's claim is based on wrongful discharge in violation of public policy under this section. Simmons v. Chemol Corp., 137 N.C. App. 319, 528 S.E.2d 368, 2000 N.C. App. LEXIS 311 (2000).

**Intentional Infliction of Emotional Distress by Sexual Harassment.** — For federal case holding that plaintiff's claim of intentional infliction of emotional distress based upon alleged sexual harassment by defendant coworker was not preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. See Johnson v. AT & T Technologies, Inc., 713 F. Supp. 885 (M.D.N.C. 1989).

**Summary judgment inappropriate where plaintiff established that material issues of fact existed with regard to his discriminatory discharge claims,** and established that such issues remained on his claim of wrongful discharge in violation of North Carolina public policy. Summary judgment was, therefore, inappropriate. Mumford v. CSX Transp., 878 F. Supp. 827 (M.D.N.C. 1994), aff'd, 57 F.3d 1066 (4th Cir. 1995).

**Employee's Allegations Sufficient to Avoid Dismissal.** — In a former employee's action against his former employer and former supervisor alleging race discrimination and retaliation in violation of 42 U.S.C.S. § 1983, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e et seq., N.C. Const. art. I, § 19, and state public policy, as well as negligent and intentional infliction of emotional distress, the motion to dismiss under Fed. R. Civ. P. 12(b)(6) filed by the employer and the supervisor was denied in part, where further discovery was necessary to determine whether there was any reasonable basis to conclude that the employee had timely submitted his charge of racial discrimination to the Equal Employment Opportunity Commission pursuant to 42 U.S.C.S. § 2000e-5(e), and had alleged sufficient facts to support his race discrimination public policy claim under G.S. 143-422.2. Ijames v. Murdock, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 4537 (M.D.N.C. Mar. 21, 2003).

In a former employee's action against his former employer and former supervisor alleging race discrimination and retaliation in violation of 42 U.S.C.S. § 1983, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e et seq., N.C. Const. art. I, § 19, and state public policy, as well as negligent and intentional infliction of emotional distress, the motion to dismiss under Fed. R. Civ. P. 12(b)(6) filed by the employer and the supervisor was granted in part, where the supervisor had no personal liability under Title VII, the employee's allegation of retaliation was not reasonably related to his Equal Employment Opportunity Commission discrimination charge; the employee's 42 U.S.C.S. § 1983 and N.C. Const. art. I, § 19 claims failed because he failed to allege that the supervisor had acted under color of state law, or that the conduct of the supervisor and the employer could be fairly attributable to the state; the employee had no action for wrongful discharge against his supervisor, there was no public policy under G.S. 143-422.2 with respect to the employee's retaliation claim; the employee failed to state a claim for intentional infliction of emotional distress because the supervisor's alleged statements were not sufficiently outrageous or extreme; and the employee failed to state a claim for negligent infliction of emotional distress because he failed to allege facts sufficient to show that the supervisor or employer engaged in any negligent acts. Ijames v. Murdock, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 4537 (M.D.N.C. Mar. 21, 2003).

**Age Discrimination Not Alleged.** — Plaintiff's assertion that defendant's failure to grant him tenure and renew his teaching appointment violated public policy failed because he did not allege that defendant discharged him on the basis of his age. Claggett v. Wake Forest Univ., 126 N.C. App. 602, 486 S.E.2d 443 (1997).

**Disability Discrimination.** — Former employee stated a claim against a former employer for wrongful discharge in violation of North Carolina's public policy against disability discrimination set out in G.S. 143-422.2 of the North Carolina Equal Employment Protection Act (NCEEPA), G.S. 143-422.1 et seq.; however, the employee could not bring claims against individual managers under NCEEPA, nor did NCEEPA include a claim for wrongful constructive discharge or hostile work environment. Arbia v. Owens-Illinois, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 9429 (M.D.N.C. June 4, 2003).

District court granted summary judgment to the employers on the employee's claim for wrongful discharge on the basis of disability in violation of public policy as stated in the North Carolina Equal Employment Practices Act, G.S. 143-422.1 to G.S. 143-422.3, because the North Carolina courts did not recognized the tort of wrongful discharge. Gallimore v. Newman Mach. Co., 301 F. Supp. 2d 431, 2004 U.S. Dist. LEXIS 1594 (M.D.N.C. 2004).

**Constitutional Action Precluded.** — A plaintiff alleging sex discrimination by her employer could not bring an action directly under the North Carolina Constitution; an adequate state remedy was available to the plaintiff because she could have filed an action under this section for wrongful discharge in violation of public policy. Emmons v. Rose's Stores, Inc., 5 F. Supp. 2d 358 (E.D.N.C. 1997), aff'd, 141 F.3d 1158 (4th Cir. 1998).

**Plaintiff's Wrongful Discharge Claim Jurisdictionally Barred by the Eleventh Amendment.** — Contrary to defendants' argument, G.S. 143-422.2 could be applied to allow a plaintiff to bring a common law claim for wrongful discharge; however, defendants' removal of the former employee's North Carolina Equal Employment Practices Act (NCEEPA), N.C. Gen. Stat. § 143-422.1 et seq., based common law wrongful discharge tort claim to federal court did not constitute a waiver of the State's Eleventh Amendment immunity. Therefore, the employee's count II, which was in essence a common law wrongful discharge claim against the university, was jurisdictionally barred by the Eleventh Amendment. Ji Da Dai v. Univ. of N.C., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 15880 (M.D.N.C. Sept. 2, 2003).

**Applied** in Mayse v. Protective Agency, Inc., 772 F. Supp. 267 (W.D. N.C. 1991); Bannerman v. Burlington Indus., Inc., 7 F. Supp. 2d 645 (E.D.N.C. 1997); Souther v. New River Area Mental Health Dev. Disabilities & Substance Abuse Program, 142 N.C. App. 1, 541 S.E.2d 750, 2001 N.C. App. LEXIS 29 (2001); Vanderburg v. N.C. Dep't of Revenue, 168 N.C. App. 598, 608 S.E.2d 831, 2005 N.C. App. LEXIS 451 (2005); Faulkner v. Tyco Elecs. Corp., 552 F. Supp. 2d 546, 2008 U.S. Dist. LEXIS 25772 (M.D.N.C. 2008).

**Cited** in Jackson v. Kimel, 992 F.2d 1318 (4th Cir. 1993); Abels v. Renfro Corp., 335 N.C. 209, 436 S.E.2d 822 (1993); McCullough v. Branch Banking & Trust Co., 844 F. Supp. 258 (E.D.N.C. 1993); Bradley v. CMI Indus., Inc., 17 F. Supp. 2d 491 (W.D.N.C. 1998); Russell v.

Buchanan, 129 N.C. App. 519, 500 S.E.2d 728 (1998); Julsaint v. Corning, Inc., 178 F. Supp. 2d 610, 2001 U.S. Dist. LEXIS 23843 (M.D.N.C. 2001); Jane v. Bowman Gray Sch. of Medicine-North Carolina Baptist Hosp., 211 F. Supp. 2d 678, 2002 U.S. Dist. LEXIS 13362 (M.D.N.C. 2002); Helmstetler v. Borden Chem., Inc., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 13795 (M.D.N.C. June 13, 2002); Jane v. Bowman Gray Sch. of Med.-N.C. Baptist Hosp., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 19548 (M.D.N.C. June 2, 2002); Carter v. Rockingham County Bd. of Educ., 158 N.C. App. 687, 582 S.E.2d 69, 2003 N.C. App. LEXIS 1279 (2003); Lawson v. Tyco Elecs. Corp., 286 F. Supp. 2d 639, 2003 U.S. Dist. LEXIS 18231 (M.D.N.C. 2003); Watkins v. Hospitality Group Mgmt. Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 22291 (M.D.N.C. Dec. 1, 2003).

### OPINIONS OF ATTORNEY GENERAL

**For a cause of action based on this section,** the public policy exception, a plaintiff must show (1) that the discharge violates some well established public policy, and (2) that there is no remedy to protect the interest of the aggrieved employee or society. Frazier v. First Union Nat'l Bank, 747 F. Supp. 1540 (W.D.N.C. 1990).

**Adequate Federal Remedy.** — In a discriminatory discharge case where plaintiff also has an adequate remedy in Title VII, a cause of action based on this section, the public policy exception, should be dismissed. Frazier v. First Union Nat'l Bank, 747 F. Supp. 1540 (W.D.N.C. 1990).

## § 143-422.3. Investigations; conciliations.

The Human Relations Commission in the Department of Administration shall have the authority to receive charges of discrimination from the Equal Employment Opportunity Commission pursuant to an agreement under Section 709(b) of Public Law 88-352, as amended by Public Law 92-261, and investigate and conciliate charges of discrimination. Throughout this process, the agency shall use its good offices to effect an amicable resolution of the charges of discrimination. (1977, c. 726, s. 1; 1989 (Reg. Sess., 1990), c. 979, ss. 1(5), 2.)

**Legal Periodicals.** — For article discussing evidentiary standards in employment discrimination suits in light of Department of Cor. v. Gibson, 308 N.C. 131, 301 S.E.2d 78 (1983), see 6 Campbell L. Rev. 163 (1984).

For article, "North Carolina Employment Law After *Coman*: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

For article, "Wrongful Discharge and the North Carolina Equal Employment Practices Act: The Localization of Federal Discrimination Law", see 21 N.C. Cent. L.J. 54 (1995).

### CASE NOTES

**Plaintiff in Federal Age Discrimination Suit Need Not Seek Relief from Human Relations Council (now Commission) as Jurisdictional Prerequisite.** — Recourse by a plaintiff to the North Carolina Human Relations Council (now Commission) is not a jurisdictional prerequisite to filing a suit in federal court under the Age Discrimination in Employment Act, 29 U.S.C. § 201-219, since this Article is not "a law prohibiting discrimination in employment because of age" and the North Carolina Human Relations Council (now Commission) is not a "state authority established or authorized to grant or seek relief from such discriminatory practice" within the meaning of 29 U.S.C. § 633(b). Spagnuolo v. Whirlpool Corp., 467 F. Supp. 364 (W.D.N.C. 1979), aff'd in part and rev'd in part, 641 F.2d 1109 (4th Cir. 1981).

**Cited** in Williams v. Blue Cross Blue Shield, 357 N.C. 170, 581 S.E.2d 415, 2003 N.C. LEXIS 595 (2003).

## Article 50.

## *Commission on the Status of Women.*

### §§ 143-423 through 143-428: Repealed by Session Laws 1975, c. 879, s. 39.

**Cross References.** — For present provisions as to the North Carolina Council for Women, see G.S. 143B-393 and 143B-394.

## Article 51.

## *Tobacco Museums.*

### §§ 143-429, 143-430: Repealed by Session Laws 1973, c. 476, s. 116.

### § 143-431. Tobacco museums.

It shall be the duty of the Department of Cultural Resources to establish, supervise, manage and maintain the tobacco museums. The Department of Cultural Resources may establish a reasonable fee for viewing the museums which fees shall be used to defray the expenses of the museums. To accomplish these purposes, the Department of Cultural Resources shall have authority to buy and sell real and personal property and to accept donations of real or personal property from any source. The Department of Cultural Resources shall not contract any debt in its purchase of real or personal property. (1969, c. 840, s. 3; 1973, c. 476, s. 116.)

### § 143-432. Location of museums.

One of the tobacco museums shall be located within Rockingham County at a site to be determined by the Department of Cultural Resources, and shall emphasize the history and development of tobacco manufacturing. One of the tobacco museums shall be located in Nash or Edgecombe Counties at a site to be determined by the Department of Cultural Resources and shall emphasize the history and development of growing and marketing of tobacco. (1969, c. 840, s. 4; 1973, c. 476, s. 116.)

## Article 51A.

## *Tax Study Commission.*

### §§ 143-433 through 143-433.5: Repealed by Session Laws 1979, c. 14, s. 1.

## Article 51B.

## *North Carolina Federal Tax Reform Allocation Committee.*

### § 143-433.6. Legislative findings.

(a) The General Assembly finds and determines that the Tax Reform Act of 1984 established a federal volume limitation upon the aggregate amount of "private activity bonds" that may be issued by each state; that, pursuant to Section 103(n) of the Internal Revenue Code of 1954, as amended, a previous Governor of North Carolina issued Executive Order 113 proclaiming a formula for allocating the federal volume limitation for North Carolina; that on October 22, 1986, the Tax Reform Act of 1986, hereinafter referred to as the "Tax Reform Act", was enacted; that the Tax Reform Act (i) establishes a new unified limitation for private activity bonds on a state by state basis, (ii) establishes a new definition of the types of private activity bonds to be included under those new limitations, (iii) establishes a new low-income housing credit to induce the construction of and the improvement of housing for low-income people, and (iv) limits the aggregate use of this low-income housing credit on a state by state basis; that the Tax Reform Act provides for federal formulas for the allocation of these "state by state" resources, and also provides for states which cannot use the federal formula for allocation to set allocation procedures and formulas which are more appropriate for the individual states; that the Tax Reform Act gives authority for the legislature of each state to formulate and execute plans for allocation; and that Section 146 of the Internal Revenue Code of 1986, as amended, and Section 42 of the Internal Revenue Code of 1986, as amended, will require continued inquiry and study in the ways in which North Carolina can best and most fairly manage and utilize resources provided therein.

(b) The General Assembly further finds and determines that the Economic Growth and Tax Relief Reconciliation Act of 2001 added new subsections (a)(13) and (k) to section 142 of the Internal Revenue Code of 1986, as amended, which (i) establish a new type of private activity bond that can be issued to finance "qualified public educational facilities," (ii) establish an annual aggregate limitation on the face amount of qualified public educational facility bonds that may be issued on a state-by-state basis, (iii) provide that each state may allocate the annual aggregate limitation for any calendar year in such manner as each state determines appropriate, and (iv) provide for an elective carryforward by each state of the unused annual aggregate limitation; and that subsections (a)(13) and (k) will require continued inquiry and study in the ways in which North Carolina can best and most fairly manage and utilize the resource provided therein.

(c) The General Assembly further finds and determines that section 1400U-3 of the American Recovery and Reinvestment Tax Act of 2009 (ARRTA) added a new type of exempt facility bond called "recovery zone facility bonds" to be used to finance construction, renovation, and equipping of recovery zone property for use in any trade or business in a recovery zone, all as defined in ARRTA, and a new type of governmental bond called "recovery zone economic development bonds." The ARRTA provides a formula for allocation of authority to issue recovery zone facility bonds and recovery zone economic development bonds to the states and by which the authority is to be reallocated by the State to counties and large municipalities within the State.

(d) The General Assembly further finds and determines that section 54D of the Internal Revenue Code of 1986, as amended, permits the issuance of tax credit bonds called "qualified energy conservation bonds" (QECBs), the proceeds of which must be used for certain energy conservation purposes enumerated in section 54D. Section 54D and ARRTA provide a national bond limitation for the issuance of QECBs, and the Treasury Department has allocated that authority among the states. Under section 54D, the United States is required to reallocate the authority to issue QECBs to the counties and large local governments within the states based on population, in accordance with the guidelines provided by the Treasury Department, and to assure that not more than thirty percent (30%) of the QECBs issued in a state are used for private activity bonds, as defined in section 54D. (1987, c. 588, s. 1; 2008-204, s. 6.1; 2009-140, s. 2.)

**Effect of Amendments.** — Session Laws 2008-204, s. 6.1, effective August 8, 2008, designated the previously existing provisions as subsection (a) and added subsection (b).

Session Laws 2009-140, s. 2, effective June 19, 2009, added subsections (c) and (d).

## § 143-433.7. North Carolina Federal Tax Reform Allocation Committee.

The North Carolina Federal Tax Reform Allocation Committee, hereinafter referred to as the "Committee," is hereby established. The Committee is a continuation of the Interim Private Activity Bond Allocation Committee established under Executive Order 28 and amended under Executive Order 31 and the North Carolina Federal Tax Reform Allocation Committee established under Executive Order 37. The Secretary of the Department of Commerce, the Executive Assistant to the Governor for Budget Management, and the Treasurer of the State of North Carolina shall constitute the membership of this Committee. The Secretary of the Department of Commerce shall serve as Chairman of the Committee. (1987, c. 588, s. 2.)

## § 143-433.8. Duties.

The Committee shall perform the following duties:

(1) Manage the allocation of private activity bonds, low-income housing credits, qualified public educational facility bonds, recovery zone facility bonds, recovery zone economic development bonds, and qualified energy conservation bonds and receive advice from bond issuers, elected officials, and the General Assembly.

(2) Continue to monitor bond markets, economic development financing trends, school financing trends, housing markets, and tax incentives available to induce events and programs favorable to North Carolina, its cities and counties, and individual citizens.

(3) Continue to study the ways in which North Carolina can best and most fairly manage and utilize the allocation of private activity bonds, low-income housing credits, qualified public educational facility bonds, recovery zone facility bonds, recovery zone economic development bonds, and qualified energy conservation bonds.

(4) Report to the Governor, Lieutenant Governor, the Speaker of the House of Representatives, the President Pro Tempore of the Senate, and the Revenue Laws Study Committee as requested and on not less than an annual basis. The annual report is due by November 1 of each year. (1987, c. 588, s. 3; 2008-204, s. 6.2; 2009-140, s. 3.)

**Effect of Amendments.** — Session Laws 2008-204, s. 6.2, effective August 8, 2008, in the introductory language, substituted "shall perform" for "may perform"; in subdivision (1), substituted "private activity bonds, low-income housing credits, and qualified public educational facility bonds" for "tax exempt private activity bonds and low-income housing credits"; in subdivision (2), inserted "school financing trends"; in subdivision (3), substituted "private activity bonds, low-income housing credits, and qualified public educational facility bonds" for "private activity bonds and low-income housing credits"; and in subdivision (4), substituted "the Speaker of the House of Representatives, the President Pro Tempore of the Senate, and the Revenue Laws Study Committee" for "and the Speaker of the House of Representatives" and added the last sentence.

Session Laws 2009-140, s. 3, effective June 19, 2009, inserted "recovery zone facility bonds, recovery zone economic development bonds, and qualified energy conservation bonds" in subdivisions (1) and (3), and made related stylistic and punctuation changes.

## § 143-433.9. Allocation.

(a) To provide for the orderly and prompt issuance of bonds the allocation of which is managed under this Article, the Committee must follow formulas for allocating the following: (i) the unified volume limitation, (ii) the state housing credit ceiling, (iii) the annual aggregate limitation on the face amount of qualified public educational facility bonds, (iv) the limitation on issuance of recovery zone facility bonds, (v) the limitation on issuance of recovery zone economic development bonds, and (vi) the limitation on issuance of qualified energy conservation bonds. The unified volume limitation for all issues of private activity bonds, other than qualified public educational facility bonds and recovery zone facility bonds, in North Carolina shall be considered as a single resource to be allocated under this Article. The annual aggregate limitation on the face amount of qualified public educational facility bonds for all issues in North Carolina shall be considered as a single resource to be allocated under this Article. The Committee shall issue the following: (i) allocations of the unified volume limitation, (ii) allocations of the state housing credit ceiling, (iii) allocations and reallocations of the aggregate limitation on the face amount of qualified public educational facility bonds, (iv) allocation and reallocation of the authority for issuance of recovery zone facility bonds allocated to the State, (v) allocation and reallocation of the authority for issuance of recovery zone economic development bonds allocated to the State, (vi) allocation and reallocation of authority for issuance of qualified energy conservation bonds allocated to the State, and (vii) allocation of other limitations on authority to issue bonds as may be directed by the Governor. The Committee shall set forth procedures for making such allocations and in the making of such allocations shall take into consideration the best interest of the State of North Carolina with regard to the economic development, school facility needs, energy conservation, green initiatives, and general prosperity of the people of North Carolina. In making the initial allocations for recovery zone facility bonds and recovery zone economic development bonds, the Committee shall follow the formula provided in section 1400U-1(a)(3) of ARRTA. In making the initial allocation for qualified energy conservation bonds, the Committee shall follow the guidelines provided in section 54D of the Internal Revenue Code of 1986. The Committee shall make all elective carryforwards of the unused unified volume limitation, the annual aggregate limitation on the face amount of qualified public educational facility bonds, recovery zone facility bonds, qualified energy conservation bonds, and any other bonds or tax credits over which it has allocation authority on behalf of the State. The Committee shall monitor the issuance of qualified energy conservation bonds to ensure that not more than thirty percent (30%) of such bonds are used for purposes that would be treated as private activity bonds under the Internal Revenue Code of 1986, as amended. The Committee is authorized to establish a procedure to monitor whether the initial allocations of recovery zone facility bonds or recovery zone economic development bonds to counties and large municipalities pursuant to ARRTA will be utilized, for an allocation that will not be utilized to be waived by notice to the Committee, and for the reallocation of the waived allocation to other projects that qualify pursuant to ARRTA.

(b) In administering the low-income housing credit program, the Committee shall adopt a Qualified Allocation Plan (the Plan) as required by 26 U.S.C. § 42(m) annually. Solely with respect to the adoption of the Plan, the Committee is exempt from the requirements of Article 2A of Chapter 150B of the General Statutes. Prior to adoption or amendment of the Plan, the Committee shall:

(1) Publish the proposed Plan in the North Carolina Register at least 30 days prior to the adoption of the final Plan;

(2) Notify any person who has applied for the low-income housing credit in the previous year and any other interested parties of its intent to adopt the Plan;
(3) Accept oral and written comments on the proposed Plan; and
(4) Hold at least one public hearing on the proposed Plan. (1987, c. 588, s. 4; 2001-299, s. 1.1; 2008-204, s. 6.3; 2009-140, s. 4.)

**Effect of Amendments.** — Session Laws 2008-204, s. 6.3, effective August 8, 2008, rewrote subsection (a).

Session Laws 2009-140, s. 4, effective June 19, 2009, rewrote subsection (a).

## ARTICLE 52.

## *Pesticide Board.*

## Part 1. Pesticide Control Program: Organization and Functions.

### § 143-434. Short title.

This Article may be cited as the North Carolina Pesticide Law of 1971. (1971, c. 832, s. 1.)

**Editor's Note.** — Session Laws 1971, c. 832, which enacted this Article, in s. 5, provided:

"Sec. 5. This act shall not be deemed to repeal the Structural Pest Control Act of North Carolina of 1955, as amended (Chapter 106, Article 4C)."

**Legal Periodicals.** — For note on control of pesticides, see 49 N.C.L. Rev. 529 (1971).

For article, "The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation," see 29 Campbell L. Rev. 535 (2007).

### § 143-435. Preamble.

(a) The Legislative Research Commission was directed by House Resolution 1392 of the 1969 General Assembly "to study agricultural and other pesticides," and to report its findings and recommendations to the 1971 General Assembly. Pursuant to said Resolution a report was prepared and adopted by the Legislative Research Commission in 1970 concerning pesticides. In this report the Legislative Research Commission made the following findings concerning the use and effects of pesticides and the need for legislation concerning control of pesticide use, of which the General Assembly hereby takes cognizance:

(1) The use of chemical pesticides has developed since the 1940's into a major, new billion-dollar industry. Pesticides have bettered the lot of mankind in many ways and especially have assisted the farmer by their contribution to a stable and inexpensive supply of high quality food, fiber and forest products. The control of insects, fungi and other pests is essential to the public health and welfare and specifically to the prevention of disease, to the production and preservation of food, fiber, and forests and to the protection of other aspects of modern civilization.

(2) The use of pesticides for these important purposes is currently a matter of serious public concern and their use in some instances presents risks to man and the environment which must be weighed against the benefits of those uses in the overall public interest. Evidence is accumulating that extensive use of persistent pesticides poses hazards to health and the environment. Environmental problems resulting from the use, overuse and misapplication of some

chemicals, and the disposal of unused chemicals and containers, have grown to the point where contamination of the environment is approaching significant proportions. There is concern among scientists and public health personnel about the long-term chronic effects of pesticide pollution on human health. Contamination by DDT has been shown to be global in extent. Moreover, recent experience in North Carolina and elsewhere has shown that the more toxic but less persistent pesticides cannot safely be substituted for the persistent "hard" pesticides without stringent safeguards.

(3) More extensive observation, study and monitoring of the effectiveness and the use of pesticides and of undesirable side effects on man and on the environment and of their relative importance for the overall public health and welfare are desirable in the public interest.

(4) Continued and strengthened control of the quality of pesticides and the control of labeling claims, direction for use and warnings are necessary for the protection of the purchasing public, including the household consumer, the farmer and other users.

(5) No existing legislation in North Carolina effectively limits or controls the use of pesticides. Misuse and misapplication of pesticides, while effectively controlled by law with respect to structural pest control operators, is not adequately controlled with respect to some other major groups of pesticide applicators. Careless disposal of unused pesticides and contaminated containers is not controlled by law, and no North Carolina legislation requires that pesticide dealers, who are the principal source of advice for many pesticide users, be qualified to give advice or be held responsible for their advice. These gaps in legal control of pesticides are important and should be remedied.

(b) The purpose of this Article is to regulate in the public interest the use, application, sale, disposal and registration of insecticides, fungicides, herbicides, defoliants, desiccants, plant growth regulators, nematicides, rodenticides, and any other pesticides designated by the North Carolina Pesticide Board. New pesticides are continually being discovered or synthesized which are valuable for the control of insects, fungi, weeds, nematodes, rodents, and for use as defoliants, desiccants, plant regulators and related purposes. However, such pesticides may be ineffective or may seriously injure health, property, or wildlife if not properly used. Pesticides may injure man or animals, either by direct poisoning or by gradual accumulation of poisons in the tissues. Crops or other plants may also be injured by their improper use. The drifting or washing of pesticides into streams or lakes can cause appreciable danger to aquatic life. A pesticide applied for the purpose of killing pests in a crop, which is not itself injured by the pesticide, may drift and injure other crops or nontarget organisms with which it comes in contact. In furtherance of the findings and recommendations of the Legislative Research Commission, it is hereby declared to be the policy of the State of North Carolina that for the protection of the health, safety, and welfare of the people of this State, and for the promotion of a more secure, healthy and safe environment for all the people of the State, the future sale, use and application of pesticides shall be regulated, supervised and controlled by the State in the manner herein provided. (1971, c. 832, s. 1.)

## CASE NOTES

**Cited** in Meads v. North Carolina Dep't of Agric., 349 N.C. 656, 509 S.E.2d 165 (1998).

## § 143-436. North Carolina Pesticide Board; creation and organization.

(a) There is hereby established the North Carolina Pesticide Board which, together with the Commissioner of Agriculture, shall be responsible for carrying out the provisions of this Article.

(b) The Pesticide Board shall consist of seven members, to be appointed by the Governor, as follows:

(1) One member each representing the North Carolina Department of Agriculture and Consumer Services, the State Health Director or his designee, and one member from an environmental protection agency in the Department of Environment and Natural Resources. The persons so selected may be either members of a policy board or departmental officials or employees.

(2) A representative of the agricultural chemical industry.

(3) A person directly engaged in agricultural production.

(4) Two at-large members, from fields of endeavor other than those enumerated in subdivisions (2) and (3) of this subsection, one of whom shall be a nongovernmental conservationist.

(c) The members of the Pesticide Board shall serve staggered four-year terms. Of the persons originally appointed, the members representing State agencies shall serve two-year terms, and the four at-large members shall serve four-year terms. All members shall hold their offices until their successors are appointed and qualified. Any vacancy occurring in the membership of the Board prior to the expiration of the term shall be filled by appointment by the Governor for the remainder of the unexpired term. The Governor may at any time remove any member from the Board for gross inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office. Each appointment to fill a vacancy in the membership of the Board shall be of a person having the same credentials as his predecessor.

(d) The Board shall select its chair from its own membership, to serve for a term of two years. The chair shall have a full vote. Any vacancy occurring in the chair's position shall be filled by the Board for the remainder of the term. The Board may select such other officers as it deems necessary.

(e) Any action of the Board shall require at least four concurring votes.

(f) The members of the Board who are not officers or employees of the State shall receive for their services the per diem and compensation prescribed in G.S. 138-5. (1971, c. 832, s. 1; 1973, c. 476, s. 128; 1989, c. 727, s. 170; 1997-261, s. 90; 1997-443, s. 11A.97.)

## § 143-437. Pesticide Board; functions.

The Pesticide Board shall be the governing board for the programs of pesticide management and control set forth in this Article. The Pesticide Board shall have the following powers and duties under this Article:

(1) To adopt rules and regulations and make policies for the programs set forth in this Article.

(2) To carry out a program of planning, environmental and biological monitoring, and of investigation into long-range needs and problems concerning pesticides. In order to encourage the cooperation of private property owners needed to implement the provisions of this subdivision, the Board may enter into agreements with private property owners to conduct sampling, testing, monitoring, and related activities on their property. Information obtained pursuant to these agreements shall not be disclosed in a manner that would permit the identification of an individual property owner unless the property owner has given permission to disclose the information.

(3) To collect, analyze and disseminate information necessary for the effective operation of the programs set forth in this Article.

(4) To provide professional advice to public and private agencies and citizens of the State on matters relating to pesticides, in cooperation with other State agencies, with professional groups, and with North Carolina State University and other educational institutions.

(5) To accept gifts, devises and bequests, and with the approval of the Governor to apply for and accept grants from the federal government and its agencies and from any foundation, corporation, association or individual, and may comply with the terms, conditions and limitations of the grant, in order to accomplish any of the purposes of the Board, such grant funds to be expended pursuant to the Executive Budget Act.

(6) To inform and advise the Governor on matters involving pesticides, and to prepare and recommend to the Governor and the General Assembly any legislation which may be deemed proper for the management and control of pesticides in North Carolina.

(7) To make annual reports to the Governor and to make such other investigations and reports as may be requested by the Governor or the General Assembly.

(8) To exempt any federal or State agency from any provision of this Article if it is determined by the Board that emergency conditions exist which require exemption. (1971, c. 832, s. 1; 1977, c. 199; 1979, c. 448, s. 14; 1995, c. 445, s. 1.)

**Editor's Note.** — Session Laws 2008-212, s. 2 provides: "The Pesticide Board shall adopt rules to implement the recommendations of the Governor's Task Force on Preventing Agricultural Pesticide Exposure, requiring recording of the specific time of day when each pesticide application was completed and extending the retention period for pesticide application records for all pesticides covered under the Worker Protection Standards for Agricultural Pesticides from 30 days to two years."

## § 143-438. Commissioner of Agriculture to administer and enforce Article.

The Commissioner of Agriculture shall have the following powers and duties under this Article:

(1) To administer and enforce the provisions of this Article.

(2) To attend all meetings of the Pesticide Board, but without power to vote (unless he be designated as the ex officio member of the Board from the Department of Agriculture and Consumer Services).

(3) To keep an accurate and complete record of all Board meetings and hearings, and to have legal custody of all books, papers, documents and other records of the Board.

(4) To assign and reassign the administrative and enforcement duties and functions assigned to him in this Article to one or more of the divisions and other units within the Department of Agriculture and Consumer Services.

(5) To direct the work of the personnel employed by the Board and of the personnel of the Department of Agriculture and Consumer Services who have responsibilities concerning the programs set forth in this Article.

(6) To delegate to any division head or other officer or employee of the Department of Agriculture and Consumer Services any of the powers and duties given to the Department by statute or by the rules, regulations and procedures established pursuant to this Article.

(7) To perform such other duties as the Board may from time to time direct. (1971, c. 832, s. 1; 1997-261, s. 91.)

### § 143-439. Pesticide Advisory Committee; creation and functions.

(a) There is hereby authorized the establishment of the Pesticide Advisory Committee, which shall assist the Board and the Commissioner in an advisory capacity on matters which may be submitted to it by the Board or the Commissioner, including technical questions and the development of rules and regulations.

(b) The Pesticide Advisory Committee shall consist of: three practicing farmers; one conservationist (at large); one ecologist (at large); one representative of the pesticide industry; one representative of agribusiness (at large); one local health director; three members of the North Carolina State University School of Agriculture and Life Sciences, at least one of which shall be from the area of wildlife or biology; one member representing the North Carolina Department of Agriculture and Consumer Services; one member representing the Department of Environment and Natural Resources; the State Health Director or his designee; one representative of a public utility or railroad company which uses pesticides; one representative of the Board of Transportation; one member of the North Carolina Agricultural Aviation Association; one member of the general public (at large); one member actively engaged in forest pest management; and one member representing the Division of Waste Management of the Department of Environment and Natural Resources. Each State agency represented [representative] on the Committee shall be appointed by the head of the agency. Other members of the Committee shall be appointed by the Board.

(c) Members of the Pesticide Advisory Committee shall serve at the pleasure of the Board. The members who are not officers or employees of the State shall receive regular State subsistence and travel expenses. (1971, c. 832, s. 1; 1973, c. 476, s. 128; c. 507, s. 5; 1975, c. 824; 1987, c. 559, s. 1; 1989, c. 727, s. 171; 1989 (Reg. Sess., 1990), c. 1004, s. 14; 1995 (Reg. Sess., 1996), c. 743, s. 19; 1997-261, s. 109; 1997-443, s. 11A.119(a).)

## Part 2. Regulation of the Use of Pesticides.

### § 143-440. Restricted use pesticides regulated.

(a) The Board may, by regulation after a public hearing, adopt and from time to time revise a list of restricted use pesticides for the State or for designated areas within the State. The Board may designate any pesticide or device as a "restricted use pesticide" upon the grounds that, in the judgment of the Board (either because of its persistence, its toxicity, or otherwise) it is so hazardous or injurious to persons, pollinating insects, animals, crops, wildlife, lands, or the environment, other than the pests it is intended to prevent, destroy, control, or mitigate that additional restriction on its sale, purpose, use or possession are required.

(b) The Board may include in any such restricted use regulation the time and conditions of sale, distribution, or use of such restricted use pesticides, may prohibit the use of any restricted use pesticide for designated purposes or at designated times; may require the purchaser or user to certify that restricted use pesticides will be used only as labeled or as further restricted by regulation; may require the certification and recertification of private applicators, and charge a fee of up to ten dollars ($10.00), with the fee set at a level to make the certification/recertification program self-supporting, and, after opportunity for a hearing, may suspend, revoke or modify the certification for violation of any provision of this Article, or any rule or regulation adopted thereunder; and may, if it deems it necessary to carry out the provisions of this Part, require that any or all restricted use pesticides shall be purchased, possessed, or used only under permit of the Board and under its direct supervision in certain areas and/or under certain conditions or in certain quantities or concentrations except that any person licensed to sell such pesticides may purchase and possess such pesticides without a permit. The Board may require all persons issued such permits to maintain records as to the use of the restricted use pesticides. The Board may authorize the use of restricted use pesticides by persons licensed under the North Carolina Structural Pest Control Act without a permit. (1971, c. 832, s. 1; 1979, c. 448, s. 1; 1981, c. 592, s. 1; 1987, c. 559, s. 2; c. 846.)

## § 143-441. Handling, storage and disposal of pesticides.

(a) The Board may adopt regulations:

(1) Concerning the handling, transport, storage (which may include security precautions), display or distribution of pesticides, and concerning the disposal of pesticides and pesticide containers.

(2) Restricting or prohibiting the use of certain types of containers or packages for specific pesticides. These restrictions may apply to type of construction, strength, and/or size to alleviate danger of spillage, breakage, or misuse.

(b) No person shall handle, transport, store, display, or distribute pesticides in such a manner as to endanger man and his environment or to endanger food, feed, or any other products that may be transported, stored, displayed, or distributed with pesticides, or in any manner contrary to the regulations of the Board.

(c) No person shall dispose of, discard, or store any pesticides or pesticide containers in such a manner as may cause injury to humans, vegetation, crops, livestock, wildlife, or to pollute any water supply or waterway, or in any manner contrary to the regulations of the Board. (1971, c. 832, s. 1.)

## § 143-442. Registration.

(a) Every pesticide prior to being distributed, sold, or offered for sale within this State or delivered for transportation or transported in intrastate commerce or between points within this State through any point outside this State shall be registered in the office of the Board, and such registration shall be renewed annually before January 1 for the ensuing calendar year. Beginning in 1988, the Board may by rule adopt a system of staggered three-year registrations. The applicant for registration shall file with the Board a statement including:

(1) The name and address of the applicant and the name and address of the person whose name will appear on the label, if other than the applicant;

(2) The name of the pesticide;

(3) A complete copy of the labeling accompanying the pesticide and a statement of all claims to be made for it including directions for use;

(4) If requested by the Board, a full description of the tests made and the results thereof upon which the claims are based;

(5) In the case of renewal of registration, a statement with respect to information which is different from that furnished when the pesticide was last registered;

(6) A Material Safety Data Sheet for the pesticide; and

(7) Any other information needed by the Board to determine the amount of annual assessment payable by the applicant.

(b) The applicant shall pay an annual registration fee of one hundred fifty dollars ($150.00) plus an additional annual assessment for each brand or grade of pesticide registered. The annual assessment shall be fifty dollars ($50.00) if the applicant's gross sales of the pesticide in this State for the preceding 12 months for the period ending September 30th were more than five thousand dollars ($5,000.00) and twenty-five dollars ($25.00) if gross sales were less than five thousand dollars ($5,000.00). An additional two hundred dollars ($200.00) delinquent registration penalty shall be assessed against the registrant for each brand or grade of pesticide which is marketed in North Carolina prior to registration as required by this Article. In the case of multi-year registration, the annual fee and additional assessment for each year shall be paid at the time of the initial registration. The Board shall give a pro rata refund of the registration fee and additional assessment to the registrant in the event that registration is canceled by the Board or by the United States Environmental Protection Agency.

(c) The Board, when it deems necessary in the administration of this Article, may require the submission of the complete formula of any pesticide.

(d) If the pesticide is properly registered with the United States Environmental Protection Agency and is in compliance with the requirements of G.S. 143-443, the Board shall register the pesticide. Provided, however, that if it does not appear to the Board that the article is such as to warrant the proposed claims for it or if the article and its labeling and other material required to be submitted do not comply with the provisions of this Part, it shall not register the article and in turn shall notify the applicant of the manner in which the article, labeling, or other material required to be submitted fail to comply. The Board may suspend or cancel the registration of a pesticide when the pesticide or its labeling does not comply with this Part.

(e) The Board is authorized and empowered to refuse to register, or to cancel the registration of any brands and grades of pesticides as herein provided, if the registrant fails or refuses to comply with the provisions of this Part, or any rules and regulations promulgated thereunder, or, upon satisfactory proof that the registrant or applicant has been guilty of fraudulent and deceptive practices in the evasions or attempted evasions of the provisions of this Part, or any rules and regulations promulgated thereunder. The Board may require the manufacturer or distributor of any pesticide, for which registration has been refused, cancelled, suspended or voluntarily discontinued or which has been found adulterated or deficient in its active ingredient, to remove such pesticide from the marketplace.

(f) Notwithstanding any other provisions of this Part, registration is not required in the case of a pesticide shipped from one plant within this State to another plant within this State operated by the same person.

(g) Any pesticide declared to be discontinued by the registrant must be registered by the registrant for one full year after distribution is discontinued. Any pesticide in channels of distribution after the aforesaid registration period may be confiscated and disposed of by the Board, unless the pesticide is acceptable for registration and is continued to be registered by the manufacturer or the person offering the pesticide for wholesale or retail sale. Provided, however, this subsection shall not apply to any brand or grade of pesticide which the Board determines does not remain in channels of distribution due to method of sale by registrant directly to users thereof.

(h) A pesticide may be registered by the Board for experimental use, including use to control wild animal or bird populations, even though the Wildlife Resources Commission may not have concurred in the declaration of the animal or bird populations as pests under the terms of Article 22A of Chapter 113 of the General Statutes.

(i) The Board shall be empowered to set forth criteria for determining when a given product constitutes a different or separate brand or grade of pesticide.

(j) Each manufacturer, distributor or registrant of a pesticide shall supervise the activities of any employee or agent to prevent the making of deceptive or misleading statements about the pesticide. (1971, c. 832, s. 1; 1973, c. 389, ss. 1, 7; 1975, c. 425, ss. 1, 2; 1979, c. 448, ss. 2, 3; c. 830, s. 10; 1981, c. 592, s. 2; 1987, c. 559, ss. 3-7; c. 827, s. 39; 1989, c. 544, s. 13; 1993, c. 481, ss. 1.1, 2; 1995, c. 445, s. 2; 2003-284, s. 35.4(e); 2009-451, s. 11.2.)

**Editor's Note.** — Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2009-451, s. 11.2, effective August 15, 2009, substituted "one hundred fifty dollars ($150.00)" for "one hundred dollars ($100.00)" in the first sentence of subsection (b).

## § 143-443. Miscellaneous prohibited acts.

(a) It shall be unlawful for any person to distribute, sell, or offer for sale within this State or deliver for transportation or transport in intrastate commerce or between points within this State through any point outside this State any of the following:

(1) Any pesticide which has not been registered pursuant to the provisions of G.S. 143-442, or any pesticide if any of the claims made for it or any of the directions for its use differ in substance from the representations made in connection with the registration, or if the composition of a pesticide differs from its composition as represented in connection with its registration: Except that, in the discretion of the Board, a change in the labeling or formula of a pesticide may be made within a registration period without requiring reregistration of the product.

(2) Any pesticide unless it is in the registrant's or the manufacturer's unbroken immediate container, and there is affixed to such container, and to the outside container or wrapper of the retail package, if there be one through which the required information on the immediate container cannot be clearly read, a label bearing:

a. The name and address of the manufacturer, registrant, or person for whom manufactured;

b. The name, brand, or trademark under which said article is sold; and

c. The net weight or measure of the content subject, however, to such reasonable variations as the Board may permit.

(3) Any pesticide which contains any substance or substances in quantities highly toxic to man, determined as provided in G.S. 143-444,

unless the label shall bear, in addition to any other matter required by this Part:

a. The skull and crossbones;

b. The word "poison" prominently, in red, on a background of distinctly contrasting color; and

c. A statement of an antidote for the pesticide.

(4) The pesticides commonly known as standard lead arsenate, basic lead arsenate, calcium arsenate, magnesium arsenate, zinc arsenate, zinc arsenite, sodium fluoride, sodium fluosilicate, and barium fluosilicate unless they have been distinctly colored or discolored as provided by regulations issued in accordance with this Part, or any other white or lightly colored pesticide which the Board, after investigation of and after public hearing on the necessity for such action for the protection of the public health and the feasibility of such coloration or discoloration, shall, by regulation, require to be distinctly colored or discolored; unless it has been so colored or discolored, provided, that the Board may exempt any pesticide to the extent that it is intended for a particular use or uses from the coloring or discoloring required or authorized by this section if the Board determines that such coloring or discoloring for such use or uses is not necessary for the protection of the public health.

(5) Any pesticide which is adulterated or misbranded, (or any device which is misbranded).

(6) Any pesticide in containers violating regulations adopted pursuant to G.S. 143-441. Pesticides found in containers which are unsafe due to damage or defective construction may be seized and impounded.

(b) It shall be unlawful:

(1) For any person to detach, alter, deface, or destroy, in whole or in part, any label or labeling provided for in this Part or regulations promulgated hereunder, or to add any substance to, or take any substance from a pesticide in a manner that may defeat the purpose of this Part;

(2) For any person to use for his own advantage or to reveal, other than to the Board or proper officials or employees of the State or federal government or to the courts of this State in response to a subpoena, or to physicians, or in emergencies to pharmacists and other qualified persons, for use in the preparation of antidotes, any information relative to formulas of products acquired by authority of G.S. 143-442.

(2a) Repealed by Session Laws 1981, c. 592, s. 3.

(3) For any person to use any pesticide in a manner inconsistent with its labeling.

(4) For any person who contracts for the aerial application of a pesticide to permit the application of any pesticide that is designated on its labeling as toxic to bees without first notifying, based on available listings, the owner or operator of any apiary registered under the North Carolina Bee and Honey Act of 1977 that is within a distance designated by the Pesticide Board as necessary and appropriate to prevent damage or injury.

(5) For any person to distribute, sell or offer for sale any restricted use pesticide to any dealer who does not hold a valid North Carolina Pesticide Dealer License.

(6) For any person to assault, resist, impede, intimidate, or interfere with any State employee while that employee is engaged in the performance of his or her duties under this Article.

(7) For any person to apply, for compensation, a pesticide that has not been registered pursuant to G.S. 143-442. (1971, c. 832, s. 1; 1975, c. 425, s. 3; 1979, c. 448, ss. 4, 5; 1981, c. 547; c. 592, ss. 3, 4; 1987, c. 559, s. 8; 1995, c. 445, s. 3.)

**Editor's Note.** — The North Carolina Bee and Honey Act of 1977, referred to in subdivision (b)(4), is codified as G.S. 106-634 through 106-644.

CASE NOTES

**Application Inconsistent with Labeling.** — Substantial evidence supported a conclusion by the Pesticide Board that petitioner violated statutes making it unlawful to use any pesticide inconsistent with its label where the evidence tended to show that petitioner aerially applied a pesticide to a soybean field; the pesticide label stated that the pesticide should not be applied so as to directly and through drift expose workers or other persons; a resident of land adjoining the soybean field was exposed to a vapor containing the pesticide; and the pesticide was found on vegetation on the land adjoining the soybean field. Meads v. North Carolina Dep't of Agric., 349 N.C. 656, 509 S.E.2d 165 (1998).

## § 143-444. Determinations.

The Board is authorized:

(1) To declare as a pest any form of plant or animal life or virus which is injurious to plants, man, domestic animals, articles, or substances;

(2) To determine whether pesticides are highly toxic to man; and

(3) To determine standards of coloring or discoloring for pesticides, and to subject pesticides to the requirements of G.S. 143-443(a)(4). (1971, c. 832, s. 1.)

## § 143-445. Exemptions.

(a) The penalties provided for violations of G.S. 143-443(a) shall not apply to:

(1) Any carrier while lawfully engaged in transporting pesticides within this State, if such carrier shall, upon request, permit the Board or its designated agent to copy all records showing the transactions in and movement of the articles;

(2) Public officials of this State or local subdivisions thereof and the federal government engaged in the performance of their official duties;

(3) The manufacturer or shipper of a pesticide for experimental use only,

a. By or under the supervision of an agency of this State or of the federal government authorized by law to conduct research in the field of pesticides, or

b. By others if the pesticide is not sold and if the container thereof is plainly and conspicuously marked "For experimental use only — Not to be sold," together with the manufacturer's name and address; (except that if a written permit has been obtained from the Board, pesticides may be sold for experimental purposes subject to such restrictions and conditions as may be set forth in the permit).

(b) No article shall be deemed in violation of this Part when intended solely for export to a foreign country, and when prepared or packed according to the specifications or directions of the purchaser. If not so exported, all the provisions of this Part shall apply. (1971, c. 832, s. 1.)

## § 143-446. Samples; submissions.

(a) The Board, or its agent, is authorized and directed to sample, test, inspect and make analyses of pesticides sold or offered for sale or distributed within this State, at time and place and to such an extent as it may deem necessary to determine whether such pesticides are in compliance with the provisions of this Article. The Board is authorized to adopt regulations concerning the collection and examination of samples (or devices), and to adopt regulations establishing tolerances providing for reasonable deviations from the guaranteed analysis.

(b) The official analysis shall be made from the official sample. Official samples shall be collected from material that has been packaged, labeled and released for shipment. A sealed and identified sample, herein called "official check sample" shall be kept until the analysis is completed on the official sample, except that the registrant may obtain upon request a portion of said official sample. If the official analysis conforms with the provisions of this Part, the official check sample may be destroyed. If the official analysis does not conform with the provisions of this Part, then the official check sample shall be retained for a period of 90 days from the date of the certificate of analysis of the official sample.

(c) The Board, of its own motion or upon complaint, may cause an examination to be made for the purpose of determining whether any pesticide complies with the requirements of this Part. If it shall appear from such examination that a pesticide fails to comply with the provisions of this Part, the Board may cause notice to be given to the offending person in the manner provided in G.S. 143-464, and the proceedings thereupon shall be as provided in such section; provided that pesticides may be seized and confiscated as provided in G.S. 143-447.

(d) The Board shall, by publication in such manner as it may prescribe, give notice of all judgments entered in actions instituted under the authority of this Article. (1971, c. 832, s. 1; 1987, c. 559, s. 9.)

## § 143-447. Emergency suspensions; seizures.

(a) The Board may order the summary suspension of the registration of a pesticide if it finds the suspension necessary to prevent an imminent hazard to the public, a nontarget organism, or a segment of the environment. In no event shall registration of a pesticide be construed as a defense to any charge of an offense prohibited under this Article.

(b) It shall be the duty of the Board to issue and enforce a written or printed "stop sale, stop use, or removal" order to the owner or custodian of any lot of pesticide and for the owner or custodian to hold said lot at a designated place when the Board finds said pesticide is being offered or exposed for sale in violation of any of the provisions of this Article until the law has been complied with and said pesticide is released in writing by the Board or said violation has been otherwise legally disposed of by written authority. The Board shall release the pesticide so withdrawn when the requirements of the provisions of this Article have been complied with and upon payment of all costs and expenses incurred in connection with the withdrawal.

The Board may issue a "stop sale, use or removal order" to prevent or stop the use of a pesticide in a manner inconsistent with its labeling or to prevent or stop the disposal of a pesticide or a pesticide container in violation of this Article or the rules of the Board adopted thereunder.

(c) Any pesticide (or device) that is distributed, sold, or offered for sale within this State or delivered for transportation or transported in intrastate commerce between points within this State through any point outside this State shall be liable to be proceeded against in superior court in any county of the State where it may be found and seized for confiscation by process or libel for condemnation:

(1) In the case of a pesticide,

  a. If it is adulterated or misbranded,

  b. If it has not been registered under the provisions of G.S. 143-442, or has had its registration suspended or revoked or is the subject of a stop sale, stop use, or removal order,

c. If it fails to bear on its label the information required by this Part,
d. If it is a white or lightly colored pesticide and is not colored as required under this Part.

(2) In the case of a device, if it is misbranded.

(d) If the article is condemned, it shall, after entry of decree, be disposed of by destruction or sale as the court may direct and the proceeds, if such article is sold, less legal costs, shall be paid to the State Treasurer; provided that the article shall not be sold contrary to the provisions of this Part; and provided further that upon payment of costs and execution and delivery of a good and sufficient bond conditioned that the article shall not be disposed of unlawfully, the court may direct that said article be delivered to the owner thereof for relabeling or reprocessing or disposal, as the case may be.

(e) When a decree of condemnation is entered against the article, court costs and fees and storage and other proper expenses shall be awarded against the person, if any, intervening as claimant of the article. (1971, c. 832, s. 1; 1979, c. 448, s. 6; 1981, c. 592, s. 5; 1987, c. 559, s. 10; c. 827, s. 41.)

## Part 3. Pesticide Dealers.

### § 143-448. Licensing of pesticide dealers; fees.

(a) No person shall act in the capacity of a pesticide dealer, or shall engage or offer to engage in the business of, advertise as, or assume to act as a pesticide dealer unless he is licensed annually as provided in this Part. A separate license and fee shall be obtained for each location or outlet from which restricted use pesticides are distributed, sold, held for sale, or offered for sale.

(b) Applications for a pesticide dealer license shall be in the form and shall contain the information prescribed by the Board. Each application shall be accompanied by a non-refundable fee of fifty dollars ($50.00). All licenses issued under this Part shall expire on December 31 of the year for which they are issued.

(c) The license for a pesticide dealer may be renewed annually upon application to the Board, accompanied by a fee of fifty dollars ($50.00) for each license, on or before the first day of January of the calendar year for which the license is issued.

(d) Repealed by Session Laws 1981, c. 592, s. 6.

(e) Every licensed pesticide dealer who changes his address or place of business shall immediately notify the Board.

(f) The Board shall issue to each applicant that satisfies the requirements of this Part a license which entitles the applicant to conduct the business described in the application for the calendar year for which the license is issued, unless the license is sooner revoked or suspended. (1971, c. 832, s. 1; 1981, c. 592, s. 6; 1987, c. 559, ss. 2, 11; 1989, c. 544, s. 11; 1995, c. 445, s. 4; 2003-284, ss. 35.4(b), 35.4(c).)

**Editor's Note.** — Session Laws 1987, c. 559, s. 12 rewrote the heading of Part 3, which formerly read "Pesticide Dealers and Manufacturers."

Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

## § 143-449. Qualifications for pesticide dealer license; examinations.

(a) An applicant for a license must present evidence satisfactory to the Board concerning his qualifications for such license.

(b) Each applicant shall satisfy the Board as to his responsibility in carrying on the business of a pesticide dealer. Each applicant for an original license must demonstrate upon written, or written and oral, examination to be prescribed by the Board his knowledge of pesticides, their usefulness and their hazards; his competence as a pesticide dealer; and his knowledge of the laws and regulations governing the use and sale of pesticides.

(c) The Board shall by regulation:

(1) Designate what persons or class of persons shall be required to pass the examination in the case of a pesticide dealer operating more than one location, and in the case of an applicant that is a corporation, governmental unit or agency, or other organized group;

(2) Provide for renewal license examinations at intervals not more frequent than four years. (1971, c. 832, s. 1; 1975, c. 425, s. 4.)

## § 143-450. Employees of pesticide dealers; dealer's responsibility.

(a) Every licensed pesticide dealer shall submit to the Board, at such times as the Board or the Commissioner may prescribe, the names of all persons employed by him who sell or recommend "restricted use pesticides."

(b) Each pesticide dealer shall be responsible for the actions of every person who acts as his employee or agent in the solicitation or sale of pesticides, and in all claims and recommendations for use or application of pesticides. (1971, c. 832, s. 1; 1979, c. 448, s. 7; 1987, c. 559, s. 2.)

## § 143-451. Denial, suspension and revocation of license.

(a) The Board may deny, suspend, modify, or revoke a license issued under this Part if it finds that the applicant or licensee or his employee has committed any of the following acts, each of which is declared to be a violation of this Part:

(1) Made false or fraudulent claims through any media, misrepresenting the effect of materials or methods to be utilized or sold;

(2) Made a pesticide recommendation not in accordance with the label registered pursuant to this Article;

(3) Violated any provision of this Article or of any rule or regulation adopted by the Board or of any lawful order of the Board;

(4) Failed to pay the original or renewal license fee when due, and continued to sell restricted use pesticides without paying the license fee, or sold restricted use pesticides without a license;

(5) Was guilty of gross negligence, incompetency or misconduct in acting as a pesticide dealer;

(6) Refused or neglected to keep and maintain the records required by this Article, or to make reports when and as required, or refusing to make these records available for audit or inspection;

(7) Made false or fraudulent records, invoices, or reports;

(8) Used fraud or misrepresentation, or presented false information, in making an application for a license or renewal of a license, or in selling or offering to sell restricted use pesticides;

(9) Refused or neglected to comply with any limitations or restrictions on or in a duly issued license or permit;
(10) Aided or abetted a licensed or an unlicensed person to evade the provisions of this Article, combined or conspired with such a licensed or unlicensed person to evade the provisions of this Article, or allowed one's license to be used by an unlicensed person;
(11) Impersonated any state, county, or city inspector or official;
(12) Stored or disposed of containers or pesticides by means other than those prescribed on the label or adopted regulations;
(13) Provided or made available any restricted use pesticide to any person other than a certified private applicator, licensed pesticide applicator, certified structural pest control applicator, structural pest control licensee or an employee under the direct supervision of one of the aforementioned certified or licensed applicators.

(b) Any licensee whose license is revoked under the provisions of this Article shall not be eligible to apply for a new license hereunder until such time has elapsed from the date of the order revoking said license as established by the Board (not to exceed two years), or if an appeal is taken from said order or revocation, not to exceed two years from the date of the order or final judgment sustaining said revocation. (1971, c. 832, s. 1; 1975, c. 425, ss. 6, 7; 1987, c. 559, ss. 2, 13; c. 827, s. 40.)

## Part 4. Pesticide Applicators and Consultants.

### § 143-452. Licensing of pesticide applicators; fees.

(a) No person shall engage in the business of pesticide applicator within this State at any time unless he is licensed annually as a pesticide applicator by the Board.

(b) Applications for pesticide applicator license shall be in the form and shall contain the information prescribed by the Board. Each application shall be accompanied by a non-refundable fee of fifty dollars ($50.00) for each pesticide applicator's license. In addition, an annual inspection fee of twenty-five dollars ($25.00) shall be submitted for each aircraft to be licensed. Should any aircraft fail to pass inspection, making it necessary for a second inspection to be made, the Board shall require an additional twenty-five-dollar ($25.00) inspection fee. In addition to the required inspection, unannounced inspections may be made without charge to determine if equipment is properly calibrated and maintained in conformance with the laws and regulations. All aircraft licensed to apply pesticides shall be identified by a license plate or decal furnished by the Board at no cost to the licensee, which plate or decal shall be affixed on the aircraft in a location and manner prescribed by the Board. No applicator inspection or license fee, original or renewal, shall be charged to State agencies or local governments or their employees. Inspections of ground pesticide application equipment may be made. Any such equipment determined to be faulty or unsafe shall not be used for the purpose of applying a pesticide(s) until such time as proper repairs and/or alterations are made.

(c) Repealed by Session Laws 1981, c. 592, s. 6.

(d) The Board shall classify licenses to be issued under this Part. Separate classifications or subclassifications shall be specified for (i) ground and aerial methods of application, and (ii) State and local government units engaged in the control of rodents and insects of public health significance. The Board may include such further classifications and subclassifications as the Board considers appropriate, including provisions for licensing of apprentice pesticide applicators. For aerial applicators, a license shall be required for both the contractor and the pilot. Each classification and subclassification may be subject to separate testing procedures and requirements.

(e) Every licensed pesticide applicator who changes his address shall immediately notify the Board.

(f) If the Board finds the applicant qualified to apply pesticides in the classifications he has applied for and, if the applicant files the bond or insurance required under G.S. 143-467, and if the applicant applying for a license to engage in aerial application of pesticides has met all of the requirements of the Federal Aviation Agency to operate the equipment described in the application, the Board shall issue a pesticide applicator's license limited to the classifications for which he is qualified. Every such license shall expire at the end of the calendar year of issue unless it has been revoked or suspended prior thereto by the Board for cause, or unless such financial security required under G.S. 143-467 is dated to expire at an earlier date, in which case said license shall be dated to expire upon expiration date of said financial security. The license may restrict the applicant to the use of a certain type or types of equipment or pesticides or to certain areas if the Board finds that the applicant is qualified to use only such type or types. If a license is not issued as applied for, the Board shall inform the applicant in writing of the reasons therefor.

(g) A pesticide applicator's license shall not be transferable. When there is a transfer of ownership, management, or operation of a business of a licensee hereunder, the new owner, manager, or operator (as the case may be) whether it be an individual, firm, partnership, corporation, or other entity, must have available a licensed pesticide applicator to supervise the pesticide application business prior to continuance of such business.

(h) Repealed by Session Laws 1987, c. 559, s. 15. (1971, c. 832, s. 1; 1973, c. 389, ss. 2, 5; 1977, c. 100; 1981, c. 592, ss. 6, 7; 1987, c. 559, ss. 14, 15; 1989, c. 544, s. 10; 2003-284, s. 35.4(a).)

**Editor's Note.** — Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

## § 143-453. Qualifications for pesticide applicator's license; examinations.

(a) An applicant for a license must present satisfactory evidence to the Board concerning his qualifications for a pesticide applicator license. The contractor and each pilot involved in aerial application of pesticides shall be licensed.

Those qualifications, in the case of a pilot, shall include at least 125 hours and one year's flying experience as a pilot in the field of aerial pesticide application. A pilot lacking 125 hours and one year's experience as a pilot in the field of aerial pesticide application shall be licensed as an apprentice aerial pesticide applicator pilot. All aerial applications of pesticides by a licensed apprentice shall be conducted under the direct supervision of a licensed pesticide applicator pilot. The supervising pilot, while directly supervising an apprentice, shall operate out of the same airstrip as the apprentice and shall be available periodically throughout each day to provide advice and assistance to the apprentice.

(b) Each applicant shall satisfy the Board as to his knowledge of the laws and regulations governing the use and application of pesticides in the classifications he has applied for (manually or with various equipment that he may have applied for a license to operate), and as to his responsibility in carrying on the business of a pesticide applicator. Each applicant for an original license must demonstrate upon written, or written and oral, examination to be prescribed by the Board his knowledge of pesticides, their usefulness and their hazards; his competence as a pesticide applicator; and his knowledge of the laws and regulations governing the use and application of pesticides in the classification for which he has applied.

(c) The Board shall by regulation:

(1) Designate what persons or class of persons shall be required to pass the examination in the case of an applicant that is a corporation or governmental unit or agency;

(2) Provide for license renewal examinations at intervals not more frequent than four years, or more frequently if found by the Board to be required to be necessary in order to qualify North Carolina's State pesticide control plan for federal approval. (1971, c. 832, s. 1; 1973, c. 389, s. 4; 1975, c. 425, ss. 5, 9; 1977, c. 1125; 1985, c. 163.)

## § 143-454. Solicitors, salesmen and operators; applicator's responsibility.

(a) Every licensed pesticide applicator shall submit to the Board, at such times as the Board or the Commissioner may prescribe, the names of all solicitors, salesmen, and operators employed by him.

(b) Each licensed pesticide applicator shall be responsible for solicitors, salesmen, and operators in his employment to assure that pesticides are used in a manner consistent with the intent of this Article. (1971, c. 832, s. 1; 1979, c. 448, s. 8.)

## § 143-455. Pest control consultant license.

(a) No person shall perform services as a pest control consultant without first procuring from the Board a license. Applications for a consultant license shall be in the form and shall contain the information prescribed by the Board. The application for a license shall be accompanied by a non-refundable annual fee of fifty dollars ($50.00).

(b) An applicant for a consultant license must present satisfactory evidence to the Board concerning his qualifications for such license. The Board may classify consultant licenses into one or more classifications or subclassifications based upon types of consulting services performed or to be performed. Such classifications and subclassifications may reflect the crops involved in the consulting service, the discipline or training of consultant, the discretion or lack of discretion involved in the consulting service, and the site or location of the service. Each classification and subclassification may be subject to separate testing procedures and requirements, and may be subject to its own minimum standards of training in specialized subject matter from a recognized college or university, or equivalent specialized consulting experience or training. Qualifications for licensing may be less stringent if the licensee is restricted to making recommendations contained in publications recognized by the Board as appropriate for a specific consulting classification or subclassification.

(c) Each applicant shall satisfy the Board as to his responsibility in carrying on the business of a pesticide consultant. Each applicant for an original license must demonstrate upon written, or written and oral, examination to be prescribed by the Board his knowledge of pesticides, their usefulness and their hazards; his competence as a pesticide consultant; and his knowledge of the laws and regulations governing the use and sale of pesticides.

(d) Pest control consultants shall be subject to the same provisions as pesticide applicators concerning penalties for late applications for license, changes of address, transferability of licenses, periodic reexamination, and examinations for corporate applicants. (1971, c. 832, s. 1; 1975, c. 425, s. 10; 1987, c. 559, s. 16; 1989, c. 544, s. 12; 2003-284, s. 35.4(d).)

**Editor's Note.** — Session Laws 2003-284, s. 48.1, provides: "Parts 32 through 47 of this act do not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by those parts before the effective date of its amendment or repeal; nor do they affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

## § 143-456. Denial, suspension and revocation of license.

(a) The Board may deny, suspend, modify, or revoke a license issued under this Part if it finds that the applicant or licensee or his employee has committed any of the following acts, each of which is declared to be a violation of this Part:

(1) Made false or fraudulent claims through any media, misrepresenting the effect of materials or methods to be utilized;
(2) Made a pesticide recommendation or application not in accordance with the label registered pursuant to this Article;
(3) Operated faulty or unsafe equipment;
(4) Operated in a faulty, careless, or negligent manner;
(5) Violated any provision of this Article or of any rule or regulation adopted by the Board or any lawful order of the Board;
(6) Refused or neglected to keep and maintain the records required by this Article, or to make reports when and as required;
(7) Made false or fraudulent records, invoices, or reports;
(8) Operated unlicensed equipment;
(9) Used fraud or misrepresentation, or presented false information, in making an application for a license or renewal of a license;
(10) Refused or neglected to comply with any limitations or restrictions on or in a duly issued license or permit;
(11) Aided or abetted a licensed or an unlicensed person to evade the provisions of this Article, combined or conspired with such a licensed or unlicensed person to evade the provisions of this Article, or allowed one's license to be used by an unlicensed person;
(12) Made false or misleading statements during or after an inspection concerning any infestation or infection of pests found on land;
(13) Impersonated any state, county, or city inspector or official;
(14) Stored or disposed of containers or pesticides by means other than those prescribed on the labeling or by rule;
(15) Failed to pay the original or renewal license fee when due and continued to operate as an applicator, or applied pesticides without a license.

(16) Failed to pay a civil penalty assessed under this Article within 30 days after the date it is assessed.

(b) Any licensee whose license is revoked under the provisions of this Article shall not be eligible to apply for a new license hereunder until such time has elapsed from the date of the order revoking said license as established by the Board (not to exceed two years), or if an appeal is taken from said order or revocation, not to exceed two years from the date of the order or final judgment sustaining said revocation. (1971, c. 832, s. 1; 1975, c. 425, ss. 6, 8; 1987, c. 559, s. 17; c. 827, s. 42; 1995, c. 445, s. 5.)

### CASE NOTES

**License Properly Revoked.** — Evidence that a pesticide was found in many areas outside the application area after being aerially applied supported the Pesticide Board's finding that the applicator acted in a faulty, careless, or negligent manner, which supported the revocation of the applicator's license. Meads v. North Carolina Dep't of Agric., 349 N.C. 656, 509 S.E.2d 165 (1998).

**§ 143-457:** Repealed by Session Laws 1981, c. 592, s. 8.

## § 143-458. Rules and regulations concerning methods of application.

(a) The Board may adopt rules prescribing the method to be used in the application of pesticides and the times and places pesticides may be applied. The Board may adopt rules restricting or prohibiting the sale and use of pesticides in designated areas during specified time periods. In adopting rules under this subsection, the Board shall consider factors required to prevent damage or injury to the following by the drift or misapplication of pesticides:

(1) Plants, including forage plants, on adjacent or nearby land;
(2) Wildlife in the adjoining or nearby areas;
(3) Fish and other aquatic life in waters in reasonable proximity to the area to be treated; or
(4) Other animals, persons or beneficial insects.

In issuing such regulations, the Board shall give consideration to pertinent research findings and recommendations of other agencies of this State or of the federal government.

(b) The Board may by regulation require that notice of a proposed application of a pesticide be given to landowners adjoining the property to be treated or in the immediate vicinity thereof, if it finds that such notice is necessary to carry out the purpose of this Article.

(c) A pesticide applicator, a pesticide applicator's employee, or an agent of a pesticide applicator shall not apply any substance that:

(1) Has the active ingredients contained in a pesticide that is registered pursuant to G.S. 143-442, and
(2) Is not registered as a pesticide pursuant to G.S. 143-442.

(d) A pesticide applicator, a pesticide applicator's employee, or an agent of a pesticide applicator shall not combine any substance whose application is prohibited under subsection (c) of this section with any other substance to apply as a pesticide or to apply for any other reason, whether the combination occurs before, during, or after the application.

(e) Any person who violates subsection (c) or (d) of this section shall be guilty of a Class 2 misdemeanor, which shall include a fine of up to one thousand dollars ($1,000) per violation. (1971, c. 832, s. 1; 1987, c. 827, s. 43; 1995, c. 478, s. 1.)

## § 143-459. Reporting of shipments and volumes of pesticides.

Every person selling pesticides directly to the consumer shall file with the Board, in such manner and with such frequency as the Board may prescribe, reports of purchases, sales and shipments of restricted use pesticides and other pesticides designated by the Board. Failure to file any report when due shall be cause for suspension or revocation of any license or registration issued under this Article, or for denial of the issuance or renewal of any such license or registration, and shall be a misdemeanor, punishable as provided by G.S. 143-469. The time for reporting may be extended for an additional 15 days for cause, upon written request to the Board. All reports provided under this Part are provided solely for the purposes of the Board. (1971, c. 832, s. 1; 1987, c. 559, s. 2.)

## Part 5. General Provisions.

## § 143-460. Definitions.

As used in this Article, unless the context otherwise requires:

(1) The term "active ingredient" means
   a. In the case of a pesticide other than a plant regulator, defoliant, or desiccant, an ingredient which will prevent, destroy, repel, or mitigate insects, nematodes, fungi, rodents, weeds, or other pests;
   b. In the case of a plant regulator, an ingredient which, through physiological action, will accelerate or retard the rate of growth or rate of maturation or otherwise alter the behavior of ornamental or crop plants or the produce thereof;
   c. In the case of a defoliant, an ingredient which will cause the leaves or foliage to drop from a plant;
   d. In the case of a desiccant, an ingredient which will artificially accelerate the drying of a plant tissue.

(2) The term "adulterated" shall apply to any pesticide if its strength or purity falls below the professed standard or quality as expressed on labeling or under which it is sold, or if any substance has been substituted wholly or in part for the article, or if any valuable constituent of the article has been wholly or in part abstracted.

(2a) "Antimicrobial pesticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any microorganism pest.

(3) Reserved.

(4) "Board" means the North Carolina Pesticide Board.

(5) "Commissioner" means the North Carolina Commissioner of Agriculture.

(6) "Committee" means the Pesticide Advisory Committee.

(7) The term "defoliant" means any substance or mixture of substances intended for causing the leaves or foliage to drop from a plant, with or without causing abscission.

(8) The term "desiccant" means any substance or mixture of substances intended for artificially accelerating the drying of plant tissues.

(9) The term "device" means any instrument or contrivance intended for trapping, destroying, repelling, or mitigating insects or rodents or destroying, repelling, or mitigating fungi, weeds, nematodes, or such other pests as may be designated by the Board, but not including equipment used for the application of pesticides when sold separately therefrom.

(10) Repealed by Session Laws 1995, c. 445, s. 6.

(11) "Equipment" means any type of ground, water or aerial equipment, device, or contrivance using motorized, mechanical or pressurized power and used to apply any pesticide on land and anything that may be growing, habitating or stored on or in such land, but shall not include any pressurized hand-sized household device used to apply any pesticide or any equipment, device or contrivance of which the person who is applying the pesticide is the source of power or energy in making such pesticide application.

(12) The term "fungus" means any non-chlorophyll-bearing thallophyte (that is any non-chlorophyll-bearing plant of a lower order than mosses and liverworts), as for example, rust, smut, mildew, mold, yeast, and bacteria, except those on or in living man or other animals and those on or in processed food, beverages, or pharmaceuticals.

(13) The term "fungicide" means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any fungi.

(14) The term "herbicide" means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any weed.

(15) The term "inert ingredient" means an ingredient which is not an active ingredient.

(16) The term "ingredient statement" means

a. A statement of the name and percentage of each active ingredient, together with the total percentage of the inert ingredients, in the pesticide; and

b. In case the pesticide contains arsenic in any form, a statement of the percentages of total and water-soluble arsenic, each calculated as elemental arsenic.

(17) The term "insect" means any of the numerous small invertebrate animals generally having the body more or less obviously segmented, for the most part belonging to the class Insecta, comprising six-legged, usually winged forms, as, for example, beetles, bugs, wasps, flies, and to other allied classes of arthropods whose members are wingless and usually have more than six legs, as, for example, spiders, mites, ticks, centipedes, and wood lice.

(18) The term "insecticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects which may be present in any environment whatsoever.

(19) The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide (or device) or the immediate container thereof, and the outside container or wrapper of the retail package, if any there be, of the pesticide (or device).

(20) The term "labeling" means all labels and other written, printed, or graphic matter:

a. Upon the pesticide (or device) or any of its containers or wrappers;

b. Accompanying the pesticide (or device) at any time;

c. To which reference is made on the label or in literature accompanying the pesticide (or device) except when accurate, nonmisleading reference is made to current official publications of the United States Department of Agriculture or Interior, the United States Public Health Service, state experiment stations, state agricultural colleges, or other similar federal institutions or official agencies of this State or other states authorized by law to conduct research in the field of pesticides.

(21) "Land" means all land and water areas, including airspace, and all plants, animals, structures, buildings, devices and contrivances, appurtenant thereto or situated thereon, fixed or mobile, including any used for transportation.

(22) "Manufacturer" includes any person engaged in the business of importing, producing, preparing, formulating, mixing, or processing pesticides.

(22a) "Material Safety Data Sheet" or "MSDS" means a chemical information sheet which would satisfy the requirements of the Hazardous Chemicals Right-to-Know Act, Article 18, Chapter 95 of the General Statutes, or any law enacted in substitution therefor.

(23) The term "misbranded" shall apply:

a. To any pesticide or device if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular;

b. To any pesticide:

1. If it is an imitation of or is offered for sale under the name of another pesticide;
2. If its labeling bears any reference to registration under this Article;
3. If the labeling accompanying it does not contain instructions for use which are necessary and, if complied with, adequate for the protection of the public;
4. If the label does not contain a warning or caution statement which may be necessary and, if complied with, adequate to prevent injury to living man and other vertebrate animals;
5. If the label does not bear an ingredient statement on that part of the immediate container and on the outside container or wrapper, if there be one, through which the ingredient statement on the immediate container cannot be clearly read, of the retail package which is presented or displayed under customary conditions of purchase except that the Board may permit the statement to appear prominently on some other part of the container, if the size or form of the container make it impractical to comply with the requirements of this subparagraph;
6. If any word, statement, or other information required by or under the authority of this Article to appear on the labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or graphic matter in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use; or
7. If in the case of an insecticide, nematicide, fungicide, or herbicide, when used as directed or in accordance with commonly recognized practice, it shall be injurious to living man or other vertebrate animals or vegetation, except weeds, to which it is applied, or to the person applying such pesticides or
8. In the case of a plant regulator, defoliant, or desiccant when used as directed it shall be injurious to living man or other vertebrate animals, or vegetation to which it is applied, or to the person applying such pesticides, except that physical or physiological effects on plants or parts thereof shall not be deemed to be injury, when this is the purpose for which the plant regulator, defoliant, or desiccant was applied, in accordance with the label claims and recommendations.

(24) The term "nematicide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating nematodes.

(25) The term "nematode" means invertebrate animals of the phylum nemathelminthes and class Nematoda, that is, unsegmented round worms with elongated, fusiform, or saclike bodies covered with cuticle, and inhabiting soil, water, plants or plant parts; may also be called nemas or eelworms.

(25a) The phrase "packaged, labeled and released for shipment" means the point in the production and marketing process of a pesticide where the pesticide has been produced, and it is the intent of the producer that such product be introduced into commerce for direct retail sale.

(26) A "person" is any person, including (but not limited to) an individual, firm, partnership, association, company, joint-stock association, public or private institution, municipality or county or local government unit (as defined in G.S. 143-215.40(b)), state or federal governmental agency, or private or public corporation organized under the laws of this State or the United States or any other state or country.

(26a) The term "pest" means any insect, rodent, nematode, fungus, weed or any other noxious or undesirable microorganism or macroorganism, except viruses, bacteria, or other microorganisms on or in living persons or other living animals.

(27) "Pest control consultant" means any person, who, for a fee, offers or supplies technical advice, supervision, or aid, or recommends the use of specific pesticides for the purpose of controlling insects, plant diseases, weeds, and other pests, but does not include any person regulated by the North Carolina Structural Pest Control Act (G.S. Chapter 106, Article 4C).

(28) The term "pesticide" means:
  a. Any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and
  b. Any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant.

(29) "Pesticide applicator" means any person who owns or operates a pesticide application business or who provides, for compensation, a service that includes the application of pesticides upon the lands or properties of another; any public operator; any golf course operator; any seed treater; any person engaged in demonstration or research pest control; and any other person who applies pesticides for compensation and is not exempt from this definition. It does not include:
  a. Any person who uses or supervises the use of a pesticide (i) only for the purpose of producing an agricultural commodity on property owned or rented by him or his employer, or (ii) only (if applied without compensation other than trading of personal services between producers of agricultural commodities) on the property of another person, or (iii) only for the purposes set forth in (i) and (ii) above.
  b. Any person who applies pesticides for structural pest control, as defined in the North Carolina Structural Pest Control Law (G.S. Chapter 106, Article 4C).
  c. Any person certified by the Water Treatment Facility Operators Board of Certification under Article 2 of Chapter 90A of the General Statutes or by the Wastewater Treatment Operators Plant Certification Commission under Article 3 of Chapter 90A of the General Statutes who applies pesticides labeled for the treatment of water or wastewater.
  d. Any person who applies antimicrobial pesticides that are not classified for restricted use and are not being used for agricultural, horticultural, or forestry purposes.

e. Any person who applies a general use pesticide to the property of another as a volunteer, without compensation.

f. Any person who is employed by a licensed pesticide applicator.

(30) The term "pesticide dealer" means any person who is engaged in the business of distributing, selling, offering for sale, or holding for sale restricted use pesticides for distribution directly to users. The term pesticide dealer does not include:

a. Persons whose sales of pesticides are limited to pesticides in consumer-sized packages (as defined by the Board) which are labeled and intended for home and garden use only and are not restricted use pesticides, or

b. Practicing veterinarians and physicians who prescribe, dispense, or use pesticides in the performance of their professional services.

(31) Repealed by Session Laws 1973, c. 389, s. 3.

(32) The term "plant regulator" means any substance or mixture of substances, intended through physiological action, for accelerating or retarding the rate of growth or rate of maturation, or for otherwise altering the behavior of ornamental or crop plants or the produce thereof, but shall not include substances to the extent that they are intended as plant nutrients, trace elements, nutritional chemicals, plant inoculants, and soil amendments.

(33) "Public operator" means any person in charge of any equipment used by public utilities (as defined by General Statutes Chapter 62), State agencies, municipal corporations, or other governmental agencies applying pesticides.

(34) The term "registrant" means the person registering any pesticide pursuant to the provisions of this Article.

(35) The term "restricted use pesticide" or "pesticide classified for restricted use" means any pesticide or use classified as restricted by the Administrator of the United States Environmental Protection Agency or other pesticide or use which the Board has designated as such pursuant to G.S. 143-440.

(36) The term "rodenticide" means any substance or mixture of substances intended for preventing, destroying, repelling, attracting, or mitigating rodents or any other vertebrate animal which the Board shall declare to be a pest.

(36a) The phrase "to use any pesticide in a manner inconsistent with its labeling" means to use any pesticide in a manner not permitted by the labeling; provided that the phrase shall not include:

a. Applying a pesticide at any dosage, concentration, or frequency less than that specified on the labeling,

b. Applying a pesticide against any target pest not specified on the labeling if the application is to the crop, animal, or site specified on the labeling, unless the labeling specifically states that the pesticide may be used only for the pests specified on the labeling,

c. Employing any method of application not prohibited by the labeling, or

d. Mixing pesticides or mixing a pesticide with a fertilizer when such mixture is not prohibited by the labeling.

(37) The term "weed" means any plant or part thereof which grows where not wanted.

(38) "Wildlife" means all living things that are neither human, domesticated, nor, as defined in this Article, pests; including but not limited to mammals, birds, and aquatic life. (1971, c. 832, s. 1; 1973, c. 389, s. 3; 1975, c. 425, s. 11; 1979, c. 448, ss. 9, 10; 1981, c. 592, ss. 9-11; 1987, c. 559, ss. 2, 18-20; 1991, c. 87, ss. 1, 2; 1995, c. 445, ss. 6, 7.)

### CASE NOTES

**Cited** in Meads v. North Carolina Dep't of Agric., 349 N.C. 656, 509 S.E.2d 165 (1998).

## § 143-461. General powers of Board.

In addition to the specific powers prescribed elsewhere in this Article, and for the purpose of carrying out its duties, the Board shall have the power, at any time and from time to time:

(1) To adopt from time to time and to modify and revoke official regulations interpreting and applying the provisions of this Article and rules of procedure establishing and amplifying the procedures to be followed in the administration of this Article. Unless the Board deems there are overriding policy considerations involved, any regulation of the Board, which will in the judgment of the Board result in severe curtailment of the usefulness or value of inventories or equipment in the hands of persons licensed under this Article, should be given a future effective date so as to minimize undue potential economic loss to licensees;

(2) To authorize the Commissioner by proclamation (i) to suspend or implement, in whole or in part, particular regulations of the Board which may be affected by variable conditions, or (ii) to suspend the application of any provision of this Part to any federal or State agency if it is determined by the Commissioner that emergency conditions require such action.

(3) To conduct such investigations as it may reasonably deem necessary to carry out its duties as prescribed by this Article;

(4) To conduct public hearings in accordance with the procedures prescribed by this Article;

(5) To delegate such of the powers of the Board as the Board deems necessary (other than its powers to adopt rules and regulations of any kind) to one or more of its members, to the Commissioner, or to any qualified employee of the Board or of the Commissioner; provided, that the provisions of any such delegation of power shall be set forth in the official regulations of the Board. Any person to whom a delegation of power is made to conduct a hearing shall report the hearing with its evidence and record to the Board for decision;

(6) To call upon the Attorney General for such legal advice and assistance as is necessary to the functioning of the Board;

(7) To institute such actions in the superior court in the county in which any defendant resides, or has his or its principal place of business, as the Board may deem necessary for the enforcement of any of the provisions of this Article or of any official actions of the Board, including proceedings to enforce subpoenas or for the punishment of contempt of the Board. Upon violation of any of the provisions of this Article, or of any regulation of the Board adopted under the authority of this Article the Board may, either before or after the institution of any other proceedings (civil or criminal), institute a civil action in the superior court in the name of the State for injunctive relief to restrain the violation and for such other or further relief in the premises as said court shall deem proper. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from any other penalty or remedy prescribed by this Article for any violation of same;

(8) To agree upon or enter into any settlements or compromises of any actions and to prosecute any appeals or other proceedings. (1971, c. 832, s. 1; 1973, c. 389, s. 6; 1987, c. 827, s. 44.)

**Editor's Note.** — Session Laws 2008-212, s. 2, provides: "The Pesticide Board shall adopt rules to implement the recommendations of the Governor's Task Force on Preventing Agricultural Pesticide Exposure, requiring recording of the specific time of day when each pesticide application was completed and extending the retention period for pesticide application records for all pesticides covered under the Worker Protection Standards for Agricultural Pesticides from 30 days to two years."

## § 143-462. Procedures for revocations and related actions affecting licenses.

In all proceedings, the effect of which would be to revoke, suspend, deny, or withhold renewal of a license issued under Part 3 or Part 4 of this Article, or to deny permission to take an examination for such a license, the provisions of Chapter 150B of the General Statutes shall be applicable. (1971, c. 832, s. 1; 1987, c. 827, s. 1.)

## § 143-463. Adoption and publication of rules.

Chapter 150B of the General Statutes governs the adoption of rules under this Article and the publication of those rules. (1971, c. 832, s. 1; 1975, 2nd Sess., c. 983, s. 84; 1979, c. 448, s. 11; 1987, c. 827, s. 45.)

## § 143-464. Procedures concerning registration of pesticides.

A denial, suspension, or cancellation of a registration of a pesticide shall be made in accordance with the procedures in Chapter 150B of the General Statutes for denying, suspending, or canceling a license. (1971, c. 832, s. 1; 1979, c. 448, s. 12; 1987, c. 827, s. 46.)

## § 143-465. Reciprocity; intergovernmental cooperation.

(a) The Board may issue any license required by this Article on a reciprocal basis with other states without examination to a nonresident who is licensed in another state substantially in accordance with any of the provisions of the Article, provided that financial security as provided for in G.S. 143-467 is met.

(b) The Board may cooperate or enter into formal agreements with any other agency of this State or its subdivisions or with any agency of any other state or of the federal government for the purpose of enforcing any of the provisions of this Article.

(c) In order to avoid confusion resulting from diverse requirements and to avoid increased costs to the people of this State due to the necessity of complying with such diverse requirements in the manufacture and sale of such pesticides, it is desirable that there should be uniformity between the requirements of the several states and the federal government relating to such pesticides. To this end the Board is authorized, after public hearing, to adopt by regulation such regulations, applicable to and in conformity with the primary standards established by this Article, as have been or may be prescribed with respect to pesticides by departments or agencies of the United States government.

(d) No county, city, or other political subdivision of the State shall adopt or continue in effect any ordinance, rule, regulation, or resolution regulating the use, sale, distribution, storage, transportation, disposal, formulation, labeling, registration, manufacture, or application of pesticides in any area subject to regulation by the Board pursuant to this Article. Nothing in this section shall prohibit a county, city, or other political subdivision of the State from exercising its planning and zoning authority under Article 19 of Chapter 160A of the General Statutes or Article 18 of Chapter 153A of the General Statutes, or from exercising its fire prevention or inspection authority. (1971, c. 832, s. 1; 1995, c. 445, s. 8.)

## § 143-466. Records; information; inspection; enforcement.

(a) The Board shall require licensees to maintain records with respect to the sale and application of such pesticides as it may from time to time prescribe. Such relevant information as the Board may deem necessary may be specified by rule. The records shall be kept for a period of three years from the date of the application of the pesticide to which the records refer, and shall be available for inspection and copying by the Board or its agents at its request.

(b) The Board may publish information regarding injury which may result from improper application or use of pesticides and the methods and precautions designed to prevent such injury.

(c) The Board may provide for inspection of any equipment used for application of pesticides and may require repairs or other changes before its further use for pesticide application. A list of requirements that equipment shall meet may be adopted by the Board by regulation.

(d) The Board may provide for inspection of any place of business where pesticides are stored or sold and may require changes in methods of handling, displaying and storing of all pesticides. A list of requirements that places of business must meet may be adopted by regulation of the Board.

(e) For the purpose of carrying out the provisions of this Article, inspectors designated by the Board may enter upon any public or private premises at reasonable times, in order:

(1) To have access for the purpose of inspecting the premises and any equipment subject to this Article and such premises on which such equipment is kept or stored;
(2) To inspect lands actually or reported to be exposed to pesticides;
(3) To inspect storage or disposal areas;
(4) To inspect or investigate complaints of injury to humans, land or plants; or
(5) To sample pesticides being applied, or to be applied.

No person shall refuse entry or access to any authorized representative of the Board who requests entry for purposes of inspection, and who presents appropriate credentials, nor shall any person obstruct, hamper or interfere with any such representative while in the process of carrying out his official duties. Should the Board or its designated agent be denied access to any land where such access was sought for the purposes set forth in this Article, the Board may apply to any court of competent jurisdiction for a search warrant authorizing access to such land for said purposes. The court may upon such application issue the search warrant for the purposes requested. (1971, c. 832, s. 1; 1995, c. 445, s. 9.)

**Editor's Note.** — Session Laws 2008-212, s. 2, provides: "The Pesticide Board shall adopt rules to implement the recommendations of the Governor's Task Force on Preventing Agricultural Pesticide Exposure, requiring recording of the specific time of day when each pesticide application was completed and extending the retention period for pesticide application records for all pesticides covered under the Worker Protection Standards for Agricultural Pesticides from 30 days to two years."

## § 143-467. Financial responsibility.

(a) The Board may require from a licensee or an applicant for a license under this Article evidence of his financial ability to properly indemnify persons suffering damage from the use or application of pesticides, in the form of a surety bond, liability insurance or cash deposit. The amount of this bond, insurance or deposit shall be determined by the Board, in light of the risk of damage. The indemnification requirements may extend to damage to persons and property from equipment used (including aircraft).

(b) The Board may also require a reasonable performance bond with satisfactory surety to secure the performance of contractual obligations of the licensee, with respect to application of pesticides. Any person injured by the breach of any such obligation or any person damaged by pesticides or by equipment used in their application shall be entitled to sue on the bond in his own name in any court of competent jurisdiction to recover the damages he may have sustained.

(c) Any regulations adopted by the Board pursuant to G.S. 143-461 to implement this section may provide for such conditions, limitations and requirements concerning the financial responsibility required by this section as the Board deems necessary, including but not limited to notice of reduction or cancellation of coverage, deductible provisions, and acceptability of surety. Such regulations may classify financial responsibility requirements according to the separate license classifications and subclassifications prescribed by the Board pursuant to G.S. 143-452 and the dealer category (Part 3 of this Article). (1971, c. 832, s. 1.)

## § 143-468. Disposition of fees and charges.

(a) Except as provided in G.S. 143-469 and in subsection (b), all fees and charges received by the Board under this Article shall be credited to the Department of Agriculture and Consumer Services for the purpose of administration and enforcement of this Article.

(b) The Pesticide Environmental Trust Fund is established as a nonreverting account within the Department of Agriculture and Consumer Services. The Department of Agriculture and Consumer Services shall administer the Fund. The additional assessment imposed by G.S. 143-442(b) on the registration of a brand or grade of pesticide shall be credited to the Fund. The Department shall distribute money in the Fund as follows:

(1) Two and one-half percent (2.5%) to North Carolina State University Cooperative Extension Service to enhance its agromedicine efforts in cooperation with East Carolina University School of Medicine.

(2) Two and one-half percent (2.5%) to East Carolina University School of Medicine to enhance its agromedicine efforts in cooperation with North Carolina State University Cooperative Extension Service.

(3) Twenty percent (20%) to North Carolina State University, Department of Toxicology, to establish and maintain an extension agromedicine specialist position.

(4) Seventy-five percent (75%) to the Department of Agriculture and Consumer Services for the costs of administering its pesticide disposal program, including the salaries and support of staff for the pesticide disposal program, and for its environmental programs, as directed by the Board, including establishing a pesticide container management program to enhance its pesticide disposal program and its water quality initiatives. (1971, c. 832, s. 1; 1993, c. 481, s. 1; 1997-261, s. 92; 1998-215, s. 26(b); 2005-276, s. 11.1.)

## § 143-469. Penalties.

(a) Any person who shall be adjudged to have violated any provision of this Article, or any regulation of the Board adopted pursuant to this Article, shall be guilty of a Class 2 misdemeanor. In addition, if any person continues to violate or further violates any provision of this Article after written notice from the Board, the court may determine that each day during which the violation continued or is repeated constitutes a separate violation subject to the foregoing penalties.

(b) A civil penalty of not more than two thousand dollars ($2,000) may be assessed by the Board against any person who violates or directly causes a violation of any provision of this Article or any rule adopted pursuant to this Article.

(c) Proceedings for the assessment of civil penalties under this section shall be governed by Chapter 150B of the North Carolina General Statutes. If the person assessed a civil penalty fails to pay the penalty to the North Carolina Department of Agriculture and Consumer Services, the Board may institute an action in the superior court of the county in which the person resides or has his principal place of business to recover the unpaid amount of said penalty. An action to recover a civil penalty under this section shall not relieve any party from any other penalty prescribed by law.

(d) Notwithstanding any other provision of this Article, the maximum penalty which may be assessed under this section against any person referred to in G.S. 143-460(29)a shall not exceed five hundred dollars ($500.00). Penalties may be assessed under this section against a person referred to in G.S. 143-460(29)a only for willful violations.

(e) The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1971, c. 832, s. 1; 1981, c. 592, s. 12; 1987, c. 559, s. 21; c. 827, s. 1; 1993, c. 539, s. 1035; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 445, s. 10; 1997-261, s. 109; 1998-215, s. 26(a).)

**Legal Periodicals.** — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

CASE NOTES

**Applied** in Meads v. North Carolina Dep't of Agric., 349 N.C. 656, 509 S.E.2d 165 (1998).

## § 143-470: Repealed by Session Laws 1981, c. 592, s. 13.

## § 143-470.1. Report of minor violations in discretion of Board or Commissioner.

Nothing in this Article shall be construed to require the Board or the Commissioner to initiate, or attempt to initiate, any criminal or administrative proceedings under this Article for minor violations of this Article whenever the Board or Commissioner believes that the public interest will be adequately served in the circumstances by a suitable written notice or warning. (1979, c. 448, s. 13.)

## ARTICLE 53.

## *Commission for Mental Health, Mental Retardation and Substance Abuse Services.*

**§§ 143-471 through 143-475:** Repealed by Session Laws 1975, c. 879, s. 18.

**§ 143-475.1:** Repealed by Session Laws 1985, c. 589, s. 44.

## ARTICLE 54.

## *North Carolina Council on State Goals and Policy Act.*

**§§ 143-476 through 143-489:** Repealed by Session Laws 1975, c. 879, s. 9.

**Editor's Note.** — Former sections 143-483 through 143-489 had been reserved for future codification purposes.

## ARTICLE 55.

## *The Southern Growth Policies Agreement.*

### § 143-490. Compact enacted into law.

The Southern Growth Policies Agreement is hereby enacted into law and entered into by this State with all other states legally joining therein in the form substantially as follows. (1973, c. 200, s. 1.)

### § 143-491. Article I. Findings and Purposes.

(a) The party states find that the South has a sense of community based on common social, cultural and economic needs and fostered by a regional tradition. There are vast potentialities for mutual improvement of each state in the region by cooperative planning for the development, conservation and efficient utilization of human and natural resources in a geographic area large enough to afford a high degree of flexibility in identifying and taking maximum advantage of opportunities for healthy and beneficial growth. The independence of each state and the special needs of subregions are recognized and are to be safeguarded. Accordingly, the cooperation resulting from this Agreement is intended to assist the states in meeting their own problems by enhancing their abilities to recognize and analyze regional opportunities and take account of regional influences in planning and implementing their public policies.

(b) The purposes of this Agreement are to provide:

(1) Improved facilities and procedures for study, analysis and planning of governmental policies, programs and activities of regional significance.

(2) Assistance in the prevention of interstate conflicts and the promotion of regional cooperation.

(3) Mechanisms for the coordination of state and local interests on a regional basis.

(4) An agency to assist the states in accomplishing the foregoing. (1973, c. 200, s. 1.)

## § 143-492. Article II. The Board.

(a) There is hereby created the Southern Growth Policies Board, hereinafter called "the Board."

(b) The Board shall consist of five members from each party state, as follows:

(1) The governor.

(2) Two members of the state legislature, one appointed by the presiding officer of each house of the legislature or in such other manner as the legislature may provide. For the Senate of North Carolina, the General Assembly provides that the appointment shall be made by the President Pro Tempore of the Senate.

(3) Two residents of the state who shall be appointed by the governor to serve at his pleasure.

(c) In making appointments pursuant to paragraph (b)(3), a governor shall, to the greatest extent practicable, select persons who, along with the other members serving pursuant to paragraph (b), will make the state's representation on the Board broadly representative of the several socioeconomic elements within his state.

(d)(1) A governor may be represented by an alternate with power to act in his place and stead, if notice of the designation of such alternate is given to the Board in such manner as its bylaws may provide.

(2) A legislative member of the Board may be represented by an alternate with power to act in his place and stead, unless the laws of his state prohibit such representation and if notice of the designation of such alternate is given to the Board in such manner as its bylaws may provide. An alternate for a legislative member of the Board shall be selected by the member from among the members of the legislative house in which he serves.

(3) A member of the Board serving pursuant to paragraph (b) (3) of this Article may be represented by another resident of his state who may participate in his place and stead, except that he shall not vote: Provided that notice of the identity and designation of the representative selected by the member is given to the Board in such manner as its bylaws may provide. (1973, c. 200, s. 1; 1995, c. 490, s. 50.)

## § 143-493. Article III. Powers.

(a) The Board shall prepare and keep current a statement of regional objectives, including recommended approaches to regional problems. The statement may also identify projects deemed by the Board to be of regional significance. The statement shall be available in its initial form two years from the effective date of this Agreement and shall be amended or revised no less frequently than once every six years. The statement shall be in such detail as the Board may prescribe. Amendments, revisions, supplements or evaluations may be transmitted at any time. An annual commentary on the statement shall be submitted at a regular time to be determined by the Board.

(b) In addition to powers conferred on the Board elsewhere in this Agreement, the Board shall have the power to make or commission studies, investigations and recommendations with respect to:

(1) The planning and programming of projects of interstate or regional significance.

(2) Planning and scheduling of governmental services and programs which would be of assistance to the orderly growth and prosperity of the region, and to the well-being of its population.

(3) Effective utilization of such federal assistance as may be available on a regional basis or as may have an interstate or regional impact.

(4) Measures for influencing population distribution, land use, development of new communities and redevelopment of existing ones.

(5) Transportation patterns and systems of interstate and regional significance.

(6) Improved utilization of human and natural resources for the advancement of the region as a whole.

(7) Any other matters of a planning, data collection or informational character that the Board may determine to be of value to the party states. (1973, c. 200, s. 1.)

## § 143-494. Article IV. Avoidance of Duplication.

(a) To avoid duplication of effort and in the interest of economy, the Board shall make use of existing studies, surveys, plans and data and other materials in the possession of the governmental agencies of the party states and their respective subdivisions or in the possession of other interstate agencies. Each such agency, within available appropriations and if not expressly prevented or limited by law, is hereby authorized to make such materials available to the Board and to otherwise assist it in the performance of its functions. At the request of the Board, each such agency is further authorized to provide information regarding plans and programs affecting the region, or any subarea thereof, so that the Board may have available to it current information with respect thereto.

(b) The Board shall use qualified public and private agencies to make investigations and conduct research, but if it is unable to secure the undertaking of such investigations or original research by a qualified public or private agency, it shall have the power to make its own investigations and conduct its own research. The Board may make contracts with any public or private agencies or private persons or entities for the undertaking of such investigations or original research within its purview.

(c) In general, the policy of paragraph (b) of this Article shall apply to the activities of the Board relating to its statement of regional objectives, but nothing herein shall be construed to require the Board to rely on the services of other persons or agencies in developing the statement of regional objectives or any amendment, supplement or revision thereof. (1973, c. 200, s. 1.)

## § 143-495. Article V. Advisory Committees.

The Board shall establish a Local Governments Advisory Committee. In addition, the Board may establish advisory committees representative of subregions of the South, civic and community interests, industry, agriculture, labor or other categories or any combinations thereof. Unless the laws of a party state contain a contrary requirement, any public official of the party state or a subdivision thereof may serve on an advisory committee established pursuant hereto and such service may be considered as a duty of his regular office or employment. (1973, c. 200, s. 1.)

## § 143-496. Article VI. Internal Management of the Board.

(a) The members of the Board shall be entitled to one vote each. No action of the Board shall be binding unless taken at a meeting at which a majority of the total number of votes on the Board are cast in favor thereof. Action of the Board shall be only at a meeting at which a majority of the members or their alternates are present. The Board shall meet at least once a year. In its bylaws, and subject to such directions and limitations as may be contained therein, the Board may delegate the exercise of any of its powers relating to internal administration and management to an Executive Committee or the Executive Director. In no event shall any such delegation include final approval of:

(1) A budget or appropriation request.
(2) The statement of regional objectives or any amendment, supplement or revision thereof.
(3) Official comments on or recommendations with respect to projects of interstate or regional significance.
(4) The annual report.

(b) To assist in the expeditious conduct of its business when the full Board is not meeting, the Board shall elect an Executive Committee of not to exceed 23 members, including at least one member from each party state. The Executive Committee, subject to the provisions of this Agreement and consistent with the policies of the Board, shall be constituted and function as provided in the bylaws of the Board. One half of the membership of the Executive Committee shall consist of governors, and the remainder shall consist of other members of the Board, except that at any time when there is an odd number of members on the Executive Committee, the number of governors shall be one less than half of the total membership. The members of the Executive Committee shall serve for terms of two years, except that members elected to the first Executive Committee shall be elected as follows: One less than half of the membership for two years and the remainder for one year. The Chairman, Chairman-Elect, Vice-Chairman and Treasurer of the Board shall be members of the Executive Committee and anything in this paragraph to the contrary notwithstanding shall serve during their continuance in these offices. Vacancies in the Executive Committee shall not affect its authority to act, but the Board at its next regularly ensuing meeting following the occurrence of any vacancy shall fill it for the unexpired term.

(c) The Board shall have a seal.

(d) The Board shall elect, from among its members, a Chairman, a Chairman-Elect, a Vice-Chairman and a Treasurer. Elections shall be annual. The Chairman-Elect shall succeed to the office of Chairman for the year following his service as Chairman-Elect. For purposes of the election and service of officers of the Board, the year shall be deemed to commence at the conclusion of the annual meeting of the Board and terminate at the conclusion of the next annual meeting thereof. The Board shall provide for the appointment of an Executive Director. Such Executive Director shall serve at the pleasure of the Board, and together with the Treasurer and such other personnel as the Board may deem appropriate shall be bonded in such amounts as the Board shall determine. The Executive Director shall be Secretary.

(e) The Executive Director, subject to the policy set forth in this Agreement and any applicable directions given by the Board, may make contracts on behalf of the Board.

(f) Irrespective of the civil service, personnel or other merit system laws of any of the party states, the Executive Director, subject to the approval of the Board, shall appoint, remove or discharge such personnel as may be necessary for the performance of the functions of the Board, and shall fix the duties and compensation of such personnel. The Board in its bylaws shall provide for the personnel policies and programs of the Board.

(g) The Board may borrow, accept or contract for the services of personnel from any party jurisdiction, the United States, or any subdivision or agency of the aforementioned governments, or from any agency of two or more of the party jurisdictions or their subdivisions.

(h) The Board may accept for any of its purposes and functions under this Agreement any and all donations, and grants of money, equipment, supplies, materials, and services, conditional or otherwise, from any state, the United States, or any other governmental agency, or from any person, firm, association, foundation, or corporation, and may receive, utilize and dispose of the same. Any donation or grant accepted by the Board pursuant to this paragraph or services borrowed pursuant to paragraph (g) of this Article shall be reported in the annual report of the Board. Such report shall include the nature, amount and conditions, if any, of the donation, grant, or services borrowed, and the identity of the donor or lender.

(i) The Board may establish and maintain such facilities as may be necessary for the transacting of its business. The Board may acquire, hold, and convey real and personal property and any interest therein.

(j) The Board shall adopt bylaws for the conduct of its business and shall have the power to amend and rescind these bylaws. The Board shall publish its bylaws in convenient form and shall file a copy thereof and a copy of any amendment thereto, with the appropriate agency or officer in each of the party states.

(k) The Board annually shall make to the governor and legislature of each party state a report covering the activities of the Board for the preceding year. The Board at any time may make such additional reports and transmit such studies as it may deem desirable.

(*l*) The Board may do any other or additional things appropriate to implement powers conferred upon it by this Agreement. (1973, c. 200, s. 1; 1979, c. 35, s. 1.)

## § 143-497. Article VII. Finance.

(a) The Board shall advise the governor or designated officer or officers of each party state of its budget of estimated expenditures for such period as may be required by the laws of that party state. Each of the Board's budgets of estimated expenditures shall contain specific recommendations of the amount or amounts to be appropriated by each of the party states.

(b) The total amount of appropriation requests under any budget shall be apportioned among the party states. Such apportionment shall be in accordance with the following formula:

(1) One third in equal shares,
(2) One third in the proportion that the population of a party state bears to the population of all party states, and
(3) One third in the proportion that the per capita income in a party state bears to the per capita income in all party states.

In implementing this formula, the Board shall employ the most recent authoritative sources of information and shall specify the sources used.

(c) The Board shall not pledge the credit of any party state. The Board may meet any of its obligations in whole or in part with funds available to it pursuant to Article VI(h) of this Agreement, provided that the Board takes specific action setting aside such funds prior to incurring an obligation to be met in whole or in part in such manner. Except where the Board makes use of funds available to it pursuant to Article VI(h), or borrows pursuant to this paragraph, the Board shall not incur any obligation prior to the allotment of funds by the party states adequate to meet the same. The Board may borrow against anticipated revenues for terms not to exceed two years, but in any such event the credit pledged shall be that of the Board and not of a party state.

(d) The Board shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Board shall be subject to the audit and accounting procedures established by its bylaws. However, all receipts and disbursements of funds handled by the Board shall be audited yearly by a certified or licensed public accountant, and the report of the audit shall be included in and become part of the annual report of the Board.

(e) The accounts of the Board shall be open at any reasonable time for inspection by duly constituted officers of the party states and by any persons authorized by the Board.

(f) Nothing contained herein shall be construed to prevent Board compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the Board. (1973, c. 200, s. 1.)

## § 143-498. Article VIII. Cooperation with the Federal Government and Other Governmental Entities.

Each party state is hereby authorized to participate in cooperative or joint planning undertakings with the federal government, and any appropriate agency or agencies thereof, or with any interstate agency or agencies. Such participation shall be at the instance of the governor or in such manner as state law may provide or authorize. The Board may facilitate the work of state representatives in any joint interstate or cooperative federal-state undertaking authorized by this Article, and each such state shall keep the Board advised of its activities in respect of such undertakings, to the extent that they have interstate or regional significance. (1973, c. 200, s. 1.)

## § 143-499. Article IX. Subregional Activities.

The Board may undertake studies or investigations centering on the problems of one or more selected subareas within the region: Provided that in its judgment, such studies or investigations will have value as demonstrations for similar or other areas within the region. If a study or investigation that would be of primary benefit to a given state, unit of local government, or intrastate or interstate area is proposed, and if the Board finds that it is not justified in undertaking the work for its regional value as a demonstration, the Board may undertake the study or investigation as a special project. In any such event, it shall be a condition precedent that satisfactory financing and personnel arrangements be concluded to assure that the party or parties benefited bear all costs which the Board determines that it would be inequitable for it to assume. Prior to undertaking any study or investigation pursuant to this Article as a special project, the Board shall make reasonable efforts to secure the undertaking of the work by another responsible public or private entity in accordance with the policy set forth in Article IV(b). (1973, c. 200, s. 1.)

## § 143-500. Article X. Comprehensive Land Use Planning.

If any two or more contiguous party states desire to prepare a single or consolidated comprehensive land use plan, or a land use plan for any interstate area lying partly within each such state, the governors of the states involved may designate the Board as their joint agency for the purpose. The Board shall accept such designation and carry out such responsibility: Provided that the states involved make arrangements satisfactory to the Board to reimburse it or otherwise provide the resources with which the land use plan is to be prepared. Nothing contained in this Article shall be construed to deny the availability for use in the preparation of any such plan of data and information already in the possession of the Board or to require payment on account of the use thereof in addition to payments otherwise required to be made pursuant to other provisions of this Agreement. (1973, c. 200, s. 1.)

## § 143-501. Article XI. Compacts and Agencies Unaffected.

Nothing in this Agreement shall be construed to:

(1) Affect the powers or jurisdiction of any agency of a party state or any subdivision thereof.
(2) Affect the rights or obligations of any governmental units, agencies or officials, or of any private persons or entities conferred or imposed by any interstate or interstate-federal compacts to which any one or more states participating herein are parties.
(3) Impinge on the jurisdiction of any existing interstate-federal mechanism for regional planning or development. (1973, c. 200, s. 1.)

## § 143-502. Article XII. Eligible Parties; Entry into and Withdrawal.

(a) This Agreement shall have as eligible parties the states of Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia, the Commonwealth of Puerto Rico, and the Territory of the Virgin Islands, hereinafter referred to as party states.

(b) Any eligible state may enter into this Agreement and it shall become binding thereon when it has adopted the same: Provided that in order to enter into initial effect, adoption by at least five states shall be required.

(c) Adoption of the Agreement may be either by enactment thereof or by adherence thereto by the governor; provided that in the absence of enactment, adherence by the governor shall be sufficient to make his state a party only until December 31, 1973. During any period when a state is participating in this Agreement through gubernatorial action, the governor may provide to the Board an equitable share of the financial support of the Board from any source available to him. Nothing in this paragraph shall be construed to require a governor to take action contrary to the constitution or laws of his state.

(d) Except for a withdrawal effective on December 31, 1973, in accordance with paragraph (c) of this Article, any party state may withdraw from this Agreement by enacting a statute repealing the same, but no such withdrawal shall take effect until one year after the governor of the withdrawing state has given notice in writing of the withdrawal to the governors of all other party states. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal. (1973, c. 200, s. 1; 1979, c. 35, s. 2.)

## § 143-503. Article XIII. Construction and Severability.

This Agreement shall be liberally construed so as to effectuate the purposes thereof. The provisions of this Agreement shall be severable and if any phrase, clause, sentence, or provision of this Agreement is declared to be contrary to the constitution of any state or of the United States, or the application thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this Agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this Agreement shall be held contrary to the constitution of any state participating therein, the Agreement shall remain in full force and effect as to the state affected as to all severable matters. (1973, c. 200, s. 1.)

## § 143-504. Copies of bylaws and amendments to be filed.

Copies of bylaws and amendments to be filed pursuant to Article VI(j) of the Agreement shall be filed with chief state records-keeping agency. (1973, c. 200, s. 2.)

### § 143-505. Continuance of states as parties.

Nothing contained in the Southern Growth Policies Agreement as enacted by this Article shall in any event be construed to terminate the participation of this State with any state which adopted the Southern Growth Policies Agreement prior to the effective date of this Article, except that the provisions of Article XII(c) shall govern with respect to the continuance of states as parties thereto after December 31, 1973. (1973, c. 200, s. 3.)

### § 143-506. Rights of State and local governments not restricted.

No section, Article, or provision contained herein shall be construed so as to prohibit, restrict or restrain the actions of any individual member state or the actions of any county or municipal government within the boundaries of any individual member state nor shall any delegate from the State of North Carolina be authorized by this General Assembly to cast any vote that would in any manner restrict the sovereign rights presently granted to or retained by this State under the United States Constitution, or the rights of any local governments granted by the Constitution of the State of North Carolina or by statutory acts of the General Assembly. (1973, c. 200, s. 4.)

**§§ 143-506.1 through 143-506.5:** Reserved for future codification purposes.

## Article 55A.

## *Balanced Growth Policy Act.*

### § 143-506.6. Title.

This Article shall be known as the North Carolina Balanced Growth Policy Act. (1979, c. 412, s. 1.)

### § 143-506.7. Purposes.

The purposes of this Article are to declare as a policy that the State of North Carolina shall encourage economic progress and job opportunities throughout the State; support growth trends which are favorable to maintain a dispersed population, to maintain a healthy and pleasant environment and to preserve the natural resources of the State. (1979, c. 412, s. 2.)

### § 143-506.8. Declaration of State Balanced Growth Policy.

The General Assembly of North Carolina recognizes the importance of reaching a higher standard of living throughout North Carolina by maintaining a balance of people, jobs, public services and the environment, supported by the growing network of small and large cities in the State. The General Assembly of North Carolina, in order to assure that opportunities for a higher standard of living are available all across the State, declares that it shall be the policy of the State to bring more and better jobs to where people live; to encourage the development of adequate public services on an equitable basis for all of the State's people at an efficient cost; and to maintain the State's natural environmental heritage while accommodating urban and agricultural growth. (1979, c. 412, s. 3.)

## § 143-506.9. Cooperation of agencies.

The General Assembly encourages, to the fullest extent possible, all State agencies to review their existing policies, procedures and regulations to bring them into conformity with the provisions of this Balanced Growth Policy. (1979, c. 412, s. 4.)

## § 143-506.10. Designation of growth centers; achieving balanced growth.

It shall be the policy of the State of North Carolina to support the expansion of the State and to designate growth areas or centers with the potential, capacity and desire for growth. The Governor, with the advice of county and municipal government officials and citizens, is charged with designating growth areas or centers, which shall include at least one center in each North Carolina county. Designation of growth areas or centers shall be reviewed annually. These designations may be used for the purpose of establishing priority consideration for State and federal assistance for growth.

Progress toward achieving balanced growth shall be measured by the strengthening of economic activity and the adequacy of public services within each of the State's multi-county regions and, as to the geographical area included, the Southeastern Economic Development Commission. The Governor, with the advice of county and municipal government officials and citizens, shall develop measures of progress toward achieving balanced growth. (1979, c. 412, s. 5.)

## § 143-506.11. Citizen participation.

The Governor shall establish a process of citizen participation that assures the expression of needs and aspirations of North Carolina's citizens in regard to the purposes of this Article. (1979, c. 412, s. 6.)

## § 143-506.12. Policy areas.

The following program area guidelines shall become the policy for the State of North Carolina:

(1) To encourage diversified job growth in different areas of the State, with particular attention to those groups which have suffered from high rates of unemployment or underemployment, so that sufficient work opportunities at high wage levels can exist where people live;

(2) To encourage the development of transportation systems that link growth areas or centers together with appropriate levels of service;

(3) To encourage full support for the expansion of family-owned and operated units in agriculture, forestry and the seafood industry as the basis for increasing productive capacity;

(4) To encourage the development and use of the State's natural resources wisely in support of Balanced Growth Policy while fulfilling the State's constitutional obligation to protect and preserve its natural heritage;

(5) To promote the concept that a full range of human development services shall be available and accessible to persons in all areas of the State;

(6) To encourage the continued expansion of early childhood, elementary, secondary and higher education opportunities so that they are improving in both quality and availability;

(7) To encourage excellent technical training for North Carolina workers that prepares them to acquire and hold high-skill jobs and that

encourages industries which employ high-skill workers to locate in the State;

(8) To encourage the availability of cultural opportunities to people where they live;

(9) To encourage the expansion of local government capacity for managing growth consistent with this Balanced Growth Policy; and

(10) To encourage conservation of existing energy resources and provide for the development of an adequate and reliable energy supply, while protecting the environment. (1979, c. 412, s. 7.)

## § 143-506.13. Implementation of a State-local partnership.

The Governor, with the advice of the State Goals and Policy Board, shall establish a statewide policy-setting process for Balanced Growth, in partnership with local government, that brings about full participation of both the State and local government. The purpose of this State-local partnership is to arrive at joint strategies and objectives for balanced statewide development and ensure consistent action by the State and local government for jointly agreed upon strategies and objectives. (1979, c. 412, s. 8.)

## § 143-506.14. North Carolina Office of Local Government Advocacy created; membership; terms; meetings; compensation; powers and duties; staff; cooperation by departments.

(a) There is established in the office of the Governor, the North Carolina Office of Local Government Advocacy. The Local Government Advocacy Council, created by Executive Order Number 22, is hereby transferred to the Office of Local Government Advocacy. The Council shall consist of 19 persons and shall be composed as follows: six members representing county government, five of whom are the members of the Executive Committee of the North Carolina Association of County Commissioners and one who is the Executive Director of the Association; six members representing municipal government, five of whom are the members of the Executive Committee of the North Carolina League of Municipalities and one who is the Executive Director of the League; two Senators appointed by the President Pro Tempore of the Senate; two members of the House of Representatives, appointed by the Speaker of the House of Representatives and three at-large members appointed by the Governor. The Association of County Commissioners and the League of Municipalities representatives shall serve terms on the Council consistent with their terms as Executive Committee members appointed by the Governor. The members appointed by the President of the Senate and the Speaker of the House of Representatives shall serve until January 15, 1981, or until their successors are appointed, whichever is later. Their successors shall serve a term of two years. The at-large members shall serve at the pleasure of the Governor for a period of two years. The Chairman and Vice-Chairman shall be the President of the Association of County Commissioners and the President of the League of Municipalities respectively, with the office rotating between the League and Association annually. Provided that no person among those appointed by the Governor, the President Pro Tempore of the Senate and the Speaker of the House of Representatives shall serve on the Council for more than two complete consecutive terms.

(b) The Council shall meet at least once each quarter and may hold special meetings at any time at the call of the Chairman or the Governor.

The members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(c) Membership. The Local Government Advocacy Council shall not be considered a public office and, to that end membership may be held in addition to the number of offices authorized by G.S. 128-1.1.

(d) The general duties and responsibilities of the Council are:

(1) To advocate on behalf of local government and to advise the Governor and his Cabinet on the development and implementation of policies and programs which directly affect local government;

(2) To function as liaison for State and local relations and communications;

(3) To identify problem areas and recommend policies with respect to State, regional and local relations; and

(4) To review, monitor and evaluate current and proposed State program policies, practices, procedures, guidelines and regulations with respect to their effect on local government.

(e) The Office of Local Government Advocacy shall be staffed by persons knowledgeable of local government who shall seek to carry out the directives of the Local Government Advocacy Council by:

(1) Advocating the policies of the Council with various State departments;

(2) Serving as a communications liaison between the Local Government Advocacy Council and the various State departments; and

(3) Functioning as an ombudsman for the resolution of local government problems.

(f) It shall be the responsibility of each respective Cabinet department head to: (i) insure that departmental employees make every effort to cooperate with and provide support to the Local Government Advocacy Council in keeping with the intent of this Article; and (ii) advise the Local Government Advocacy Council of their proposed policies and plans for review in terms of their effect on local government. (1979, c. 412, s. 9; 1991, c. 739, s. 23.)

## ARTICLE 55B.

## *North Carolina Commission on Jobs and Economic Growth.*

**§ 143-506.15:** Expired.

## ARTICLE 56.

## *Emergency Medical Services Act of 1973.*

### § 143-507. Establishment of Statewide Emergency Medical Services System.

(a) There is established a comprehensive Statewide Emergency Medical Services System in the Department of Health and Human Services. All responsibility for this System shall be vested in the Secretary of the Department of Health and Human Services and other officers, boards, and commissions specified by law or regulation.

(b) The Statewide Medical Services System includes Emergency Medical Services and also includes first aid by members of the community; public knowledge and easy access into the system; prompt emergency medical dispatch of well-designed, equipped, and staffed ambulances; effective care by trained and credentialed personnel with appropriate disposition at the scene of the emergency and while in transit; communications with the treatment center while at the scene and while in transit; routing and referral to the appropriate treatment facility; injury prevention initiatives; wellness initiatives within the community and the public health system; and follow-up lifesaving and restorative care.

(c) The purpose of this Article is to enable and assist providers of Emergency Medical Services in the delivery of adequate emergency medical services for all people of North Carolina and the provision of medical care during a disaster.

(d) Emergency Medical Services as referred to in this Article include all services rendered by emergency medical services personnel as defined in G.S. 131E-155(7) in responding to improve the health and wellness of the community and to address the individual's need for immediate emergency medical care in order to prevent loss of life or further aggravation of physiological or psychological illness or injury. (1973, c. 208, s. 1; 1997-443, s. 11A.118(a); 2001-220, s. 1.)

**Cross References.** — As to regulation of emergency medical services, see G.S. 131E-155 et seq. For the Statewide Trauma System Act of 1993, see G.S. 131E-162.

## § 143-508. Department of Health and Human Services to establish program; rules and regulations of North Carolina Medical Care Commission.

(a) The State Department of Health and Human Services shall establish and maintain a program for the improvement and upgrading of emergency medical services throughout the State. The Department shall consolidate all State functions relating to emergency medical services, both regulatory and developmental, under the auspices of this program.

(b) The North Carolina Medical Care Commission shall adopt, amend, and rescind rules to carry out the purpose of this Article and Articles 7 and 7A of Chapter 131E of the General Statutes regardless of other provisions of rule or law. These rules shall be adopted with the advice of the Emergency Medical Services Advisory Council. The Department of Health and Human Services shall enforce all rules adopted by the Commission. Nothing in this Chapter shall be construed to authorize the North Carolina Medical Care Commission to establish or modify the scope of practice of emergency medical personnel.

(c) The North Carolina Medical Care Commission may adopt rules with regard to emergency medical services, not inconsistent with the laws of this State, that may be required by the federal government for grants-in-aid for emergency medical services and licensure which may be made available to the State by the federal government. This section is to be liberally construed in order that the State and its citizens may benefit from such grants-in-aid.

(d) The North Carolina Medical Care Commission shall adopt rules to do all of the following:

(1) Establish standards and criteria for the credentialing of emergency medical services agencies to carry out the purpose of Article 7 of Chapter 131E of the General Statutes.

(2) Establish standards and criteria for the credentialing of trauma centers to carry out the purpose of Article 7A of Chapter 131E of the General Statutes.

(3) Establish standards and criteria for the education and credentialing of emergency medical services personnel to carry out the purpose of Article 7 of Chapter 131E of the General Statutes.

(4) Establish standards and criteria for the credentialing of EMS educational institutions to carry out the purpose of Article 7 of Chapter 131E of the General Statutes.

(5) Establish standards and criteria for data collection as part of the statewide emergency medical services information system to carry out the purpose of G.S. 143-509(5).

(6) Implement the scope of practice of credentialed emergency medical services personnel as determined by the North Carolina Medical Board.
(7) Define the practice settings of credentialed emergency medical services personnel.
(8) Establish standards for vehicles and equipment used within the emergency medical services system.
(9) Establish standards for a statewide EMS communications system.
(10) Establish standards and criteria for the denial, suspension, or revocation of emergency medical services credentials for emergency medical services agencies, educational institutions, and personnel including the establishment of fines for credentialing violations.
(11) Establish standards and criteria for the education and credentialing of persons trained to administer lifesaving treatment to a person who suffers a severe adverse reaction to agents that might cause anaphylaxis.
(12) Establish standards for the voluntary submission of hospital emergency medical care data.
(13) Establish occupational standards for EMS systems, EMS educational institutions, and specialty care transport programs. (1973, c. 208, s. 2; c. 1224, s. 2; 1997-443, s. 11A.118(a); 2001-220, s. 1; 2002-179, s. 13; 2003-392, s. 2(d).)

## § 143-509. Powers and duties of Secretary.

The Secretary of the Department of Health and Human Services has full responsibilities for supervision and direction of the emergency medical services program and, to that end, shall accomplish all of the following:
(1) After consulting with the Emergency Medical Services Advisory Council and with any local governments that may be involved, seek the establishment of a Statewide Emergency Medical Services System, integrated with other health care providers and networks including, but not limited to, public health, community health monitoring activities, and special needs populations.
(2) Repealed by Session Laws 1989, c. 74.
(3) Establish and maintain a comprehensive statewide trauma system in accordance with the provisions of Article 7A of Chapter 131E of the General Statutes and the rules of the North Carolina Medical Care Commission.
(4) Establish and maintain a statewide emergency medical services communications system including designation of EMS radio frequencies and coordination of EMS radio communications networks within FCC rules and regulations.
(5) Establish and maintain a statewide emergency medical services information system that provides information linkage between various public safety services and other health care providers.
(6) Credential emergency medical services providers, vehicles, EMS educational institutions, and personnel after documenting that the requirements of the North Carolina Medical Care Commission are met.
(7), (8) Repealed by Session Laws 2001-220, s. 1, effective January 1, 2002.
(9) Promote a means of training individuals to administer life-saving treatment to persons who suffer a severe adverse reaction to agents that might cause anaphylaxis. Individuals, upon successful completion of this training program, may be approved by the North Carolina Medical Care Commission to administer epinephrine to these persons,

in the absence of the availability of physicians or other practitioners who are authorized to administer the treatment. This training may also be offered as part of the emergency medical services training program.

(10) Establish and maintain a collaborative effort with other community resources and agencies to educate the public regarding EMS systems and issues.

(11) Collaborate with community agencies and other health care providers to integrate the principles of injury prevention into the Statewide EMS System to improve community health.

(12) Establish and maintain a means of medical direction and control for the Statewide EMS System.

(13) Establish programs for aiding in the recovery and rehabilitation of EMS personnel who experience chemical addiction or abuse and programs for monitoring these EMS personnel for safe practice. (1973, c. 208, s. 3; 1981, c. 927; 1989, c. 74; 1995, c. 94, s. 34; 1997-443, s. 11A.118(a); 2001-220, s. 1; 2003-392, s. 2(e); 2009-363, s. 1.)

**Effect of Amendments.** — Session Laws 2009-363, s. 1, effective July 27, 2009, added subdivision (13).

## § 143-510. North Carolina Emergency Medical Services Advisory Council.

(a) There is created the North Carolina Emergency Medical Services Advisory Council to consult with the Secretary of the Department of Health and Human Services in the administration of this Article.

The North Carolina Emergency Medical Services Advisory Council shall consist of 25 members.

(1) Twenty-one of the members shall be appointed by the Secretary of the Department of Health and Human Services as follows:
    a. Three of the members shall represent the North Carolina Medical Society and include one licensed pediatrician, one surgeon, and one public health physician.
    b. Three members shall represent the North Carolina College of Emergency Physicians, two of whom shall be current local EMS Medical Directors.
    c. One member shall represent the North Carolina Chapter of the American College of Surgeons Committee on Trauma.
    d. One member shall represent the North Carolina Association of Rescue and Emergency Medical Services.
    e. One member shall represent the North Carolina Association of EMS Administrators.
    f. One member shall represent the North Carolina Hospital Association.
    g. One member shall represent the North Carolina Nurses Association.
    h. One member shall represent the North Carolina Association of County Commissioners.
    i. One member shall represent the North Carolina Medical Board.
    j. One member shall represent the American Heart Association, North Carolina Council.
    k. One member shall represent the American Red Cross.
    *l*. The remaining six members shall be appointed so as to fairly represent the general public, credentialed and practicing EMS

personnel, EMS educators, local public health officials, and other EMS interest groups in North Carolina.

(2) Two members shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.

(3) Two members shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate.

The membership of the Council shall, to the extent possible, reflect the gender and racial makeup of the population of the State.

(b) The members of the Council appointed pursuant to subsection (a) of this section shall serve initial terms as follows:

(1) The members appointed by the Secretary of the Department of Health and Human Services shall serve initial terms as follows:
  a. Five members shall serve initial terms of one year;
  b. Five members shall serve initial terms of two years;
  c. Five members shall serve initial terms of three years; and
  d. Six members shall serve initial terms of four years.

(2) The members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate shall serve initial terms as follows:
  a. One member shall serve an initial term of two years; and
  b. One member shall serve an initial term of four years.

(3) The members appointed by the General Assembly upon the recommendation of the Speaker of the House of the Representatives shall serve initial terms as follows:
  a. One member shall serve an initial term of two years; and
  b. One member shall serve an initial term of four years. Thereafter, all terms shall be four years.

(c) Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term. Vacancies on the Council among the membership nominated by a society, association, or foundation as provided in subsection (a) of this section shall be filled by appointment of the Secretary upon consideration of a nomination by the executive committee or other authorized agent of the society, association, or foundation until the next meeting of the society, association, or foundation at which time the society, association, or foundation shall nominate a member to fill the vacancy for the unexpired term.

(d) The members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(e) A majority of the Council shall constitute a quorum for the transaction of business. All clerical and other services required by the Council shall be supplied by the Department of Health and Human Services, Division of Health Service Regulation, Office of Emergency Medical Services.

(f) The Council shall elect annually from its membership a chairperson and vice-chairperson upon a majority vote of the quorum present. (1973, c. 208, s. 4; 1977, c. 509; 1991, c. 739, s. 24; 1997-443, s. 11A.118(a); 2001-220, s. 1; 2003-392, s. 2(f); 2007-182, s. 1.)

## § 143-511. Powers and duties of the Council.

The North Carolina Emergency Medical Services Advisory Council may advise the Secretary of the Department of Health and Human Services on policy issues regarding the Statewide Emergency Medical Services System, including all rules proposed to be adopted by the North Carolina Medical Care Commission. (1973, c. 208, s. 5; 1997-443, s. 11A.118(a); 2001-220, s. 1.)

## § 143-512. Regional demonstration plans.

The Secretary of the Department of Health and Human Services may develop and implement, in conjunction with any local sponsors that may agree to participate, regional emergency medical services systems in order to demonstrate the desirability of comprehensive regional emergency medical services systems and to determine the optimum characteristics of such plans. The Secretary may make special grants-in-aid to participants. (1973, c. 208, s. 6; 1997-443, s. 11A.118(a); 2001-220, s. 1.)

## § 143-513. Regional emergency medical services councils.

The Secretary of the Department of Health and Human Services may establish emergency medical services regional councils to implement and coordinate emergency medical services programs within regions. (1973, c. 208, s. 7; 1997-443, s. 11A.118(a).)

## § 143-514. Scope of practice for credentialed emergency medical services personnel.

The North Carolina Medical Board shall determine the scope of practice for credentialed emergency medical services personnel regardless of other provisions of law by establishing the medical skills and medications that may be used by credentialed emergency medical services personnel at each level of patient care. No provision of Article 56 of Chapter 143 or Article 7 of Chapter 131E of the General Statutes shall be interpreted to require the North Carolina Medical Board to include any service within the scope of practice of any Emergency Medical Services provider, unless the North Carolina Medical Board determines that the emergency medical service personnel in question have the experience and training necessary to ensure the service can be provided in a safe manner. (1973, c. 208, s. 8; c. 1121; 1995, c. 94, s. 35; 1997-443, s. 11A.118(a); 2001-220, s. 1.)

### OPINIONS OF ATTORNEY GENERAL

**Board Has Authority to Establish Regulations Covering Emergency Medical Services Personnel.** — The ultimate authority and responsibility for establishing regulations pertaining to the functioning and certification of emergency medical services personnel, including "mobile intensive care nurses," is, pursuant to this section, in the Board of Medical Examiners. See opinion of Attorney General to Mr. I.O. Wilkerson, Jr., Director, Division of Facility Services, Dep't of Human Resources, 49 N.C.A.G. 112 (1980).

## § 143-515. Establishment of regions.

The Secretary may establish an appropriate number of multicounty emergency medical services regions. (1973, c. 208, s. 9; 2001-220, s. 1.)

## § 143-516. Single State agency.

The Department of Health and Human Services is hereby designated as the single agency for North Carolina for the purposes of all federal emergency medical services legislation as has or may be hereafter enacted to assist in development of emergency medical services plans and programs. (1973, c. 208, s. 10; 1997-443, s. 11A.118(a).)

## § 143-517. Ambulance support; free enterprise.

Each county shall ensure that emergency medical services are provided to its citizens. Nothing in this Article affects the power of local governments to finance ambulance operations or to support rescue squads. Nothing in this Article shall be construed to allow infringement on the private practice of medicine or the lawful operation of health care facilities. (1973, c. 208, s. 11; 2001-220, s. 1.)

### CASE NOTES

**Cited** in Morris v. Rockingham County, 170 N.C. App. 417, 612 S.E.2d 660, 2005 N.C. App. LEXIS 997 (2005).

## § 143-518. Confidentiality of patient information.

(a) Medical records compiled and maintained by the Department, hospitals participating in the statewide trauma system, or EMS providers in connection with dispatch, response, treatment, or transport of individual patients or in connection with the statewide trauma system pursuant to Article 7 of Chapter 131E of the General Statutes may contain patient identifiable data which will allow linkage to other health care-based data systems for the purposes of quality management, peer review, and public health initiatives.

These medical records and data shall be strictly confidential and shall not be considered public records within the meaning of G.S. 132-1 and shall not be released or made public except under any of the following conditions:

(1) Release is made of specific medical or epidemiological information for statistical purposes in a way that no person can be identified.

(2) Release is made of all or part of the medical record with the written consent of the person or persons identified or their guardians.

(3) Release is made to health care personnel providing medical care to the patient.

(4) Release is made pursuant to a court order. Upon request of the person identified in the record, the record shall be reviewed in camera. In the trial, the trial judge may, during the taking of testimony concerning such information, exclude from the courtroom all persons except the officers of the court, the parties, and those engaged in the trial of the case.

(5) Release is made to a Medical Review Committee as defined in G.S. 131E-95, 90-21.22A, or 130A-45.7 or to a peer review committee as defined in G.S. 131E-108, 131E-155, 131E-162, 122C-30, or 131D-21.1.

(6) Release is made for use in a health research project under rules adopted by the North Carolina Medical Care Commission. The Commission shall adopt rules that allow release of information when an institutional review board, as defined by the Commission, has determined that the health research project:

a. Is of sufficient scientific importance to outweigh the intrusion into the privacy of the patient that would result from the disclosure;

b. Is impracticable without the use or disclosure of identifying health information;

c. Contains safeguards to protect the information from redisclosure;

d. Contains safeguards against identifying, directly or indirectly, any patient in any report of the research project; and

e. Contains procedures to remove or destroy at the earliest opportunity, consistent with the purposes of the project, information that would enable the patient to be identified, unless an institutional review board authorizes retention of identifying information for purposes of another research project.

(7) Release is made to a statewide data processor, as defined in Article 11A of Chapter 131E of the General Statutes, in which case the data is deemed to have been submitted as if it were required to have been submitted under that Article.

(8) Release is made pursuant to any other law.

(b) Charges, accounts, credit histories, and other personal financial records compiled and maintained by the Department or EMS providers in connection with the admission, treatment, and discharge of individual patients are strictly confidential and shall not be released. (2001-220, s. 1; 2002-179, s. 11; 2003-392, ss. 2(g), 2(h).)

### § 143-519. Emergency Medical Services Disciplinary Committee.

(a) There is created the Emergency Medical Services Disciplinary Committee. The Committee shall review and make recommendations to the Department regarding all disciplinary matters relating to credentialing of emergency medical services personnel. At the request of the Department, the Committee shall review criminal background information and make a recommendation regarding the eligibility of an individual to obtain initial EMS credentials, renew EMS credentials, or maintain EMS credentials.

(b) The Emergency Medical Services Disciplinary Committee shall consist of seven members appointed by the Secretary of the Department of Health and Human Services to serve four-year terms. Two of the members shall be currently practicing local EMS physician medical directors. One member each shall be a current physician member of the North Carolina Medical Board, a current EMS administrator, a current EMS educator, and two currently practicing and credentialed EMS personnel, one of whom shall be an emergency medical technician-paramedic.

(c) In order to stagger the terms of the membership of the Committee, the initial appointment for one of the local EMS physician medical directors and the currently practicing and credentialed emergency medical technician-paramedic shall be for a three-year term. The other three initial appointments and all future appointments shall be for four-year terms.

(d) Any appointment to fill a vacancy on the Committee created by a resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

(e) A majority of the Committee shall constitute a quorum for the transaction of business. The Department of Health and Human Services, Division of Health Service Regulation, Office of Emergency Medical Services, shall supply all clerical and other services required by the Committee.

(f) The Committee shall elect annually from its membership a chairperson and vice-chairperson upon a majority vote of the quorum present. (2001-220, s. 1; 2003-392, s. 2(i); 2007-182, s. 1.1; 2007-411, s. 3.)

**§ 143-520:** Reserved for future codification purposes.

## ARTICLE 57.

## *Crime Study Commission.*

**§§ 143-521 through 143-531:** Repealed by Session Laws 1979, c. 504, s. 3.

**Editor's Note.** — Former sections 143-527 through 143-531 had been reserved for future codification purposes.

## ARTICLE 58.

## *Committee on Inaugural Ceremonies.*

### § 143-532. Definitions.

For the purposes of this Article:

(1) The term "inaugural period" means the period which includes the day on which the ceremony inaugurating the Governor is held, the seven calendar days immediately preceding such day, and the seven calendar days immediately subsequent to such day; and

(2) The term "inaugural planning period" means the period beginning July 1 of the year in which the Governor is elected and ending the last day in the inaugural period. (1975, c. 816.)

### § 143-533. Creation, appointment of members; members ex officio.

There is hereby created a Committee on Inaugural Ceremonies to consist of three representatives to be appointed by the Speaker of the House, three senators to be appointed by the President Pro Tempore of the Senate, three citizens to be appointed by the Governor, and three citizens to be appointed by the Governor-elect upon certification of his election. Of the three citizens appointed to the Committee by the Governor, only two may be of the same political party. The Speaker of the House, (or a person designated by the Speaker), the President of the Senate, (or a person designated by the President of the Senate), the Governor, and, upon certification of their election, all members-elect of the Council of State, shall be ex officio members of the Committee on Inaugural Ceremonies. (1975, c. 816; 1981, c. 47, s. 2; 1991, c. 739, s. 25.)

**Editor's Note.** — Session Laws 1981, c. 47, s. 7 provides: "When the Speaker, President of the Senate, or Lieutenant Governor has designated a person to serve in his place as permitted by this act, that person shall be compensated in accordance with G.S. 120-3.1 if a member of the General Assembly, in accordance with G.S. 138-6 if a State officer or employee, and in accordance with G.S. 138-5 in any other case, except that a member of the General Assembly so designated may not receive per diem if the Speaker, President of the Senate, or Lieutenant Governor may not receive per diem."

### § 143-534. Time of appointments; terms of office.

Appointments to the Committee on Inaugural Ceremonies shall be made on or before July 1 of years in which there is an election of the Governor. The term of office of the Committee members, the Speaker of the House, the President of the Senate and the Governor who are members ex officio, shall begin on the first day of the inaugural planning period, and shall end on the last day of the inaugural period. The term of office of the members-elect of the Council of State, who are ex officio members of the Committee, shall begin upon certification of their election, and shall end on the last day of the inaugural period. (1975, c. 816.)

## § 143-535. Vacancies.

Vacancies in the appointive membership of the Committee on Inaugural Ceremonies occurring during a term shall be filled for the unexpired term by appointment by the officer who made the original appointment. Vacancies in the ex officio membership shall be filled for the unexpired term by election by the remaining members of the Committee. A legislative vacancy on the Committee shall be filled by a member of the same house in which the vacancy occurred. (1975, c. 816.)

## § 143-536. Chairman; rules of procedure; quorum.

At its first meeting the Committee on Inaugural Ceremonies shall, by majority vote, elect a chairman from within the Committee membership. There shall also be a vice-chairman who shall be designated by the Governor-elect from among his appointees on the Committee who shall assume his duties upon appointment. The chairman, and in his absence the vice-chairman, shall preside over meetings of the Committee. The Committee shall adopt rules of procedure governing its meetings. Six members, excluding ex officio members, shall constitute a quorum of the Committee. (1975, c. 816.)

## § 143-537. Meetings.

The first meeting of the Committee on Inaugural Ceremonies shall be held during the inaugural planning period at the call of the President of the Senate. Thereafter the Committee shall meet at the call of the chairman. (1975, c. 816.)

## § 143-538. Powers and duties.

During the inaugural planning period the Committee on Inaugural Ceremonies shall plan and sponsor official parades, swearing-in ceremonies and other formal occasions connected with the swearing-in and installation of the Governor and other members of the Council of State. Throughout the inaugural planning period the Committee shall consult with and remain in close contact with the Governor-elect and all of the other members-elect of the Council of State upon certification of their election. Balls, dinners, testimonials, parties and other informal occasions shall be coordinated with official events by the Committee; however, nothing in this Article shall preclude any group or person from conducting private events during the inaugural period. (1975, c. 816.)

## § 143-539. Offices; per diem and allowances of members; payments from appropriations.

The Department of Administration shall provide office space to the Committee. The members of the Committee, including ex officio members, shall be paid such per diem, subsistence and travel allowances as are prescribed by law for State boards and commissions generally. All payments for purposes authorized by this Article shall be paid by the State Treasurer upon written authorization of the chairman of the Committee, from funds appropriated to the Contingency and Emergency Budget. (1975, c. 816; 1991, c. 739, s. 26.)

**§§ 143-540 through 143-544:** Reserved for future codification purposes.

## ARTICLE 59.

## *Vocational Rehabilitation Services.*

**§ 143-545:** Repealed by Session Laws 1995, c. 403, s. 1.

### § 143-545.1. Purpose, establishment and administration of program; services.

(a) Policy. — Recognizing that disability is a natural part of human experience, the State establishes as its policy that individuals with physical and mental disabilities should be able to participate to the maximum extent of their abilities in the economic, educational, cultural, social, and political activities available to all citizens of the State. To implement this policy, the Department of Health and Human Services shall establish and operate comprehensive and accountable programs of vocational rehabilitation and independent living for persons with disabilities. These programs are to be administered by the Division of Vocational Rehabilitation Services in collaboration with the Division of Services for the Blind, which conducts vocational rehabilitation and independent living programs for individuals who are blind or visually impaired, pursuant to Chapter 111 of the General Statutes and the rules of the Commission for the Blind adopted pursuant to G.S. 143B-157. The programs so provided shall be administered according to the following principles:

(1) The opportunity and ability to work and to live independently are important activities that enhance not only the lives of individuals with disabilities but also the greater society in which they live. These activities fulfill the need to be productive, promote self-esteem, and allow for participation in the full array of activities of daily living;

(2) Eligible individuals with disabilities shall be provided individualized training, independent living services, and educational and support services that prepare them for independent living and competitive employment opportunities in integrated settings with reasonable accommodations;

(3) Individuals with disabilities shall be active participants in their own vocational rehabilitation/independent living programs and shall be involved in making meaningful and informed choices about vocational/independent living goals and objectives and the related services they receive; and

(4) As full partners in their vocational rehabilitation and independent living programs, participants in the programs shall provide information required by the Department to determine eligibility and the nature of their disabilities, shall use other resources that are available to assist in their programs, and shall assume joint responsibility with departmental staff for planning and implementing their programs.

(b) Services: —

(1) Vocational rehabilitation and independent living services provided by the Department shall address comprehensively the needs of each individual to the maximum extent possible within available resources. These services shall contain labor force development and training components and services that enhance the independence and full participation of citizens with disabilities in community life. Specific services shall include assessment services to determine eligibility and rehabilitation needs; counseling, guidance, and referral

services; physical and mental restoration services; reader services; vocational and other training services; job development and job placement services; interpreter services; on-the-job or other related personal assistance services including attendant care services; mobility and rehabilitation technology services; training services necessary for living in the community; and supported employment services.

(2) The Secretary of the Department of Health and Human Services shall adopt rules to establish eligibility for services, the nature and scope of services to be provided, standards for community rehabilitation programs and qualified personnel to provide services and conditions, criteria, and procedures under which services may be provided including financial need for services. Rules governing financial need for services shall meet the requirements set in federal law and regulations.

(3) The Secretary of the Department of Health and Human Services or, when appropriate, the Commission for the Blind, shall establish by rule a formula for a schedule of rates and fees to be paid by clients and other third party purchasers for services.

(4) The Secretary of the Department of Health and Human Services or, when appropriate, the Commission for the Blind, shall establish formal appeals procedures that are consistent with those required by federal regulations so that any applicant for or client of vocational rehabilitation or independent living services who is dissatisfied with any determinations made by rehabilitation counselors or coordinators concerning the furnishing or denial of services may request a timely review of those determinations. The appeal procedures shall be the same regardless of whether federal funds are included in the particular services. (1995, c. 403, s. 1(b); 1997-443, s. 11A.118(a); 1997-456, s. 27; 1999-161, s. 1.)

**Editor's Note.** — This section was formerly set out as G.S. 143-545A. It has been renumbered as set out above at the direction of the Revisor of Statutes pursuant to Session Laws 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

**§ 143-546:** Repealed by Session Laws 1995, c. 403, s. 2(a).

## § 143-546.1. Duties of Secretary; cooperation with federal rehabilitation services administration or successor.

(a) [Duties of Secretary]. — In carrying out the purposes of this Article, the Secretary of the Department of Health and Human Services shall:

(1) Ensure the cooperation of other divisions in the Department of Health and Human Services in implementing the provisions of this Article;

(2) Cooperate with other departments, agencies, and institutions, both public and private, in providing for the vocational rehabilitation and independent living of individuals with disabilities, in studying the problems involved, and in establishing, developing, and providing the programs, facilities, and services necessary to implement this Article;

(3) Conduct research and gather statistical data related to the vocational rehabilitation and independent living needs of individuals with disabilities; and

(4) Administer the expenditure of funds made available by appropriations by the General Assembly by grants from the federal government, and

by gifts, grants, or reimbursements from private or public sources, or other sources, and any combination thereof for vocational rehabilitation and independent living services. Gifts or donations, from either public or private sources, as may be offered unconditionally or under conditions that are proper and consistent with this Article, shall be deposited in the State treasury in a fund to be known as the "Vocational Rehabilitation and Independent Living State Program Fund".

(b) Federal Funds. — In accepting federal funds provided under the Rehabilitation Act of 1973, as amended, the State accepts all of the provisions and benefits of the Act. The Department of Health and Human Services shall:

(1) Cooperate with the Federal Rehabilitation Services Administration or its successor agency in the administration of the Rehabilitation Act of 1973, as amended;

(2) Administer vocational rehabilitation and independent living services provided in cooperation with the Federal Rehabilitation Services Administration or its successor agency through an approved State plan;

(3) Adopt rules as required by the Rehabilitation Act of 1973, as amended, and federal regulations promulgated pursuant to it. (1995, c. 403, s. 2(b); 1997-443, s. 11A.118(a).)

**Editor's Note.** — This section was formerly set out as G.S. 143-546A. It has been renumbered as set out above at the direction of the Revisor of Statutes pursuant to Session Laws 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

### CASE NOTES

**Cited** in Hedgepeth v. North Carolina Div. of Servs. for the Blind, 142 N.C. App. 338, 543 S.E.2d 169, 2001 N.C. App. LEXIS 94 (2001).

## § 143-547. Subrogation rights; withholding of information a misdemeanor.

(a) Notwithstanding any other provisions of law, to the extent of payments under this Article, the State Vocational Rehabilitation program shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of the assistance, or his personal representative, his heirs, or the administrator or executor of his estate, against any person; provided, however, that any attorney retained by the beneficiary of the assistance shall be compensated for his services in accordance with the following schedule and in the following order of priority from any amount obtained on behalf of the beneficiary by settlement with, judgment against, or otherwise from a third party by reason of such injury or death:

(1) First to the payment of any court costs taxed by the judgment;

(2) Second to the payment of the fee of the attorney representing the beneficiary making the settlement or obtaining the judgment, but this fee shall not exceed one-third of the amount obtained or recovered to which the right of subrogation applies;

(3) Third to the payment of the amount of assistance received by the beneficiary as prorated with other claims against the amount obtained or received from the third party to which the right of subrogation applies, but the amount shall not exceed one-third of the amount obtained or recovered to which the right of subrogation applies; and

(4) Fourth to the payment of any amount remaining to the beneficiary or his personal representative.

The United States and the State of North Carolina shall be entitled to shares in each net recovery under this section. Their shares shall be promptly paid under this section and their proportionate parts of such sum shall be determined in accordance with the matching formulas in use during the period for which assistance was paid to the recipient.

(b) In furnishing a person rehabilitation services, including medical case services under this Chapter, the Division of Vocational Rehabilitation Services is subrogated to the person's right of recovery from:

(1) Personal insurance;
(2) Worker's Compensation;
(3) Any other person or personal injury caused by the other person's negligence or wrongdoing; or
(4) Any other source.

(c) The Division of Vocational Rehabilitation Services' right to subrogation is limited to the cost of the rehabilitation services provided by or through the Division for which a financial needs test is a condition of the service provisions. Those services that are provided without a financial needs test are excluded from these subrogation rights.

(d) The Division of Vocational Rehabilitation Services may totally or partially waive subrogation rights when the Division finds that enforcement would tend to defeat the client's process of rehabilitation or when client assets can be used to offset additional Division costs.

(e) The Division of Vocational Rehabilitation Services may adopt rules for the enforcement of its rights of subrogation.

(f) It is a Class 1 misdemeanor for a person seeking or having obtained assistance under this Part for himself or another to willfully fail to disclose to the Division of Vocational Rehabilitation Services or its attorney the identity of any person or organization against whom the recipient of assistance has a right of recovery, contractual or otherwise. (1989, c. 552, s. 1; 1993, c. 539, s. 1036; 1994, Ex. Sess., c. 24, s. 14(c).)

## § 143-548. Vocational Rehabilitation Council.

(a) There is established the Vocational Rehabilitation Council within the Division of Vocational Rehabilitation Services to be composed of not more than 18 appointed members. Appointed members shall be voting members except where prohibited by federal law or regulations. The Director of the Division of Vocational Rehabilitation Services and one vocational rehabilitation counselor who is an employee of the Division shall serve ex officio as nonvoting members. The President Pro Tempore of the Senate shall appoint six members, the Speaker of the House of Representatives shall appoint six members, and the Governor shall appoint five or six members. The appointing authorities shall appoint members of the Council after soliciting recommendations from representatives of organizations representing a broad range of individuals with disabilities. Terms of appointment shall be as specified in subsection (d1) of this section. Appointments shall be made as follows:

(1) The six members appointed by the President Pro Tempore of the Senate shall include one member recommended by the North Carolina Chamber, one other representing providers of community rehabilitation services, one other who is a vocational rehabilitation counselor, with knowledge of and experience with vocational rehabilitation programs, who is not an employee of the Division, one other representing the Commission on Workforce Preparedness, and two others representing disability advocacy groups representing a cross-section

of individuals with physical, cognitive, sensory, and mental disabilities. Of the six members appointed by the President Pro Tempore of the Senate, three shall be individuals with disabilities;

(2) The six members appointed by the Speaker of the House of Representatives shall include one member representing the business and industry sector, one other representing labor, one other representing a parent training and information center established pursuant to section 631(c) of the Individuals with Disabilities Education Act, 20 U.S.C. § 1431(c), one other representing the Department of Public Instruction, and two others representing disability advocacy groups representing a cross-section of individuals with physical, cognitive, sensory, and mental disabilities. Of the six members appointed by the Speaker of the House of Representatives, three shall be individuals with disabilities; and

(3) The five or six members appointed by the Governor shall include one member representing the business and industry sector, one other representing the regional rehabilitation centers for the physically disabled, one other representing the Division's Statewide Independent Living Council, one other representing the State's Client Assistance Program, one other representing the directors of projects carried out under section 121 of the Rehabilitation Act of 1973, 29 U.S.C. § 741, as amended, if there are any of these projects in the State, and one other current or former applicant for or recipient of vocational rehabilitation services. If five members are appointed by the Governor, three shall be individuals with disabilities. If six members are appointed by the Governor, four shall be individuals with disabilities.

(b) Repealed by Session Laws 1993, c. 248, s. 1.

(b1) Additional Qualifications. — In addition to ensuring the qualifications for membership prescribed in subsection (a) of this section, the appointing authorities shall ensure that a majority of Council members are individuals with disabilities and are not employed by the Division of Vocational Rehabilitation Services.

(c) The Council shall elect one of the voting members of the Council as Chair of the Council. The Chair's term shall not exceed a single three-year term.

(d) The Council shall meet at least quarterly and at other times at the call of the Chair. A majority of the voting members of the Council constitutes a quorum.

(d1) Terms of Appointment. —

(1) Length of Term. — Each member of the Council shall serve for a term of not more than three years, except that:

a. A member appointed to fill a vacancy occurring prior to the expiration of the term for which a predecessor was appointed shall be appointed for the remainder of that term;

b. The terms of service of the members initially appointed are as specified by the appointing authority for a fewer number of years as will provide for the expiration of terms on a staggered basis and shall include the members of the existing Council to the extent possible with appropriate adjustments to their terms;

c. The appointing authority shall have the power to remove any member of the Council from office in accordance with the provisions of G.S. 143B-16; and

d. A member may continue to serve until a successor for the position is appointed;

(2) Number of Terms. — No member of the Council other than the representative of the Client Assistance Program and the representa-

tive of the directors of projects carried out under section 121 of the Rehabilitation Act of 1973, 29 U.S.C. § 741, as amended, may serve more than two consecutive full terms.

(d2) Vacancies. — Any vacancy occurring in the membership of the Council shall be filled in the same manner as the original appointment. The vacancy shall not affect the power of the remaining members to execute the duties of the Council.

(d3) Functions of Council. — The Council shall, after consulting with the Commission on Workforce Preparedness:

(1) Review, analyze, and advise the Division regarding the performance of its responsibilities under Title I of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 29 U.S.C. § 720, et seq., as amended, particularly responsibilities relating to:
  a. Eligibility, including order of selection;
  b. The extent, scope, and effectiveness of services provided; and
  c. Functions performed by State agencies that affect or that potentially affect the ability of individuals with disabilities in achieving employment outcomes under Title I of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 29 U.S.C. § 720, et seq.;

(1a) In partnership with the Division:
  a. Develop, agree to, and review State goals and priorities in accordance with section 101(a)(15)(C) of the Rehabilitation Act of 1973, 29 U.S.C. § 721(a)(15)(C); and
  b. Evaluate the effectiveness of the vocational rehabilitation program and submit reports of progress to the Commissioner of the Rehabilitation Services Administration of the U.S. Department of Education in accordance with section 101(a)(15)(E) of the Rehabilitation Act of 1973, 29 U.S.C. § 721(a)(15)(E);

(2) Advise the Department of Health and Human Services and the Division regarding activities authorized to be carried out under Title I of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 29 U.S.C. § 720, et seq., as amended and assist in the preparation of applications, the State Plan, amendments to the plans, reports, needs assessments, and evaluations required by Title I of the Rehabilitation Act of 1973;

(3) To the extent feasible, conduct a review and analysis of the effectiveness of, and consumer satisfaction with:
  a. Vocational rehabilitation functions and services provided by the Department of Health and Human Services and other State agencies and public and private entities responsible for providing vocational rehabilitation services to individuals with disabilities under the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 29 U.S.C. § 701, et seq.; and
  b. Repealed by Session Laws 1999-161, s. 2, effective June 8, 1999.
  c. Employment outcomes achieved by eligible individuals receiving services under Title I of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 29 U.S.C. § 720, et seq., as amended, including the availability of health and other employment benefits in connection with those employment outcomes;

(4) Prepare and submit an annual report to the Governor and the Commissioner of the Rehabilitation Services Administration of the U.S. Department of Education on the status of vocational rehabilitation programs operated within the State and make the report available to the public;

(5) Coordinate activities with the activities of other councils within the State, including the Division's Statewide Independent Living Council established under section 705 of the Rehabilitation Act of 1973, 29 U.S.C. § 742, the advisory panel established under section 612(a)(21) of the Individuals with Disabilities Education Act, 20 U.S.C. § 1413(a)(12), the State Development Disabilities Council described in section 124 of the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6024, the State Mental Health Planning Council established under section 1914(a) of the Public Health Service Act, 42 U.S.C. § 300x-4(e), and the Commission on Workforce Preparedness;

(6) Provide for coordination and the establishment of working relationships between the Department and the Statewide Independent Living Council and centers for independent living within the State; and

(7) Perform such other functions, consistent with the purpose of Title I of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 29 U.S.C. § 720, et seq., as amended, as the Council determines to be appropriate, that are comparable to other functions performed by the Council.

(d4) Resources. —

(1) The Division shall supply all necessary clerical and staff support to the Council pursuant to G.S. 143B-14(a) and (d). The Council shall prepare, in conjunction with the Division, a plan for the provision of such resources as may be necessary and sufficient to carry out the functions of the Council under this Part. The resource plan shall, to the maximum extent possible, rely on the use of resources in existence during the period of implementation of the plan.

(2) To the extent that there is a disagreement between the Council and the Division in regard to the resources necessary to carry out the functions of the Council as set forth in this Part, the disagreement shall be resolved by the Governor.

(3) While assisting the Council in carrying out its duties, staff and other personnel shall not be assigned duties by the Division or any other agency of the State that would create a conflict of interest.

(d5) Member Conflict of Interest. — No member of the Council shall cast a vote on any matter that would provide direct financial benefit to the member or otherwise give the appearance of a conflict of interest under State law.

(e) Council members shall be reimbursed for expenses incurred in the performance of their duties in accordance with G.S. 138-5. In addition, Council members may be reimbursed for personal assistance services that are necessary for members to attend Council meetings and perform Council duties. These expenses shall not exceed whichever is lower, the actual cost of the services or the Medicaid rate per day for personal assistance services, in addition to subsistence and travel expenses at the State rate for the attendant.

(f) Repealed by Session Laws 1993, c. 248, s. 1. (1991 (Reg. Sess., 1992), c. 900, s. 150; 1993, c. 248, s. 1; 1997-443, s. 11A.118(a); 1997-509, s. 1; 1999-161, s. 2; 2009-570, s. 8(e).)

**Effect of Amendments.** — Session Laws 2009-570, s. 8(e), effective August 28, 2009, substituted "North Carolina Chamber" for "North Carolina Citizens for Business and Industry" in the first sentence of subdivision (a)(1).

§§ **143-549 through 143-551:** Reserved for future codification purposes.

## ARTICLE 60.
## *State and Certain Local Educational Entity Employees, Nonsalaried Public Officials, and Legislators Required to Repay Money Owed to State.*

## Part 1. State and Local Educational Entity Employees.

### § 143-552. Definitions.

As used in this Part:

(1) "Employing entity" means and includes:
  a. Any State entity enumerated in G.S. 143B-3 of the Executive Organization Act of 1973;
  b. Any city or county board of education under Chapter 115 of the General Statutes; or
  c. Any board of trustees of a community college under Chapter 115D of the General Statutes.

(2) "Employee" means any person who is appointed to or hired and employed by an employing entity under this Part and whose salary is paid in whole or in part by State funds.

(3) "Net disposable earnings" means the salary paid to an employee by an employing entity after deduction of withholdings for taxes, social security, State retirement or any other sum obligated by law to be withheld. (1979, c. 864, s. 1; 1987, c. 564, s. 29.)

**Editor's Note.** — Chapter 115, referred to in subdivision (1)b of this section, was repealed by Session Laws 1981, c. 423, s. 1, effective July 1, 1981. For present provisions as to elementary and secondary education, see now Chapter 115C.

### § 143-553. Conditional continuing employment; notification among employing entities; repayment election.

(a) All persons employed by an employing entity as defined by this Part who owe money to the State and whose salaries are paid in whole or in part by State funds must make full restitution of the amount owed as a condition of continuing employment; provided, however, that no employing entity shall terminate for failure to make full restitution the employment of such an employee who owes money to the University of North Carolina Health Care System for health care services.

(b) Whenever a representative of any employing entity as defined by this Part has knowledge that an employee owes money to the State and is delinquent in satisfying this obligation, the representative shall notify the employing entity. Upon receipt of notification an employing entity shall terminate the employee's employment if after written notice of his right to do so he does not repay the money within a reasonable period of time; provided, however, that where there is a genuine dispute as to whether the money is owed or how much is owed, or there is an unresolved issue concerning insurance coverage, the employee shall not be dismissed as long as he is pursuing administrative or judicial remedies to have the dispute or the issue resolved.

(c) An employee of any employing entity who has elected in writing to allow not less than ten percent (10%) of his net disposable earnings to be periodically withheld for application towards a debt to the State shall be deemed to be repaying the money within a reasonable period of time and shall not have his employment terminated so long as he is consenting to repayment according to such terms. Furthermore, the employing entity shall allow the employee who for some extraordinary reason is incapable of repaying the obligation to the State according to the preceding terms to continue employment as long as he is attempting repayment in good faith under his present financial circumstances, but shall promptly terminate the employee's employment if he ceases to make payments or discontinues a good faith effort to make repayment. (1979, c. 864, s. 1; 2007-306, s. 2.)

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

### CASE NOTES

**Applied** in Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

## § 143-554. Right of employee appeal.

(a) Any employee or former employee of an employing entity within the meaning of G.S. 143-552(1)a whose employment is terminated pursuant to the provisions of this Part shall be given the opportunity to appeal the employment termination to the State Personnel Commission according to the normal appeal and hearing procedures provided by Chapter 126 and the State Personnel Commission rules adopted pursuant to the authority of that Chapter; however, nothing herein shall be construed to give the right to termination reviews to anyone exempt from that right under G.S. 126-5.

(b) Before the employment of an employee of a local board of education within the meaning of G.S. 143-552(1)b who is either a superintendent, supervisor, principal, teacher or other professional person is terminated pursuant to this Part, the local board of education shall comply with the provisions of G.S. 115-142. If an employee within the meaning of G.S. 143-552(1)b is other than one whose termination is made reviewable pursuant to G.S. 115-142, he shall be given the opportunity for a hearing before the local board of education prior to the termination of his employment.

(c) Before the employment of an employee of a board of trustees of a community college within the meaning of G.S. 143-552(1)c is finally terminated pursuant to this Part, he shall be given the opportunity for a hearing before the board of trustees. (1979, c. 864, s. 1; 1987, c. 564, s. 12.)

**Editor's Note.** — Chapter 115, including G.S. 115-142, referred to in subsection (b) of this section, was repealed by Session Laws 1981, c. 423, s. 1, effective July 1, 1981. For present provisions as to elementary and secondary education, see now Chapter 115C.

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

## Part 2. Public Officials.

## § 143-555. Definitions.

As used in this Part:

(1) "Appointing authority" means the Governor, Chief Justice of the Supreme Court, Lieutenant Governor, Speaker of the House, Presi-

dent pro tempore of the Senate, members of the Council of State, all heads of the executive departments of State government, the Board of Governors of The University of North Carolina, and any other State person or group of State persons authorized by law to appoint to a public office.

(2) "Employing entity" means and includes:
  a. Any State entity enumerated in G.S. 143B-3 of the Executive Organization Act of 1973;
  b. Any city or county board of education under Chapter 115 of the General Statutes; or
  c. Any board of trustees of a community college under Chapter 115D of the General Statutes.

(3) "Public office" means appointive membership on any State Commission, council, committee, board, including occupational licensing boards as defined in G.S. 93B-1, board of trustees, including boards of constituent institutions of The University of North Carolina and boards of community colleges under Chapter 115D of the General Statutes, and any other State agency created by law; provided that "public office" does not include an office for which a regular salary is paid to the holder as an employee of the State or of one of its departments, agencies, or institutions.

(4) "Public official" means any person who is a member of any public office as defined by this Part. (1979, c. 864, s. 1; 1987, c. 564, ss. 29, 30.)

**Editor's Note.** — Chapter 115, referred to in subdivision (2)b of this section, was repealed by Session Laws 1981, c. 423, s. 1, effective July 1, 1981. For present provisions as to elementary and secondary education, see now Chapter 115C.

## § 143-556. Notification of the appointing authority; investigation.

Whenever a representative of an employing entity as defined by this Part has knowledge that a public official owes money to the State and is delinquent in satisfying this obligation, the representative shall notify the appointing authority who appointed the public official in question. Upon receipt of notification the appointing authority shall investigate the circumstances of the claim of money owed to the State for purposes of determining if a debt is owed and its amount. (1979, c. 864, s. 1.)

## § 143-557. Conditional continuing appointment; repayment election.

If after investigation under the terms of this Part an appointing authority determines the existence of a delinquent monetary obligation owed to the State by a public official, he shall notify the public official that his appointment will be terminated 60 days from the date of notification unless repayment in full is made within that period. Upon determination that any public official has not made repayment in full after the expiration of the time prescribed by this section, the appointing authority shall terminate the appointment of the public official; provided however, the appointing authority shall allow the public official who for some extraordinary reason is incapable of repaying the obligation according to the preceding terms to continue his appointment as long as he is attempting repayment in good faith under his present financial circumstances, but shall promptly terminate the public official's appointment if he ceases to make payments or discontinues a good faith effort to make repayment. (1979, c. 864, s. 1.)

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

## Part 3. Legislators.

### § 143-558. Definition of employing entity.

For the purposes of this Part "employing entity" shall have the same meaning as provided in G.S. 143-552(1) and 143-555(2). (1979, c. 864, s. 1.)

### § 143-559. Notification to the Legislative Ethics Committee; investigation.

Whenever a representative of any employing entity as defined by this Part has knowledge that a legislator owes money to the State and is delinquent in satisfying this obligation, this information shall be reported to the Legislative Ethics Committee established pursuant to Chapter 120, Article 14 of the General Statutes for disposition. (1979, c. 864, s. 1.)

## Part 4. Confidentiality Exemption, Preservation of Federal Funds, and Limitation of Actions.

### § 143-560. Confidentiality exemption.

Notwithstanding the provisions of any law of this State making confidential the contents of any records or prohibiting the release or disclosure of any information, all information exchange among the employing entities defined under this Article necessary to accomplish and effectuate the intent of this Article is lawful. (1979, c. 864, s. 1.)

### § 143-561. Preservation of federal funds.

Nothing in this Article is intended to conflict with any provision of federal law or to result in the loss of federal funds. If the exchange among employing entities of information necessary to effectuate the provisions of this Article would conflict with this intention, the exchange of information shall not be made. (1979, c. 864, s. 1.)

### § 143-562. Applicability of a statute of limitations.

Payments on obligations to the State collected under the procedures established by this Article shall not be construed to revive obligations or any part thereof already barred by an applicable statute of limitations. Furthermore, payments made as a result of collection procedures established by the terms of this Article shall not be construed to extend an applicable statute of limitations. (1979, c. 864, s. 1.)

## ARTICLE 61.

## *Commission on the Bicentennial of the United States Constitution.*

**§§ 143-563 through 143-570:** Expired.

## ARTICLE 62.

## *North Carolina Child Fatality Prevention System.*

**§§ 143-571 through 143-579:** Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999.

**Cross References.** — For provisions concerning the Interstate Compact on Adoption and Medical Assistance, see Article 39 of Chapter 7B of the General Statutes.

## ARTICLE 63.

## *State Employees Workplace Requirements Program for Safety and Health.*

## Part 1. Executive Branch Programs.

### § 143-580. Definition.

As used in this Article, "State agency" means any department, commission, division, board, or institution of the State within the executive branch of government and the Office of Administrative Hearings. (1991 (Reg. Sess., 1992), c. 994, s. 1.)

**Cross References.** — As to safety and health programs of State agencies and local governments, see G.S. 95-148.

**Editor's Note.** — Sections 143-580 through 143-584 were codified as Part 1 of this Article at the direction of the Revisor of Statutes.

### § 143-581. Program goals.

Each State agency shall establish a written program for State employee workplace safety and health. The program shall promote safe and healthful working conditions and shall be based on clearly stated goals and objectives for meeting the goals. The program shall provide managers, supervisors, and employees with a clear and firm understanding of the State's concern for protecting employees from job-related injuries and health impairment; preventing accidents and fires; planning for emergencies and emergency medical procedures; identifying and controlling physical, chemical, and biological hazards in the workplace; communicating potential hazards to employees; and assuring adequate housekeeping and sanitation. (1991 (Reg. Sess., 1992), c. 994, s. 1.)

### § 143-582. Program requirements.

The written program required under this Article shall describe at a minimum:

(1) The methods to be used to identify, analyze, and control new or existing hazards, conditions, and operations.

(2) How managers, supervisors, and employees are responsible for implementing the program, controlling accident-related expenditures, and how continued participation of management and employees will be established, measured, and maintained.

(3) How the plan will be communicated to all affected employees so that they are informed of work-related physical, chemical, or biological hazards, and controls necessary to prevent injury or illness.

(4) How managers, supervisors, and employees will receive training in avoidance of job-related injuries and health impairment.
(5) How workplace accidents will be reported and investigated and how corrective actions will be implemented.
(6) How safe work practices and rules will be communicated and enforced.
(7) The safety and health training program that will be made available to employees.
(8) How employees can make complaints concerning safety and health problems without fear of retaliation.
(9) How employees will receive medical attention following a work-related injury or illness. (1991 (Reg. Sess., 1992), c. 994, s. 1.)

### § 143-583. Model program; technical assistance; reports.

(a) The State Personnel Commission, through the Office of State Personnel, shall:

(1) Maintain a model program of safety and health requirements to guide State agencies in the development of their individual programs and in complying with the provisions of G.S. 95-148 and this Article.
(2) Establish guidelines for the creation and operation of State agency safety and health committees.

(b) The Office of State Personnel shall:

(1) Provide consultative and technical services to assist State agencies in establishing and administering their workplace safety and health programs and to address specific technical problems.
(2) Monitor compliance with this Article.

(c) The State Personnel Commission shall report annually to the Joint Legislative Commission on Governmental Operations on the safety and health activities of State agencies, compliance with this Article, and the fines levied against State agencies pursuant to Article 16 of Chapter 95 of the General Statutes. (1991 (Reg. Sess., 1992), c. 994, s. 1.)

### § 143-584. State agency safety and health committees.

Each State agency shall create, pursuant to guidelines adopted under subsection (a) of G.S. 143-583, safety and health committees to perform workplace inspections, review injury and illness records, make advisory recommendations to the agency's managers, and perform other functions determined by the State Personnel Commission to be necessary for the effective implementation of the State Employees Workplace Requirements Program for Safety and Health. (1991 (Reg. Sess., 1992), c. 994, s. 1.)

**§§ 143-585 through 143-588:** Reserved for future codification purposes.

## Part 2. Legislative and Judicial Branch Programs.

### § 143-589. Legislative and judicial branch safety and health programs.

The Legislative Services Commission and the Administrative Office of the Courts are authorized to separately establish safety and health programs for their employees. (1991 (Reg. Sess., 1992), c. 994, s. 3; 2001-424, s. 22.6(c).)

**Editor's Note.** — Session Laws 1991 (Reg. Sess., 1992), c. 994, s. 3 has been codified as this section at the direction of the Revisor of Statutes.

## §§ 143-590 through 143-594: Reserved for future codification purposes.

## Article 64.

## *Smoking in Public Places.*

### § 143-595. Legislative intent.

It is the intent of the General Assembly to address the needs and concerns of both smokers and nonsmokers in public places by providing for designated smoking and nonsmoking areas. (1993, c. 367, s. 1.)

#### CASE NOTES

**Cited** in City of Roanoke Rapids v. Peedin, 124 N.C. App. 578, 478 S.E.2d 528 (1996).

### § 143-596. Definitions.

As used in this Article, unless the context clearly provides otherwise:

(1) Constituent institution. — As defined in G.S. 116-2(4) and G.S. 116-4.

(1a) Grounds. — The area located and controlled by State government that is within 100 linear feet of any of the following:
  a. A State-owned building allocated to and occupied by State government.
  b. A State-owned building leased to a third party.
  c. A building owned by a third party and leased to State government.

(1b) Local government. — The local political subdivision of the State or any authority or body created by any ordinance or rules of any such entity.

(1c) Medical Faculty Practice Plan. — As defined in G.S. 116-40.6.

(2) Nonsmoking area. — Any designated area where smoking is not permitted.

(3) Public meeting. — Any assemblage authorized by State or local government or any subdivision of State or local government.

(4) Restaurant. — Any building, structure, or area having a seating capacity of 50 or more patrons where food is available for eating on the premises in consideration of payment. The following are not included in determining seating capacity:
  a. Seats in any bar or lounge area of a restaurant.
  b. Seats in any separate room or section of a restaurant which is used exclusively for private functions.
  c. Seats in any open outside area.

(5) Smoke, smokes, or smoking. — The use or possession of a lighted cigarette, lighted cigar, lighted pipe, or any other lighted tobacco product.

(6) State government. — The political unit for the State of North Carolina; including all agencies of the executive, judicial, and legislative branches of government.

(7) The University of North Carolina. — As defined in Chapter 116 of the General Statutes.

(8) The University of North Carolina Health Care System. — As defined in G.S. 116-37. (1993, c. 367, s. 1; 2007-114, s. 1.)

## § 143-597. Nonsmoking areas in State-controlled buildings.

(a) All of the following areas may be designated as nonsmoking in buildings owned, leased, or occupied by State government:

(1) Any library open to the public.
(2) Any museum open to the public.
(3) Any area established as a nonsmoking area, so long as at least twenty percent (20%) of the interior space of equal quality to that of the nonsmoking area shall be designated as a smoking area, unless physically impracticable. If physically impracticable, the person in charge of the facility shall provide an adequate smoking area within the facility as near as feasible to twenty percent (20%) of the interior space.
(4) Any indoor space in a State-controlled building such as an auditorium, arena, or coliseum, or an appurtenant building thereof; except that a designated area for smoking shall be established in lobby areas.
(5) Any educational buildings primarily involved in health care instruction and the grounds of those buildings.
(6) Except as provided in G.S. 143-599(11), any facilities of The University of North Carolina and the grounds of those facilities. Each constituent institution, except for the North Carolina School of Science and Mathematics, shall make a reasonable effort to provide residential smoking rooms in residence halls in proportion to student demand for those rooms. For purposes of this subdivision, the term “facilities” includes all of the following:
    a. State-owned buildings allocated to and occupied by The University of North Carolina.
    b. State-owned buildings allocated to The University of North Carolina and leased to a third party.
    c. The area of any building owned by a third party and occupied by The University of North Carolina as lessee.
(7) Repealed by Session Laws 2007-114, s. 2, effective July 1, 2007.

(a1) All areas of any building occupied by the General Assembly shall be designated as nonsmoking areas.

(b) Any area designated as nonsmoking or smoking shall be established by the appropriate department, institution, agency, or person in charge of the State-controlled building or area, except as specified in subsection (a1). The person in charge of the building shall conspicuously post or cause to be posted, in any area designated as a smoking or nonsmoking area, one or more signs stating that smoking is or is not permitted in the area.

(c) Where a nonsmoking area is designated, existing physical barriers and ventilation systems shall be used where appropriate to minimize smoke from adjacent areas. This subsection shall not be construed to require fixed structural or other physical modification in providing these areas or to require installation or operation of any heating, ventilating, or air-conditioning system in any manner which adds expense. (1993, c. 367, s. 1; 2003-292, s. 1; 2006-66, s. 9.11(cc); 2006-76, s. 1; 2007-114, s. 2.)

## § 143-598. Prohibited acts related to nonsmoking areas.

(a) No person shall smoke in a nonsmoking area in a State-controlled building or area pursuant to G.S. 143-597.

(b) Any person who continues to smoke in a nonsmoking area described in this section following notice by the person in charge of the State-controlled building or area or their designee that smoking is not permitted shall be guilty of an infraction and punished by a fine of not more than twenty-five dollars ($25.00). (1993, c. 367, s. 1.)

## § 143-599. Exemptions.

All of the following facilities shall be exempt from the provisions of this Article:

(1) Any primary or secondary school or child care center, except for a teacher's lounge.
(2) An enclosed elevator.
(3) Public school bus.
(4) Hospital, nursing home, rest home, and State facility operated under the authority of G.S. 122C-181.
(5) Local health department and local department of social services and the building and grounds where the local health department or local department of social services, as applicable, is located. For the purposes of this subdivision, "grounds" means the area located within 50 linear feet of a local health department or a local department of social services.
(6) Any nonprofit organization or corporation whose primary purpose is to discourage the use of tobacco products by the general public.
(7) Tobacco manufacturing, processing, and administrative facilities.
(8) Indoor arenas with a seating capacity greater than 23,000.
(9) State correctional facilities operated by the Department of Correction.
(10) Community colleges.
(11) The buildings, grounds, and walkways of the University of North Carolina Health Care System and of the East Carolina University School of Medicine, Health Sciences Complex, and Medical Faculty Practice Plan. (1993, c. 367, s. 1; 1997-506, s. 53; 2005-19, s. 1; 2005-168, s. 1; 2005-239, s. 1; 2005-372, s. 1; 2006-133, s. 1; 2007-114, s. 3.)

**Cross References.** — As to the prohibition of tobacco products in State correctional facilities, see G.S. 148-23.1.

**Editor's Note.** — Session Laws 2005-372, s. 3, provides: "The Department of Correction shall conduct one or more pilot programs banning smoking both inside buildings and on the grounds of State correctional institutions and administering smoking cessation programs for staff and inmates. The pilot smoking cessation programs shall be available to inmates and staff on a volunteer basis, and no person shall be compelled or coerced to participate. The smoking cessation program shall include instructions and education that will help inmates and staff cease the use of tobacco products and remain smoke free. The cost of administering the pilot smoking cessation program shall be paid from existing funds available to the Department of Correction. The Department of Correction may use services, personnel, and resources donated by nongovernmental agencies and organizations to implement this program. The Department of Correction shall report to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee on or before April 1, 2006, on the progress and status of the pilot programs."

Session Laws 2005-372, s. 4, provides: "The Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee shall study and make legislative recommendations on the feasibility and implementation of a two-year phase-in program banning smoking by all inmates, personnel, and visitors in all buildings and on all grounds of State correctional institutions operated by the Department of Correction. This study shall examine methods to assist with smoking cessation, including the use of nongovernmental agencies, organizations, and corporations for counseling, training, cessation aids, and interventions. The Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee shall report the results of this study to the General Assembly prior to the convening of the 2006 Session of the 2005 General Assembly."

## § 143-600. Construction of Article.

Nothing in this Article shall be construed to permit smoking in any area where smoking is prohibited by any other law or rule for fire safety purposes, including the State minimum fire safety standards pursuant to Chapter 58, Chapter 153A, or Chapter 160A of the General Statutes; provided, however, this Article shall not be construed to recognize any authority of a local government to restrict smoking other than as provided in this Article, for fire safety purposes as specified herein, and for the facilities exempt pursuant to G.S. 143-599. (1993, c. 367, s. 1.)

## § 143-601. Applicability of Article; local government may enact.

(a) This Article shall not supersede nor prohibit the enactment or enforcement of any otherwise valid local law, rule, or ordinance enacted prior to October 15, 1993, regulating the use of tobacco products. However, no local law, rule, or ordinance enacted and placed in operation prior to October 15, 1993, shall be amended to impose a more stringent standard than in effect on the date of ratification of this Article.

(b) Any local ordinance, law, or rule that regulates smoking adopted on or after October 15, 1993, shall not contain restrictions regulating smoking which exceed those established in this Article. Any such local ordinance, law, or rule may restrict smoking in accordance with this subsection and pursuant to G.S. 143-597 only in the following facilities that are not owned, leased, or occupied by local government:

(1) Repealed by Session Laws 2007-193, s. 3, effective January 1, 2008.
(2) A public meeting.
(3) The indoor space in an auditorium, arena, or coliseum, or an appurtenant building thereof.
(4) A library or museum open to the public.
(5) Repealed by Session Laws 2007-193, s. 3, effective January 1, 2008.

If any of the facilities listed in this subsection are owned, leased as lessor, or the area leased as lessee and occupied by local government, then the local ordinance, law, or rule restricting smoking shall be governed by Article 23 of Chapter 130A of the General Statutes. (1993, c. 367, s. 1; 2007-193, s. 3.)

**Effect of Amendments.** — Session Laws 2007-193, s. 3, effective January 1, 2008, in subsection (b), in the second sentence of the introductory paragraph, inserted "and pursuant to G.S. 143-597" and substituted "that are not owned, leased, or occupied by local government" for "pursuant to G.S. 143-597" at the end, deleted subdivision (b)(1), which read: "Buildings owned, leased or occupied by local government" and deleted subdivision (b)(5), which read: "Any place on a public transportation vehicle owned or leased by local government and used by the public," and added the last paragraph.

### CASE NOTES

**Cited** in City of Roanoke Rapids v. Peedin, 124 N.C. App. 578, 478 S.E.2d 528 (1996).

## §§ 143-602 through 143-609: Reserved for future codification purposes.

## ARTICLE 65.

## *Medical Education and Primary Care.*

**§§ 143-610, 143-611:** Repealed by Session Laws 1996, Second Extra Session, c. 17, s. 16.2.

**§ 143-612:** Repealed by Session Laws 1995, c. 507, s. 23A.3(d).

**§ 143-612A:** Repealed by Session Laws 1996, Second Extra Session, c. 17, s. 16.2.

### § 143-613. Medical education; primary care physicians and other providers.

(a) In recognition of North Carolina's need for primary care physicians, Bowman Gray School of Medicine and Duke University School of Medicine shall each prepare a plan with the goal of encouraging North Carolina residents to enter the primary care disciplines of general internal medicine, general pediatrics, family medicine, obstetrics/gynecology, and combined medicine/pediatrics and to strive to have at least fifty percent (50%) of North Carolina residents graduating from each school entering these disciplines. These schools of medicine shall present their plans to the Board of Governors of The University of North Carolina by April 15, 1996, and shall update and present their plans every two years thereafter. The Board of Governors shall report to the Joint Legislative Education Oversight Committee by May 15, 1996, and every two years thereafter on the status of these efforts to strengthen primary health care in North Carolina.

(b) The Board of Governors of The University of North Carolina shall set goals for the Schools of Medicine at the University of North Carolina at Chapel Hill and the School of Medicine at East Carolina University for increasing the percentage of graduates who enter residencies and careers in primary care. A minimum goal should be at least sixty percent (60%) of graduates entering primary care disciplines. Each school shall submit a plan with strategies to reach these goals of increasing the number of graduates entering primary care disciplines to the Board by April 15, 1996, and shall update and present the plans every two years thereafter. The Board of Governors shall report to the Joint Legislative Education Oversight Committee by May 15, 1996, and every two years thereafter on the status of these efforts to strengthen primary health care in North Carolina.

Primary care shall include the disciplines of family medicine, general pediatric medicine, general internal medicine, internal medicine/pediatrics, and obstetrics/gynecology.

(b1) The Board of Governors of The University of North Carolina shall set goals for State-operated health professional schools that offer training programs for licensure or certification of physician assistants, nurse practitioners, and nurse midwives for increasing the percentage of the graduates of those programs who enter clinical programs and careers in primary care. Each State-operated health professional school shall submit a plan with strategies for increasing the percentage to the Board by April 15, 1996, and shall update and present the plan every two years thereafter. The Board of Governors shall report to the Joint Legislative Education Oversight Committee by May 15, 1996, and every two years thereafter on the status of these efforts to strengthen primary health care in North Carolina.

(c) The Board of Governors of The University of North Carolina shall further initiate whatever changes are necessary on admissions, advising, curriculum, and other policies for State-operated medical schools and State-operated health professional schools to ensure that larger proportions of students seek residencies and clinical training in primary care disciplines. The Board shall work with the Area Health Education Centers and other entities, adopting whatever policies it considers necessary to ensure that residency and clinical training programs have sufficient residency and clinical positions for graduates in these primary care specialties. As used in this subsection, health professional schools are those schools or institutions that offer training for licensure or certification of physician assistants, nurse practitioners, and nurse midwives.

(d) The progress of the private and State-operated medical schools and State-operated health professional schools towards increasing the number and proportion of graduates entering primary care shall be monitored annually by the Board of Governors of The University of North Carolina. Monitoring data shall include (i) the entry of State-supported graduates into primary care residencies and clinical training programs, and (ii) the specialty practices by a physician and each midlevel provider who were State-supported graduates as of a date five years after graduation. The Board of Governors shall certify data on graduates, their residencies and clinical training programs, and subsequent careers by October 1 of each calendar year, beginning in October of 1995, to the Fiscal Research Division of the Legislative Services Office and to the Joint Legislative Education Oversight Committee.

(e) The information provided in subsection (d) of this section shall be made available to the Appropriations Committees of the General Assembly for their use in future funding decisions on medical and health professional education. (1993, c. 321, ss. 78(a1)-(e); c. 529, s. 1.3; c. 561, s. 10; 1995, c. 507, s. 23A.5.)

**§ 143-614:** Repealed by Session Laws 1996, Second Extra Session, c. 17, s. 16.2.

**§§ 143-615 through 143-620:** Reserved for future codification purposes.

## ARTICLE 66.

### *Health Care Purchasing Alliance Act.*

**§§ 143-621 through 143-639:** Repealed by Session Laws 2000-67, s. 21.2, effective December 31, 2000.

**Editor's Note.** — Former G.S. 143-637 to 143-639 had been reserved for future codification purposes.

## ARTICLE 67.

## *First Flight Centennial Commission.*

### § 143-640. Commission established; purpose; members; terms of office; quorum; compensation; termination.

(a) Establishment. — There is established the First Flight Centennial Commission. The Commission shall be located within the Department of Cultural Resources for organizational, budgetary, and administrative purposes.

(b) Purpose. — The purpose of the Commission is to develop and plan activities to commemorate the centennial of the first successful manned, controlled, heavier-than-air, powered flight (in this Article referred to as "the First Flight") and other historical events related to the development of powered flight.

(c) Membership. — The Commission shall consist of 29 members, as follows:

(1) Four persons appointed by the Governor.
(2) Five persons appointed by the President Pro Tempore of the Senate.
(3) Five persons appointed by the Speaker of the House of Representatives.
(4) The following persons or their designees, ex officio:
  a. The Governor.
  b. The President Pro Tempore of the Senate.
  c. The Speaker of the House of Representatives.
  d. The United States Senators from this State.
  e. The member of the United States House of Representatives for the Third Congressional District.
  f. The Governor of the State of Ohio.
  g. The Secretary of the Department of Cultural Resources.
  h. The Superintendent of the Cape Hatteras National Seashore of the United States National Park Service.
  i. The chair of the Centennial of Flight Commemoration Commission.
  j. The President of the First Flight Society.
  k. The chair of the Dare County Board of Commissioners.
  *l.* The Mayor of the Town of Kill Devil Hills.
  m. The chair of the Dare County Tourism Board.
  n. The Mayor of the Town of Kitty Hawk.

The members appointed to the First Flight Centennial Commission shall be chosen from among individuals who have the ability and commitment to promote and fulfill the purposes of the Commission, including individuals who have demonstrated expertise in the fields of aeronautics, aerospace science, or history, who have contributed to the development of the fields of aeronautics or aerospace science, or who have demonstrated a commitment to serving the public.

(d) Terms. — Members shall serve for two-year terms, with no prohibition against being reappointed, except initial appointments shall be for terms as follows:

(1) The Governor shall initially appoint two members for a term of two years and two members for a term of three years.
(2) The President Pro Tempore of the Senate shall initially appoint two members for a term of two years and two members for a term of three years.

(3) The Speaker of the House of Representatives shall initially appoint two members for a term of two years and two members for a term of three years.

Initial terms shall commence on July 1, 1994.

(e) Cochairs. — The Governor shall select the cochairs biennially from among the membership of the Commission. The initial term shall commence on July 1, 2001.

(f) Vacancies. — A vacancy in the Commission or as chair of the Commission resulting from the resignation of a member or otherwise shall be filled in the same manner in which the original appointment was made and the term shall be for the balance of the unexpired term.

(g) Compensation. — The Commission members shall receive no salary as a result of serving on the Commission but shall receive per diem, subsistence, and travel expenses in accordance with the provisions of G.S. 120-3.1, 138-5, and 138-6, as applicable. When approved by the Commission, members may be reimbursed for subsistence and travel expenses in excess of the statutory amount.

(h) Removal. — Members may be removed in accordance with G.S. 143B-13 as if that section applied to this Article.

(i) Meetings. — The chair shall convene the Commission. Meetings shall be held as often as necessary, but not less than four times a year.

(j) Quorum. — A majority of the members of the Commission shall constitute a quorum for the transaction of business. The affirmative vote of a majority of the members present at meetings of the Commission shall be necessary for action to be taken by the Commission.

(k) Termination of Commission. — The Commission shall terminate June 30, 2004, which is six months after the 100th anniversary of the First Flight. (1993 (Reg. Sess., 1994), c. 777, s. 7(a); 1999-431, s. 3.2(a); 2001-486, ss. 2.12(a), 2.12(b); 2002-159, s. 20.)

**Editor's Note.** — Session Laws 1999-431, s. 4, provides that unless otherwise provided for in the act, appointments are for terms to begin when the act becomes law.

## § 143-641. Powers and duties of the Commission.

(a) Powers and Duties. — The Commission shall have the following powers and duties:

(1) To plan and develop activities appropriate to commemorate the centennial of the First Flight, including the coordination of activities throughout the State and nation.

(2) To coordinate with the national Centennial of Flight Commemoration Commission and the 2003 Fund Commission of Ohio in planning and promoting commemorative events and activities.

(3) To appoint a director, who shall be exempt from the State Personnel Act, to employ other staff as it deems necessary, subject to the State Personnel Act, and to fix their compensation.

(4) To adopt bylaws by a majority vote of the Commission.

(5) To accept grants, contributions, devises, bequests, gifts, and services for the purpose of providing support to the Commission. The funds and property shall be retained by the Commission, and the Commission shall prescribe rules under which the Commission may accept donations of money, property, or personal services, and determine the value of donations of property or personal services.

(6) To design, seek clearance for, and register with the Secretary of State a logo as the official emblem of the First Flight celebration, in coordination with the federal advisory commission. The Commission shall issue rules regarding the use of the logo.

(b) Commemoration Activities. — In planning and implementing appropriate activities to commemorate the centennial of the First Flight, the Commission shall give due consideration to:

(1) The historical setting in which the First Flight of the Wright Brothers took place.

(2) The contribution of powered flight to the development of transportation worldwide.

(3) The contribution that powered flight has made to worldwide trade and the economic development of the United States and all nations.

(4) The contribution that powered flight has made to world peace and security.

(5) The need to educate the public regarding the research and development of powered flight, and to acknowledge the development of aeronautics, aerospace science, and the aerospace industry, including the development of the glider and Orville and Wilbur Wright's contribution to the development of the glider.

(6) The development of aerospace science and the aerospace industry since the First Flight, including the development of space exploration.

(7) The importance of activities to commemorate the First Flight and to honor Orville and Wilbur Wright and their contribution to powered flight.

(8) The need to expand the facilities of the Wright Brothers National Memorial to honor Orville and Wilbur Wright and to educate the public regarding the development of powered flight and the development of aeronautics and aerospace science since the First Flight.

(9) The commitment and efforts of the First Flight Society and the National Park Service to preserving the Wright Brothers National Memorial and to honoring Orville and Wilbur Wright on the centennial of the First Flight.

(c) Contract Authority. — The Commission may procure supplies, services, and property as appropriate, and may enter into contracts, leases, or other legal agreements to carry out the purposes of this Article. All contracts, leases, or legal agreements entered into by the Commission shall terminate on the date of termination of the Commission. Termination shall not affect any disputes or causes of action of the Commission that arise before the date of termination, and the Department of Cultural Resources may prosecute or defend any causes of action arising before the date of termination. All property acquired by the Commission that remains in the possession of the Commission on the date of termination shall become the property of the Department of Cultural Resources. (1993 (Reg. Sess., 1994), c. 777, s. 7(a).)

## § 143-642. Assignment of property; offices.

(a) Assignment of Property. — Upon request of the Commission, the head of any State agency may assign property, equipment, and personnel of such agency to the Commission to assist the Commission in carrying out its duties under this Article. Assignments under this subsection shall be without reimbursement by the Commission to the agency from which the assignment was made. Property and equipment that remains in the possession of the Commission on the date of the termination of the Commission shall revert to the agency from which the property was acquired.

(b) Office Space. — The Department of Cultural Resources shall provide office space in Raleigh for use as offices by the First Flight Centennial Commission, and the Department of Cultural Resources shall receive no reimbursement from the Commission for the use of the property during the life of the Commission. (1993 (Reg. Sess., 1994), c. 777, s. 7(a).)

## § 143-643. Commission reports.

(a) Annual Report. — Before July 1, 1995, the Commission shall submit to the General Assembly a comprehensive report incorporating specific recommendations of the Commission for commemoration of the First Flight and other historical events related to the development of powered flight. After the initial report, the Commission shall submit a report to the General Assembly within 30 days of the convening of each Regular Session of the General Assembly until the Commission terminates. The report shall include:

(1) Recommendations for appropriate activities for the commemoration, including:
  a. Publications, both printed and electronic, of books, periodicals, films, videotapes, and other promotional and educational materials.
  b. Scholarly projects, conferences, lectures, seminars, and programs.
  c. Libraries, exhibits, and museums.
  d. Competitions and awards for historical, scholarly, artistic, and other works and projects related to the centennial.
  e. Ceremonies and celebrations, including a calendar of major activities, commemorating the centennial and other related historical events and achievements.
(2) Recommendations for legislation and administrative action to promote and develop the commemoration.
(3) An accounting of funds received and expended.

(b) Final Report. — The Commission shall submit a final report to the General Assembly no later than June 30, 2004. The final report shall include:

(1) A summary of the activities of the Commission.
(2) A final accounting of funds received and expended by the Commission.
(3) Recommendations concerning the disposition of historically significant property donated to or acquired by the Commission. (1993 (Reg. Sess., 1994), c. 777, s. 7(a).)

**§§ 143-644 through 143-649:** Reserved for future codification purposes.

## Article 68.

## *Regulation of Boxing.*

**§ 143-650:** Repealed by Session Laws 2004-124, s. 18.2(a), effective July 1, 2004.

## § 143-651. Definitions.

The following definitions apply in this Article:

(1) Amateur. — A person who is not receiving or competing for and has never received or competed for any purse or other article or thing of value for participating in a match.
(2) Announcer. — Any person who engages in the act of announcing a match.
(3) Boxer. — Any person who engages as a participant in a boxing match.
(4) Boxing match. — A match where the participants engage in the use of full contact boxing techniques (using the fist only), and where the object of a match is to win by decision, knockout (KO), or technical knockout (TKO).

(5) Repealed by Session Laws 2004-124, s. 18.2.(a), effective July 1, 2004.

(6) Contest. — A match in which the participants strive to win.

(7) Contestant. — Any person who engages as a participant in a boxing, kickboxing, or mixed martial arts match, or toughman event.

(7a) Division. — The Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety.

(8) Exhibition. — A match where the participants display their skills and technique without necessarily striving to win.

(9) Judge. — A person who has a vote in determining the winner of any match or contest.

(10) Kickboxer. — Any person who engages as a participant in a kickboxing match.

(11) Kickboxing match. — A match in which the participants engage in full contact martial arts fighting techniques using the hands and the feet, and where the object of the match is to win by decision, knockout (KO), or technical knockout (TKO).

(12) Licensee. — Any person, club, corporation, organization, or association to whom a license has been issued pursuant to the provisions of this Article.

(13) Manager. — Any person who controls or administers the affairs of any contestant, and who:

a. By contract, agreement, or other arrangement with any person undertakes or has undertaken to represent in any way the interest of the contestant in any professional contest in which the contestant is to participate and is entitled under that contract, agreement, or arrangement to receive monetary or other compensation for his or her services, without regard to the sources of the compensation. The term "manager" shall not be construed to mean any attorney licensed to practice in this State whose participation in the activities is restricted solely to representing the interests of a professional contestant as a client.

b. Directs or controls the professional activities of any professional contestant.

c. Receives or is entitled to receive a percentage of the gross purse or gross income of any professional contest.

(14) Match. — Any boxing, kickboxing, or mixed martial arts contest or exhibition, or toughman event, and includes any event, engagement, sparring or practice session, show or program where the public is admitted and in which there is intended to be physical contact, whether an exhibition or contest. This definition does not include training or practice sessions when no admission is charged.

(15) Matchmaker. — A person through whom matches are arranged for participants and who otherwise assists participants in procuring engagement dates.

(15a) Mixed martial artist. — Any person who engages as a participant in a mixed martial arts match.

(15b) Mixed martial arts. — A form of sporting martial arts that uses a variety of martial arts techniques to deliver blows with the hands, elbows, and any part of the leg below the hip, including the knee and foot, and also uses boxing, wrestling, and grappling techniques.

(16) Natural person. — An individual.

(17) Participant. — Any person who engages in a match or exhibition and performs as a boxer, kickboxer, or mixed martial artist.

(18) Person. — An individual, group of individuals, business, corporation, limited liability company, partnership, or any other individual or collective entity.

(19) Physician. — An individual licensed to practice medicine in this State.

(20) Professional. — Any person who is licensed as a contestant and receives compensation for participating in matches.

(21) Promoter. — Any person who produces, arranges, stages, holds, or gives any match in North Carolina involving a professional participant.

(22) Referee. — The official who shall enter and remain in the ring for the duration of a match and shall enforce the rules and maintain order in the ring.

(23) Ring official. — Any person who performs an official function for the duration of a match.

(23a) Sanctioned amateur. — A person who competes in a sanctioned amateur match.

(23b) Sanctioned amateur match. — Any match regulated by an amateur sports organization that has been recognized and approved by the Division.

(24) Second. — Any person who will work or be present in the corner of a participant for the duration of a match.

(25) Timekeeper. — Any person who will operate the clock or watch for the duration of a match for the purpose of keeping the official time of the match.

(25a) Toughman contestant. — Any person who competes in a toughman event.

(25b) Toughman event. — An elimination program of matches in which (i) the contestants are not professional boxers, (ii) the finalist receives a purse or other article of value, (iii) the participants engage in the use of full contact boxing techniques, and (iv) the object of each match is to win by decision, knockout (KO), or technical knockout (TKO).

(26) Repealed by Session Laws 2007-490, s. 1, effective August 30, 2007.

(27) Unarmed combat. — A match consisting of any combination of boxing, kicking, wrestling, hitting, punching, or other combative contact techniques which may reasonably be expected to inflict injury to opponents. (1995, c. 499, s. 1; 1997-504, s. 1; 1998-23, s. 18; 1998-212, s. 19.11(g); 2004-124, ss. 18.2(a), (b), (e); 2006-264, s. 22(c); 2007-490, s. 1.)

**Editor's Note.** — Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 18.2(e), as amended by Session Laws 2006-264, s. 22(a), provides: "With the exception of G.S. 143-655, the word 'Commission' shall be replaced with 'Division' every place that word appears in Article 68 of Chapter 143 of the General Statutes."

Session Laws 2004-124, s. 18.2(g), provides: "The Department of Crime Control and Public Safety shall use funds available from salary reserves to reclassify the two positions in the North Carolina State Boxing Commission and transfer them to the Alcohol Law Enforcement Division."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2007-490, s. 8, provides: "The Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety shall, as soon as practicable, adopt permanent rules to regulate mixed martial arts, as authorized by this act."

Session Laws 2007-490, which rewrote this section, in s. 9, provides: "This act is effective when it becomes law and applies to matches held, and licenses and permits issued, on or after that date, except that no license or permit for mixed martial arts shall be issued by the Division until the rules required under Section 8 of this act become effective."

**§ 143-652:** Repealed by Session Laws 2004-124, s. 18.2.(a), effective July 1, 2004.

## § 143-652.1. Regulation of boxing, kickboxing, mixed martial arts, and toughman events.

The Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety shall regulate live boxing, kickboxing, and mixed martial arts matches, whether professional, amateur, or sanctioned amateur, or toughman events, in which admission is charged for viewing, or the contestants compete for a purse or prize of value greater than twenty-five dollars ($25.00). The Division shall have the exclusive authority to approve and issue rules for the regulation of the conduct, promotion, and performances of live boxing, kickboxing, and mixed martial arts matches and exhibitions, whether professional, amateur, or sanctioned amateur, and toughman events in this State. The rules shall be issued pursuant to the provisions of Chapter 150B of the General Statutes and may include, without limitation, the following subjects:

(1) Requirements for issuance of licenses and permits required by this Article.
(2) Regulation of ticket sales.
(3) Physical requirements for contestants, including classification by weight and skill.
(4) Supervision of matches and exhibitions by licensed physicians and referees.
(5) Insurance and bonding requirements.
(6) Compensation of participants and licensees.
(7) Contracts and financial arrangements.
(8) Prohibition of dishonest, unethical, and injurious practices.
(9) Facilities.
(10) Approval of sanctioning amateur sports organizations.
(11) Procedures and requirements for compliance with the Professional Boxing Safety Act of 1996. (2004-124, s. 18.2(d); 2007-490, s. 2.)

**Editor's Note.** — Session Laws 2004-124, s. 18.2(g), provides: "The Department of Crime Control and Public Safety shall use funds available from salary reserves to reclassify the two positions in the North Carolina State Boxing Commission and transfer them to the Alcohol Law Enforcement Division."

Session Laws 2004-124, s. 33.6, made this section effective July 1, 2004.

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as "The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2007-490, s. 8, provides: "The Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety shall, as soon as practicable, adopt permanent rules to regulate mixed martial arts, as authorized by this act."

Session Laws 2007-490, which amended this section, in s. 9, provides: "This act is effective when it becomes law and applies to matches held, and licenses and permits issued, on or after that date, except that no license or permit for mixed martial arts shall be issued by the Division until the rules required under Section 8 of this act become effective."

## § 143-652.2. Boxing Advisory Commission.

(a) Creation. — The Boxing Advisory Commission is created within the Department of Crime Control and Public Safety to advise the Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety concerning matters regulated by this Article. The Commission shall consist of six voting members and two nonvoting advisory members. All the members shall be residents of North Carolina. The members shall be appointed as follows:

(1) One voting member shall be appointed by the Governor for an initial term of two years.

(2) One voting member shall be appointed by the President Pro Tempore of the Senate for an initial term of three years.

(3) One voting member shall be appointed by the Speaker of the House of Representatives for an initial term of three years.

(4) One voting member shall be appointed by the Secretary of Crime Control and Public Safety for an initial term of three years.

(5) One voting member shall be appointed by the Lieutenant Governor for an initial term of two years.

(6) One voting member shall be appointed by the Tribal Council of the Eastern Band of the Cherokee for an initial term of three years.

(7) One nonvoting advisory member shall be appointed by the Speaker of the House of Representatives for an initial term of one year, from nominations made by the North Carolina Medical Society, which shall nominate two licensed physicians for the position.

(8) One nonvoting advisory member shall be appointed by the President Pro Tempore of the Senate for an initial term of one year, from nominations made by the North Carolina Medical Society, which shall nominate two licensed physicians for the position.

Notwithstanding the schedule above in subdivisions (1), (5), (7), and (8) of this subsection, if any former member of the North Carolina Boxing Commission is appointed to the initial membership, that person shall serve an initial term of three years. The member appointed pursuant to subdivision (6) of this subsection may serve on the Commission only if an agreement exists and remains in effect between the Tribal Council of the Eastern Band of the Cherokee and the Commission authorizing the Commission to regulate professional boxing matches within the Cherokee Indian Reservation as provided by the Professional Boxing Safety Act of 1996.

The two nonvoting advisory members appointed pursuant to subdivisions (7) and (8) of this subsection shall advise the Commission and the Division on matters concerning the health and physical condition of boxers and health issues relating to the conduct of exhibitions and boxing matches. They may prepare and submit to the Commission for its consideration and to the Division for its approval any rules that in their judgment will safeguard the physical welfare of all participants engaged in boxing.

Terms for all members of the Commission except for the initial appointments shall be for three years.

The Secretary of Crime Control and Public Safety shall designate which member of the Commission is to serve as chair. A member of the Commission may be removed from office by the Secretary of Crime Control and Public Safety for cause. Members of the Commission are subject to the conflicts of interest requirements of 15 U.S.C. § 6308 (contained in the Professional Boxing Safety Act of 1996, as amended). Each member, before entering upon the duties of a member, shall take and subscribe an oath to perform the duties of the office faithfully, impartially, and justly to the best of the member's ability. A record of these oaths shall be filed in the Department of Crime Control and Public Safety.

(b) Vacancies. — Members shall serve until their successors are appointed and have been qualified. Any vacancy in the membership of the Commission shall be filled in the same manner as the original appointment. A vacancy in the membership of the Commission other than by expiration of term shall be filled for the unexpired term only.

(c) Meetings. — Meetings of the Commission shall be called by the chair or by any two members of the Commission, and meetings shall be held at least quarterly. Any three voting members of the Commission shall constitute a quorum at any meeting. Action may be taken and motions and resolutions adopted by the Commission at any meeting by the affirmative vote of a majority of the members of the Commission present at a meeting at which a quorum exists.

(d) Review Authority of the Commission. — The Commission shall review existing rules adopted under this Article and shall from time to time make recommendations to the Division for changes or addition to such rules. Any proposals for change, amendment, addition, or deletion to those rules shall be submitted by the Division to the Commission for its comments prior to approval.

(e) Compensation. — None of the members of the Commission shall receive compensation for serving on the Commission. However, members of the Commission may be reimbursed for their expenses in accordance with the provisions of Chapter 138 of the General Statutes.

(f) Staff Assistance. — The Secretary of Crime Control and Public Safety shall provide staff assistance to the Commission.

(g) Initial appointments to the Commission under this section shall be for terms commencing July 1, 2007. (2007-528, s. 1; 2008-187, s. 22.)

**Editor's Note.** — Session Laws 2007-528, s. 2, made this section effective August 1, 2007.

**Effect of Amendments.** — Session Laws 2008-187, s. 22, effective August 7, 2008, deleted "reenacted" preceding "section shall be" in subsection (g).

## § 143-653. Unauthorized matches prohibited.

No person shall promote, conduct, or engage in an unarmed combat match, whether the participants are professional or amateur, except as authorized by this Article. This section shall not preclude professional wrestling. (1995, c. 499, s. 1; 1997-504, s. 3; 1998-23, s. 18; 1998-212, s. 19.11(g); 2007-490, s. 3.)

**Editor's Note.** — Session Laws 2007-490, s. 8, provides: "The Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety shall, as soon as practicable, adopt permanent rules to regulate mixed martial arts, as authorized by this act."

Session Laws 2007-490, which amended this section, in s. 9, provides: "This act is effective when it becomes law and applies to matches held, and licenses and permits issued, on or after that date, except that no license or permit for mixed martial arts shall be issued by the Division until the rules required under Section 8 of this act become effective."

## § 143-654. Licensing and permitting.

(a) License and Permit Required. — Except for sanctioned amateur matches, it is unlawful for any person to act in this State as an announcer, contestant, judge, manager, matchmaker, promoter, referee, timekeeper, or second unless the person is licensed to do so under this Article. It is unlawful for a promoter to present a match in this State, other than a sanctioned amateur match, unless the promoter has a permit issued under this Article to do so. The Division has the exclusive authority to issue, deny, suspend, or revoke any license or permit provided for in this Article.

(b) License. — All licenses issued under this Article shall be valid only during the calendar year in which they are issued, except contestant licenses shall be valid for one year from the date of issuance. A license for an announcer, contestant, judge, matchmaker, referee, timekeeper, or second shall be issued only to a natural person. A natural person shall not transfer or assign a license or change it into another name. A license for a manager or promoter may be issued to a corporation or partnership; provided, however, that all officers or partners shall submit an application for individual licensure, and only those officers or partners who are licensed shall be entitled to negotiate or sign contracts. The addition of a new officer or partner during the license period shall necessitate the filing of an application for individual licensure by the new officer or partner.

An applicant for a license shall file with the Division the appropriate nonrefundable fee and any forms, documents, medical examinations, or exhibits the Division may require in order to properly administer this Article. The information requested shall include the date of birth and social security number of each applicant as well as any other personal data necessary to positively identify the applicant and may include the requirement of verification of any documents the Division deems appropriate. A person may not participate under a fictitious or assumed name in any match unless the person has first registered the name with the Division.

(c) Surety Bond. — An applicant for a promoter's license must submit, in addition to any other forms, documents, or exhibits requested by the Division, a surety bond payable to the Division for the benefit of any person injured or damaged by (i) the promoter's failure to comply with any provision of this Article or any rules adopted by the Division or (ii) the promoter's failure to fulfill the obligations of any contract related to the holding of a match. The surety bond shall be issued in an amount to be no less than ten thousand dollars ($10,000). The amount of the surety bond shall be negotiable upon the sole discretion of the Division. All surety bonds shall be upon forms approved by the Secretary of Crime Control and Public Safety and supplied by the Division.

(d) Permit. — A permit issued to a promoter under this Article is valid for a single match. An applicant for a permit shall file with the Division the appropriate nonrefundable fee and any forms or documents the Division may require. (1995, c. 499, s. 1; 1997-504, s. 4; 1998-23, s. 18; 1998-212, s. 19.11(c), (g); 1999-237, s. 20.3(b); 2004-124, s. 18.2(e); 2006-264, s. 22(a); 2007-490, s. 4.)

**Editor's Note.** — Session Laws 2004-124, s. 18.2(g), provides: "The Department of Crime Control and Public Safety shall use funds available from salary reserves to reclassify the two positions in the North Carolina State Boxing Commission and transfer them to the Alcohol Law Enforcement Division."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2007-490, s. 8, provides: "The Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety shall, as soon as practicable, adopt permanent rules to regulate mixed martial arts, as authorized by this act."

Session Laws 2007-490, which amended this section, in s. 9, provides: "This act is effective when it becomes law and applies to matches held, and licenses and permits issued, on or after that date, except that no license or permit for mixed martial arts shall be issued by the Division until the rules required under Section 8 of this act become effective."

## § 143-655. Fees; State Boxing Revenue Account.

(a) License Fees. — The Division shall collect the following license fees:

| | |
|---|---|
| Announcer | $75.00 |
| Contestant | $50.00 |
| Judge | $75.00 |
| Manager | $150.00 |
| Matchmaker | $300.00 |
| Promoter | $450.00 |

| | |
|---|---|
| Referee | $75.00 |
| Timekeeper | $75.00 |
| Second | $50.00. |

The annual license renewal fees shall not exceed the initial license fees.

(b) Permit Fees. — The Division may establish a fee schedule for permits issued under this Article. The fees may vary depending on the seating capacity of the facility to be used to present a match. The fee may not exceed the following amounts:

| Seating Capacity | Fee Amount |
|---|---|
| Less than 2,000 | $150.00 |
| 2,000 — 5,000 | $300.00 |
| Over 5,000 | $450.00. |

(b1) Admission Fees. — The Division shall collect a fee in the amount of two dollars ($2.00) per each ticket sold to attend events regulated in this Article.

(c) State Boxing Revenue Account. — There is created the State Boxing Revenue Account within the Department of Crime Control and Public Safety. Monies collected pursuant to the provisions of this Article shall be credited to the Account and applied to the administration of the Article. (1995, c. 499, s. 1; 1998-212, s. 19.11(d); 2004-124, s. 18.2(e); 2006-264, s. 22(b); 2007-490, s. 5; 2009-451, s. 17.7(a), (b).)

**Editor's Note.** — Session Laws 2004-124, s. 18.2(e), as amended by Session Laws 2006-264, s. 22(a), provides: "With the exception of G.S. 143-655, the word 'Commission' shall be replaced with 'Division' every place that word appears in Article 68 of Chapter 143 of the General Statutes."

Session Laws 2004-124, s. 18.2(g), provides: "The Department of Crime Control and Public Safety shall use funds available from salary reserves to reclassify the two positions in the North Carolina State Boxing Commission and transfer them to the Alcohol Law Enforcement Division."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2007-490, s. 8, provides: "The Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety shall, as soon as practicable, adopt permanent rules to regulate mixed martial arts, as authorized by this act."

Session Laws 2007-490, which amended this section, in s. 9, provides: "This act is effective when it becomes law and applies to matches held, and licenses and permits issued, on or after that date, except that no license or permit for mixed martial arts shall be issued by the Division until the rules required under Section 8 of this act become effective."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2009-451, s. 17.7(a) and (b), effective September 1, 2009, in subsection (a), substituted "$50.00" for "$37.50" twice, and substituted "two dollars ($2.00)" for "one dollar and fifty cents ($1.50)" in subsection (b1).

## § 143-656. Contracts and financial arrangements.

Any contract between licensees and related to a match or exhibition held or to be held in this State must meet the requirements of administrative rules as set forth by the Division. Any contract which does not satisfy the requirements of the administrative rules shall be void and unenforceable. All contracts shall be in writing. (1995, c. 499, s. 1; 1997-504, s. 5; 1998-23, s. 18; 1998-212, s. 19.11(g); 2004-124, s. 18.2(e); 2006-264, s. 22(a); 2007-490, s. 6.)

**Editor's Note.** — Session Laws 2004-124, s. 18.2(g), provides: "The Department of Crime Control and Public Safety shall use funds available from salary reserves to reclassify the two positions in the North Carolina State Boxing Commission and transfer them to the Alcohol Law Enforcement Division."

Session Laws 2004-124, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2004'."

Session Laws 2004-124, s. 33.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2004-2005 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2004-2005 fiscal year."

Session Laws 2004-124, s. 33.5, contains a severability clause.

Session Laws 2007-490, s. 8, provides: "The Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety shall, as soon as practicable, adopt permanent rules to regulate mixed martial arts, as authorized by this act."

Session Laws 2007-490, which amended this section, in s. 9, provides: "This act is effective when it becomes law and applies to matches held, and licenses and permits issued, on or after that date, except that no license or permit for mixed martial arts shall be issued by the Division until the rules required under Section 8 of this act become effective."

## § 143-657: Repealed by Session Laws 1997-504, s. 6.

## § 143-657.1. Sanctioned amateur matches.

In addition to the other applicable provisions of this Article, a sanctioned amateur match shall be conducted pursuant to the rules of the sports organization sanctioning the match or exhibition. (1997-504, s. 7; 1998-23, s. 18; 1998-212, s. 19.11(g); 2007-490, s. 7.)

**Editor's Note.** — Session Laws 2007-490, s. 8, provides: "The Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety shall, as soon as practicable, adopt permanent rules to regulate mixed martial arts, as authorized by this act."

Session Laws 2007-490, which amended this section, in s. 9, provides: "This act is effective when it becomes law and applies to matches held, and licenses and permits issued, on or after that date, except that no license or permit for mixed martial arts shall be issued by the Division until the rules required under Section 8 of this act become effective."

## § 143-658. Violations.

(a) Civil Penalties. — The Secretary of Crime Control and Public Safety may issue an order against a licensee or other person who willfully violates any provision of this Article, imposing a civil penalty of up to five thousand dollars ($5,000) for a single violation or of up to twenty-five thousand dollars ($25,000) for multiple violations in a single proceeding or a series of related proceedings. No order under this subsection may be entered without giving the licensee or other person 15 days' prior notice and an opportunity for a contested case hearing conducted pursuant to Article 3 of Chapter 150B of the General Statutes.

The clear proceeds of civil penalties imposed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Criminal Penalties. — A willful violation of any provision of this Article shall constitute a Class 2 misdemeanor. The Secretary of Crime Control and Public Safety may refer any available evidence concerning violations of this Article to the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings.

(c) Injunction. — Whenever it appears to the Secretary of Crime Control and Public Safety that a person has engaged or is about to engage in an act or practice constituting a violation of any provision of this Article or any rule or order hereunder, the Secretary of Crime Control and Public Safety may bring an action in any court of competent jurisdiction to enjoin those acts or practices and to enforce compliance with this Article or any rule or order issued pursuant to this Article.

(d) Repealed by Session Laws 1998-212, s. 19.11(e), effective July 1, 1998. (1995, c. 499, s. 1; 1997-504, s. 8; 1998-23, s. 18; 1998-212, s. 19.11(e), (g); 1998-215, s. 125.)

**§ 143-659:** Reserved for future codification purposes.

## ARTICLE 69.

## *Criminal Justice Information Network Governing Board.*

### § 143-660. Definitions.

As used in this Article:

(1) "Board" means the Criminal Justice Information Network Governing Board established by G.S. 143-661.

(2) "Local government user" means a unit of local government of this State having authorized access to the Network.

(3) "Network" means the Criminal Justice Information Network established by the Board pursuant to this Article.

(4) "Network user" or "user" means any person having authorized access to the Network.

(5) "State agency" means any State department, agency, institution, board, commission, or other unit of State government. (1996, 2nd Ex. Sess., c. 18, s. 23.3(a).)

**Editor's Note.** — Session Laws 2003-284, s. 17.1.(c), provides: "The Criminal Justice Information Network as provided in Article 69 of Chapter 143 of the General Statutes is hereby transferred by a Type II transfer, as defined in G.S. 143A-6, to the Department of Crime Control and Public Safety."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

### § 143-661. Criminal Justice Information Network Governing Board — creation; purpose; membership; conflicts of interest.

(a) The Criminal Justice Information Network Governing Board is established within the Department of Crime Control and Public Safety, to operate the State's Criminal Justice Information Network, the purpose of which shall be to provide the governmental and technical information systems infrastructure necessary for accomplishing State and local governmental public safety and justice functions in the most effective manner by appropriately and efficiently sharing criminal justice and juvenile justice information among law enforcement, judicial, and corrections agencies. The Board is established within the Department of Crime Control and Public Safety, for organizational and budgetary purposes only and the Board shall exercise all of its statutory powers in this Article independent of control by the Department of Crime Control and Public Safety.

(b) The Board shall consist of 21 members, appointed as follows:

(1) Five members appointed by the Governor, including one member who is a director or employee of a State correction agency for a term to begin September 1, 1996 and to expire on June 30, 1997, one member who is an employee of the North Carolina Department of Crime Control and Public Safety for a term beginning September 1, 1996 and to expire on June 30, 1997, one member selected from the North Carolina Association of Chiefs of Police for a term to begin September 1, 1996 and to expire on June 30, 1999, one member who is an employee of the Department of Juvenile Justice and Delinquency Prevention, and one member who represents the Division of Motor Vehicles.

(2) Six members appointed by the General Assembly in accordance with G.S. 120-121, as follows:

a. Three members recommended by the President Pro Tempore of the Senate, including two members of the general public for terms to begin on September 1, 1996 and to expire on June 30, 1997, and one member selected from the North Carolina League of Municipalities who is a member of, or an employee working directly for, the governing board of a North Carolina municipality for a term to begin on September 1, 1996 and to expire on June 30, 1999; and

b. Three members recommended by the Speaker of the House of Representatives, including two members of the general public for terms to begin on September 1, 1996 and to expire on June 30, 1999, and one member selected from the North Carolina Association of County Commissioners who is a member of, or an employee working directly for, the governing board of a North Carolina county for a term to begin on September 1, 1996 and to expire on June 30, 1997.

(3) Two members appointed by the Attorney General, including one member who is an employee of the Attorney General for a term to begin on September 1, 1996 and to expire on June 30, 1997, and one member from the North Carolina Sheriffs' Association for a term to begin on September 1, 1996 and to expire on June 30, 1999.

(4) Six members appointed by the Chief Justice of the North Carolina Supreme Court, as follows:

a. The Director of the Administrative Office of the Courts, or an employee of the Administrative Office of the Courts, for a term beginning July 1, 1997, and expiring June 30, 2001.

b. One member who is a district attorney or an assistant district attorney upon the recommendation of the Conference of District Attorneys of North Carolina, for a term beginning July 1, 1998, and expiring June 30, 1999.

c. Two members who are superior court or district court judges for terms beginning July 1, 1998, and expiring June 30, 2001.

d. One member who is a magistrate upon the recommendation of the North Carolina Magistrates' Association, for a term beginning July 1, 1998, and expiring June 30, 1999.

e. One member who is a clerk of superior court upon the recommendation of the North Carolina Association of Clerks of Superior Court, for a term beginning July 1, 1998, and expiring June 30, 1999.

(5) One member appointed by the State Chief Information Officer.

(6) One member appointed by the President of the North Carolina Chapter of the Association of Public Communications Officials International, who is an active member of the Association, for a term to begin on September 1, 1996 and to expire on June 30, 1999.

The respective appointing authorities are encouraged to appoint persons having a background in and familiarity with criminal information systems and networks generally and with the criminal information needs and capacities of the constituency from which the member is appointed.

As the initial terms expire, subsequent members of the Board shall be appointed to serve four-year terms. At the end of a term, a member shall continue to serve on the Board until a successor is appointed. A member who is appointed after a term is begun serves only for the remainder of the term and until a successor is appointed. Any vacancy in the membership of the Board shall be filled by the same appointing authority that made the appointment, except that vacancies among members appointed by the General Assembly shall be filled in accordance with G.S. 120-122.

(c) Members of the Board shall not be employed by or serve on the board of directors or other corporate governing body of any information systems, computer hardware, computer software, or telecommunications vendor of goods and services to the State or to any unit of local government in the State. No member of the Board shall vote on an action affecting solely the member's own State agency or local governmental unit or specific judicial office. (1996, 2nd Ex. Sess., c. 18, s. 23.3(a); 1998-202, s. 9; 1998-212, s. 18.2(b); 2001-424, s. 23.6(b); 2001-487, s. 90; 2003-284, s. 17.1(a); 2004-129, s. 42.)

**Editor's Note.** — Session Laws 2003-284, s. 17.1.(c), provides: "The Criminal Justice Information Network as provided in Article 69 of Chapter 143 of the General Statutes is hereby transferred by a Type II transfer, as defined in G.S. 143A-6, to the Department of Crime Control and Public Safety."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

## § 143-662. Compensation and expenses of Board members; travel reimbursements.

Members of the Board shall serve without compensation but may receive travel and subsistence as follows:

(1) Board members who are officials or employees of a State agency or unit of local government, in accordance with G.S. 138-6.

(2) All other Board members, at the rate established in G.S. 138-5. (1996, 2nd Ex. Sess., c. 18, s. 23.3(a).)

## § 143-663. Powers and duties.

(a) The Board shall have the following powers and duties:

(1) To establish and operate the Network as an integrated system of State and local government components for effectively and efficiently storing, communicating, and using criminal justice information at the State and local levels throughout North Carolina's law enforcement, judicial, juvenile justice, and corrections agencies, with the components of the Network to include electronic devices, programs, data, and governance and to set the Network's policies and procedures.

(2) To develop and adopt uniform standards and cost-effective information technology, after thorough evaluation of the capacity of information technology to meet the present and future needs of the State and, in consultation with the Office of Information Technology Services, to

develop and adopt standards for entering, storing, and transmitting information in criminal justice databases and for achieving maximum compatibility among user technologies.

(3) To identify the funds needed to establish and maintain the Network, identify public and private sources of funding, and secure funding to:
  a. Create the Network and facilitate the sharing of information among users of the Network; and
  b. Make grants to local government users to enable them to acquire or improve elements of the Network that lie within the responsibility of their agencies or State agencies; provided that the elements developed with the funds must be available for use by the State or by local governments without cost and the applicable State agencies join in the request for funding.

(4) To provide assistance to local governments for the financial and systems planning for Network-related automation and to coordinate and assist the Network users of this State in soliciting bids for information technology hardware, software, and services in order to assure compliance with the Board's technical standards, to gain the most advantageous contracts for the Network users of this State, and to assure financial accountability where State funds are used.

(5) To provide a liaison among local government users and to advocate on behalf of the Network and its users in connection with legislation affecting the Network.

(6) To facilitate the sharing of knowledge about information technologies among users of the Network.

(7) To take any other appropriate actions to foster the development of the Network.

(b) All grants or other uses of funds appropriated or granted to the Board shall be conditioned on compliance with the Board's technical and other standards. (1996, 2nd Ex. Sess., c. 18, s. 23.3(a); 2003-284, s. 17.2(b); 2004-129, s. 43.)

## § 143-664. Election of officers; meetings; staff, etc.

(a) The Governor shall call the first meeting of the Board. At the first meeting, the Board shall elect a chair and a vice-chair, each to serve a one-year term, with subsequent officers to be elected for one-year terms. The Board shall hold at least two regular meetings each year, as provided by policies and procedures adopted by the Board. The Board may hold additional meetings upon the call of the chair or any three Board members. A majority of the Board membership constitutes a quorum.

(b) Pending permanent staffing, the Department shall provide the Board with professional and clerical staff and any additional support the Board needs to fulfill its mandate. The Board may meet in an area provided by the Department of Crime Control and Public Safety and the Board's staff shall use space provided by the Department. (1996, 2nd Ex. Sess., c. 18, s. 23.3(a); 2003-284, s. 17.1(b).)

**Editor's Note.** — Session Laws 2003-284, s. 17.1.(c), provides: "The Criminal Justice Information Network as provided in Article 69 of Chapter 143 of the General Statutes is hereby transferred by a Type II transfer, as defined in G.S. 143A-6, to the Department of Crime Control and Public Safety."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 is a severability clause.

## §§ 143-665 through 143-669: Reserved for future codification purposes.

## Article 70.

## *Adopt-A-Beach Program.*

## §§ 143-670 through 143-674: Repealed by Session Laws 2001-452, s. 1.1, effective October 28, 2001.

**Editor's Note.** — Repealed G.S. 143-674 had been reserved.

## Article 71.

## *North Carolina Postal History Commission.*

### § 143-675. Commission established; purpose; members; terms of office; quorum; compensation; termination.

(a) Establishment. — There is established the North Carolina Postal History Commission. The Commission shall be located within the Department of Cultural Resources for organizational, budgetary, and administrative purposes.

(b) Purpose. — The purpose of the Commission is to advise the Secretary of Cultural Resources on the collection, preservation, cataloging, publication, and exhibition of material associated with North Carolina's postal history.

(c) Membership. — The Commission shall consist of 16 members, as follows:

(1) Four persons appointed by the Governor, two of whom shall be recommended by the President of the North Carolina Postal History Society.

(2) Four persons appointed by the President Pro Tempore of the Senate, two of whom shall be recommended by the President of the North Carolina Postal History Society.

(3) Four persons appointed by the Speaker of the House of Representatives, two of whom shall be recommended by the President of the North Carolina Postal History Society.

(4) Four persons appointed by the Secretary of Cultural Resources, two of whom shall be recommended by the President of the North Carolina Postal History Society.

The members appointed to the North Carolina Postal History Commission shall be chosen from among individuals who have education or experience in the fields of archives preservation, North Carolina history, historical administration, museum administration, or a knowledge of North Carolina's postal history.

(d) Terms. — Members shall serve for the duration of the Commission. Initial terms shall commence July 1, 1997.

(e) Chair. — The chair shall be elected biennially from the membership of the Commission from among its members. The initial term shall commence July 1, 1997.

(f) Vacancies. — Vacancies resulting from the resignation of a member or otherwise shall be filled in the same manner in which the original appointment was made, and the term shall be for the balance of the unexpired term.

(g) Compensation. — The Commission members shall receive no salary as a result of serving on the Commission but shall receive per diem, subsistence, and travel expenses in accordance with the provisions of G.S. 120-3.1, 138-5, and 138-6, as applicable.

(h) Removal. — Members may be removed in accordance with G.S. 143B-13.

(i) Meetings. — The chair shall convene the Commission. The Commission shall meet at least quarterly until an exhibit on postal history is mounted and at least semiannually thereafter.

(j) Quorum. — A majority of the members of the Commission shall constitute a quorum for the transaction of business. The affirmative vote of a majority of the members present at meetings of the Commission shall be necessary for action to be taken by the Commission.

(k) Termination of Commission. — The Commission shall terminate June 30, 2000. (1997-443, s. 30.5.)

## § 143-676. Powers and duties of the Commission.

(a) Powers and Duties. — The Commission shall have the following powers and duties:

(1) To advise the Secretary of Cultural Resources on the collection, preservation, cataloging, publication, and exhibition of materials associated with North Carolina's postal history in cooperation with the North Carolina Museum of History.

(2) To adopt bylaws by a majority vote of the Commission.

(3) To accept grants, contributions, devises, bequests, gifts, and services for the purpose of providing support to the Commission. The funds and property shall be retained by the Commission, and the Commission shall prescribe rules under which the Commission may accept donations of money, property, or personal services, and determine the value of donations of property or personal services.

(b) Contract Authority. — The Commission may procure supplies, services, and property as appropriate and may enter into contracts, leases, or other legal agreements within funds available to carry out the purposes of this Article. All contracts, leases, or legal agreements entered into by the Commission shall terminate on the date of termination of the Commission. Termination shall not affect any disputed or causes of action of the Commission that arise before the date of termination, and the Department of Cultural Resources may prosecute or defend any causes of action arising before the date of termination. All property acquired by the commission that remains in the possession of the Commission on the date of termination shall become the property of the Department of Cultural Resources. (1997-443, s. 30.5.)

## § 143-677. Assignment of property; offices.

(a) Assignment of Property. — Upon request of the Commission, the head of any State agency may assign property, equipment, and personnel of such agency to the Commission to assist the Commission in carrying out its duties under this Article. Assignments under this subsection shall be without reimbursement by the Commission to the agency from which the assignment was made. Property and equipment that remain in the possession of the Commission on the date of the termination of the Commission shall revert to the agency from which the property was acquired.

(b) Office Space. — The Department of Cultural Resources shall provide office space in Raleigh for use as offices by the North Carolina Postal History

Commission, and the Department of Cultural Resources shall receive no reimbursement from the Commission for the use of the property during the life of the Commission. (1997-443, s. 30.5.)

## § 143-678. Commission reports.

(a) Annual Report. — Before July 1, 1998, the Commission shall submit to the General Assembly a comprehensive report incorporating specific recommendations of the Commission. After the initial report, the Commission shall submit a report to the General Assembly within 30 days of the convening of each regular session of the General Assembly.

(b) Final Report. — The Commission shall submit a final report to the General Assembly no later than June 30, 2000. The final report shall include:

(1) A summary of the activities of the Commission.

(2) A final accounting of funds received and expended by the Commission. (1997-443, s. 30.5.)

## § 143-679. Application of Article.

The provisions of Article 1 of Chapter 121 of the General Statutes apply to the Commission. (1997-443, s. 30.5.)

**§§ 143-680, 143-681:** Reserved for future codification purposes.

## ARTICLE 72.

## *Commission On Children With Special Health Care Needs.*

## § 143-682. Commission established.

(a) There is established the Commission on Children With Special Health Care Needs. The Department of Health and Human Services shall provide staff services and space for Commission meetings. The purpose of the Commission is to monitor and evaluate the availability and provision of health services to special needs children in this State, and to monitor and evaluate services provided to special needs children under the Health Insurance Program for Children established under Part 8 of Article 2 of Chapter 108A of the General Statutes.

(b) The Commission shall consist of eight members appointed by the Governor, as follows:

(1) Two parents, not of the same family, each of whom has a special needs child. In appointing parents, the Governor shall consider appointing one parent of a child with chronic illness and one parent of a child with a developmental disability or behavioral disorder.

(2) A licensed psychiatrist recommended by the North Carolina Psychiatric Association;

(3) A licensed psychologist recommended by the North Carolina Psychological Association;

(4) A licensed pediatrician whose practice includes services for special needs children, recommended by the Pediatric Society of North Carolina;

(5) A representative of one of the children's hospitals in the State, recommended by the Pediatric Society of North Carolina;

(6) A local public health director recommended by the Association of Local Health Directors; and

(7) An educator providing education services to special needs children, recommended by the North Carolina Council of Administrators of Special Education.

(c) The Governor shall appoint from among Commission members the person who shall serve as chair of the Commission. Of the initial appointments, two shall serve one-year terms, three shall serve two-year terms, and three shall serve three-year terms. Thereafter, terms shall be for two years. Vacancies occurring before expiration of a term shall be filled from the same appointment category in accordance with subsection (b) of this section. (1998-1, s. 3(a); 1998-212, s. 12.12(c).)

## § 143-683. Powers and duties of the Commission.

The Commission shall have the following powers and duties:

(1) Study the needs of children with special health care needs in this State for health care services not presently provided or regularly available through State or federal programs or through private or employer-sponsored health insurance plans;

(2) Develop guidelines for case management services, quality assurance measures, and periodic evaluations to determine efficacy of health services provided to special needs children;

(3) Develop and coordinate an outreach program of case managers to assist children with special health care needs and their families in accessing available State and federal resources for all health care services;

(4) Review rules adopted by the Commission for Public Health pertaining to the provision of services for special needs children and make recommendations for modifications or additions to the rules necessary to improve services to these children or to make service delivery more efficient and effective;

(5) Review policies and practices of the Department of Health and Human Services and recommend to the Secretary of Health and Human Services changes that would improve implementation of health programs for children with special health care needs;

(6) Report to each session of the General Assembly not later than the first day of its convening. The report shall include a summary of the Commission's work and any recommendations the Commission may have on ways to improve the efficiency and effectiveness of health services delivery to children with special health care needs in this State, The Commission shall provide a copy of its report to the General Assembly's Commission on Children With Special Needs;

(7) Study the feasibility of establishing a privately funded risk pool to provide insurance coverage and services for children with special health care needs;

(8) Make recommendations to the Department and to the Commission for Public Health regarding quality assurance measures and mechanisms to enhance the health outcomes of children with special health care needs;

(9) Establish subcommittees as necessary to provide assistance and advice to the Commission in conducting its studies and other activities. The Commission may appoint non-Commission members to the subcommittees;

(10) Seek grants and other funds from private and federal sources to carry out the purposes of this Article; and

(11) Conduct other activities the Commission deems appropriate and necessary to carry out the purposes of this Article. (1998-1, s. 3(a); 2007-182, s. 2.)

### § 143-684. Compensation and expenses of Commission members; travel reimbursements.

Members of the Commission shall serve without compensation but may receive travel and subsistence as follows:

(1) Commission members who are officials or employees of a State agency or unit of local government, in accordance with G.S. 138-6.
(2) All other Commission members at the rate established in G.S. 138-5. (1998-1, s. 3(a).)

**§§ 143-685 through 143-689:** Reserved for future codification purposes.

## ARTICLE 73.

## *Reserved.*

**§§ 143-690 through 143-693:** Reserved for future codification purposes.

**Editor's Note.** — Session Laws 1998-132, s. 14 was codified as Part 30 of Article 7 of Chapter 143B rather than as Article 73 of Chapter 143 at the direction of the Revisor of Statutes.

## ARTICLE 74.

## *North Carolina Government Competition Act.*

**§§ 143-701 through 143-709:** Repealed by Session Laws 1999-395, s. 18.1, effective July 1, 1999.

**Editor's Note.** — This Article, which was enacted as Chapter 143C by Session Laws 1998-212, s. 15.2C(a), was recodified as this Article at the direction of the Revisor of Statutes.

**§§ 143-710 through 143-714:** Reserved for future codification purposes.

## ARTICLE 75.

## *Tobacco Trust Fund.*

### § 143-715. Policy; purpose.

The General Assembly finds:

(1) For many years, the State and its prosperity have been supported by its agricultural economy and particularly by the tobacco-related segment of the agricultural economy. The Master Settlement Agreement is expected to cause significant economic hardship upon the tobacco-related segment of the agricultural economy in that it is expected to result in reduced demand, sales, and prices for tobacco as an agricultural product.

(2) Tobacco producers, tobacco allotment holders, and persons engaged in tobacco-related businesses are entitled to indemnification for the adverse economic effects in the State resulting from the Master Settlement Agreement, tobacco producers, allotment holders, and persons engaged in tobacco-related businesses are entitled to compensation for the economic losses resulting from lost quota in this State, and tobacco producers are entitled to compensation for the decline in value of tobacco-related personal property assets and declining market conditions in this State resulting from the Master Settlement Agreement, to the extent that funds are available in the Tobacco Trust Fund to address those purposes.

(3) Even in the absence of the Master Settlement Agreement, the tobacco-related segment of the State's economy is experiencing severe economic hardship as it confronts a national decline in the use of, and demand for, tobacco products, which decline is expected to continue. At present, the tobacco producers, tobacco allotment holders, and persons engaged in tobacco-related businesses are facing an economic crisis that threatens their health and survival. Therefore, in addition to indemnification and compensation for losses in this State resulting from the Master Settlement Agreement, the public interest will be served by the funding of qualified agricultural programs that support, foster, encourage, and facilitate a strong agricultural economy in North Carolina. To the extent that funds are available in the Tobacco Trust Fund, expenditure of those funds to finance qualified agricultural programs is in the public interest.

(4) It is a public purpose for these funds to be expended in this manner, and it is public service for these persons to accept these funds to the end that conditions of unemployment and fiscal distress may be alleviated or avoided, more stable local economies may be created, local tax bases may be stabilized and maintained, natural resources may be optimally used, and the general public may be benefited. (2000-147, s. 3.)

**Cross References.** — For the Health and Wellness Trust Fund, see G.S. 147-86.30 et seq.

**Editor's Note.** — Session Laws 2000-147, s. 8(a)-(c), provides:

"(a) Interpretation of Act.--The foregoing sections of this act provide an additional and alternative method for the doing of the things authorized by the act, are supplemental and additional to powers conferred by other laws, and do not derogate any powers now existing.

"(b) References in this act to specific sections or Chapters of the General Statutes are intended to be references to those sections or Chapters as amended and as they may be amended from time to time by the General Assembly.

"(c) This act, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect its purposes."

Session Laws 2000-147, s. 8(d), contains a severability clause.

Session Laws 2001-487, s. 124, provides: "Notwithstanding G.S. 150B-21.1(a)(2), the Health and Wellness Trust Fund Commission and the Tobacco Trust Fund Commission shall have the authority to adopt temporary rules as a recent act of the General Assembly through June 30, 2002, in order to adopt rules as authorized in S.L. 2000-147."

## § 143-716. Definitions.

The following definitions apply in this Article:

(1) Commission. — The Tobacco Trust Fund Commission.

(2) Compensatory programs. — Programs developed by the Commission to identify, locate, compensate, and indemnify tobacco producers, allotment holders, and persons engaged in tobacco-related businesses who have suffered actual economic losses in this State due to lost

quota, the decline in value of tobacco-related personal property assets, and declining market conditions resulting from the Master Settlement Agreement or declines in the tobacco-related segment of the State's economy.

(3) Fund. — The Tobacco Trust Fund.

(4) Master Settlement Agreement. — The settlement agreement between certain tobacco manufacturers and the states, as incorporated in the consent decree entered in the action of State of North Carolina v. Philip Morris, Incorporated, et al., 98 CVS 14377, in the General Court of Justice, Superior Court Division, Wake County, North Carolina.

(5) National Tobacco Grower Settlement Trust. — The trust established by tobacco companies to provide payments to tobacco growers and allotment holders in 14 states for the purposes of ameliorating potential adverse economic consequences of likely reduction in demand, sales, and prices for tobacco as an agricultural product as a result of the Master Settlement Agreement.

(6) Qualified agricultural programs. — Programs developed by the Commission to support and foster the vitality and solvency of the tobacco-related segment of the State's agricultural economy, particularly the segment adversely affected by the Master Settlement Agreement, with the objective of alleviating and avoiding unemployment, preserving, and increasing local tax bases, and encouraging the economic stability of participants in the State's agricultural economy. Examples of qualified agricultural programs include programs to finance the modernization of farming equipment, programs to finance the conversion of existing equipment to conform to environmental and other regulatory requirements, and programs to finance the conversion or replacement of equipment in order to cultivate crops that are more profitable than are currently being cultivated.

(7) Tobacco product component business. — An individual, partnership, limited liability company, corporation, or other commercial entity that engages in the manufacture of component products for use in the manufacture of tobacco products.

(8) Tobacco-related business. — An individual, partnership, limited liability company, corporation, or other commercial entity that provides products or services used directly in (i) the production of tobacco, or (ii) support of the business of the production or sale of tobacco. The term does not include the manufacturing of tobacco products or the sale of tobacco products at wholesale or retail.

(9) Tobacco-related employment. — Employment in a tobacco-related business, or in the manufacturing of tobacco products or the component products used in the manufacture of tobacco products. The term does not include persons employed in the sale of tobacco products at wholesale or retail. (2000-147, s. 3.)

## § 143-717. Commission.

(a) Creation. — The Tobacco Trust Fund Commission is created. The Commission shall be administratively located within the Department of Agriculture and Consumer Services but shall exercise its powers independently of the Commissioner of Agriculture and the Department. All administrative expenses of the Commission shall be paid from the Fund.

(b) Membership. — The Commission shall consist of 18 members. The Commission shall be appointed as follows: six members by the Governor, six members by the President Pro Tempore of the Senate, and six members by the

Speaker of the House of Representatives. The members shall be appointed as follows:

(1) The Governor shall make the following appointments:
   a. A flue-cured tobacco farmer.
   b. A flue-cured tobacco farmer.
   c. A person in or displaced from tobacco-related employment.
   d. An at-large appointee.
   e. An at-large appointee.
   f. An at-large appointee.

(2) The President Pro Tempore of the Senate shall make the following appointments:
   a. A flue-cured tobacco farmer.
   b. A flue-cured tobacco farmer.
   c. A burley tobacco farmer.
   d. An at-large appointee.
   e. An at-large appointee.
   f. An at-large appointee.

(3) The Speaker of the House of Representatives shall make the following appointments:
   a. A flue-cured tobacco farmer.
   b. A former flue-cured allotment holder who is not also a flue-cured tobacco farmer.
   c. A burley tobacco farmer.
   d. An at-large appointee.
   e. An at-large appointee.
   f. An at-large appointee.

It is the intent of the General Assembly that the appointing authorities, in appointing members, shall appoint members who represent the geographic, political, gender, and racial diversity of the State. It is the intent of the General Assembly that at least one-half of the members of the Commission be tobacco farmers.

Except as provided for the initial members under subsection (c) of this section, members shall serve four-year terms beginning July 1. No member may serve more than two full consecutive terms. Members may continue to serve beyond their terms until their successors are duly appointed, but any holdover shall not affect the expiration date of the succeeding term. Vacancies shall be filled by the designated appointing authority for the remainder of the unexpired term. A member may be removed from office for cause by the authority that appointed that member.

(c) Initial Membership; Staggering. — To provide for a staggered membership, the members initially appointed to the Commission shall be appointed to staggered terms. Of the initial appointments to the Commission, the members initially appointed pursuant to sub-subdivisions (b)(1)a., (1)b., (2)d., and (3)d. of this section shall serve one-year terms ending on June 30, 2001. The members initially appointed pursuant to sub-subdivisions (b)(2)c., (2)e., (3)a., and (3)e. shall serve two-year terms ending on June 30, 2002. The members initially appointed pursuant to sub-subdivisions (b)(1)c., (1)d., (1)e., (2)b., and (3)c. of this section shall serve three-year terms ending June 30, 2003. The remaining members initially appointed pursuant to subsection (b) of this section shall serve four-year terms ending June 30, 2004.

(d) Officers. — The Commission shall elect from its membership a chair, vice-chair, and other officers as necessary for two-year terms beginning July 1 at the first meeting of the Commission held on or after July 1 of every even-numbered year. The vice-chair may act for the chair in the absence of the chair as authorized by the Commission.

(e) Frequency of Meetings. — The Commission shall meet at least quarterly each year and may hold special meetings at the call of the chair or a majority of members. The Governor shall call the initial meeting of the Commission.

(f) Quorum; Majority. — Ten members shall constitute a quorum of the Commission. The Commission may act upon a majority vote of the members of the Commission on matters involving the disbursement of funds and personnel matters properly before the Commission. On all other matters, the Commission may act by majority vote of the members of the Commission at a meeting at which a quorum is present.

(g) Per Diem and Expenses. — The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5. Per diem, subsistence, and travel expenses of the members shall be paid from the Fund.

(h) Conflict of Interest. — Members of the Commission shall comply with the provisions of G.S. 14-234 prohibiting conflicts of interest, except that G.S. 14-234(a) shall not apply to an application for or the receipt of a grant or other financial assistance award by a member of the Commission from the Fund created under this Article, or an entity in which a member of the Commission has an interest, if both of the following conditions are met:

(1) A member does not vote on, participate in the deliberation of, or otherwise attempt through his or her official capacity to influence the vote on, a grant or other financial assistance award by the Commission to the member.
(2) The Commissioner of Agriculture determines that any award to a member is in accordance with general criteria adopted by the Commission for the distribution of funds from the Fund.

(i) Limit on Operating and Administrative Expenses. — No more than two and one-half percent (2 ½%) of the annual receipts of the Fund for the fiscal year beginning July 1 or a total sum of one million dollars ($1,000,000), whichever is less, may be used each fiscal year for administrative and operating expenses of the Commission and its staff. All administrative expenses of the Commission shall be paid from the Fund. (2000-147, s. 3; 2006-264, s. 68.)

**Editor's Note.** — Subsection (i) was enacted as subsection (h) by Session Laws 2000-147, s. 3; it was redesignated at the direction of the Revisor of Statutes.

## § 143-718. Powers and duties.

The Commission shall have the following powers and duties:

(1) To administer the provisions of this Article.
(2) To develop compensatory programs and qualified agriculture programs, including guidelines and criteria for eligibility for and disbursement of funds, the forms of direct and indirect economic assistance to be awarded, and procedures for applying for and reviewing applications for assistance from the Fund. In developing guidelines and criteria for eligibility and disbursement of funds, the Commission may consult with and otherwise obtain assistance from the State and local offices of the Farm Service Agency and other agencies of the United States Department of Agriculture.
(3) To provide financial assistance to eligible recipients, in carrying out compensatory programs and qualified agricultural programs.
(4) To hire staff for the administration of the Fund.
(5) To contract with other persons to assist in the administration of the Commission's programs.
(6) To accept gifts or grants from other sources.
(7) To adopt rules to implement this Article. (2000-147, s. 3.)

## § 143-719. Tobacco Trust Fund; creation; investment; priority use.

(a) Fund Established. — The Tobacco Trust Fund is established in the Office of the State Treasurer. The Fund shall be used for the purposes provided in this Article.

(b) Fund Earnings, Assets, and Balances. — The State Treasurer shall hold the Fund separate and apart from all other moneys, funds, and accounts. The State Treasurer is the custodian of the Fund and shall invest the assets in accordance with G.S. 147-69.2 and G.S. 147-69.3. Investment earnings credited to the Fund become part of the Fund. Any balance remaining in the Fund at the end of any fiscal year is carried forward in the Fund for the next succeeding fiscal year. Payments from the Fund shall be made on the warrant of the chair of the Commission, pursuant to the directives of the Commission.

(c) Priority Use of Funds. — As soon as practicable after the beginning of each fiscal year, the State Treasurer must certify in writing to the chair of the Commission the estimated amount of debt service anticipated to be paid during the fiscal year for special indebtedness authorized by the State Capital Facilities Act of 2004, Part 1 of S.L. 2004-179. The chair of the Commission must issue a warrant from the Fund to the General Fund for the lesser of (i) one-half of the amount certified by the Treasurer and (ii) the applicable percentage of the Fund's receipts for the current fiscal year. For fiscal years beginning before July 1, 2007, the applicable percentage is thirty percent (30%). For fiscal years beginning on or after July 1, 2007, the applicable percentage is sixty-five percent (65%). (2000-147, s. 3; 2004-179, s. 1.4.)

## § 143-720. Benefits and administration of Fund for compensatory programs.

(a) Funds held in the Fund may be expended on compensatory programs as provided in this section.

(b) The Fund may provide direct and indirect financial assistance, in accordance with criteria established by the Commission and to the extent allowed by law, to accomplish the following:

(1) Indemnify tobacco producers, allotment holders, and persons engaged in tobacco-related businesses from the adverse economic effects in this State of the Master Settlement Agreement.

(2) Compensate tobacco producers, allotment holders, and persons engaged in tobacco-related businesses for economic loss resulting from lost quota and compensate tobacco producers for the decline in value of tobacco-related personal property assets and declining market conditions resulting from the Master Settlement Agreement in this State.

(3) Compensate individuals displaced from tobacco-related employment in this State as a result of the adverse economic effects of the Master Settlement Agreement.

(4) Compensate tobacco product component businesses that are (i) adversely impacted by the Master Settlement Agreement and that (ii) need financial assistance to retool machinery or equipment or to retrain workers, in order to convert to the production of new products or nontobacco use of existing products, or to effect other similar changes.

(c) Only tobacco producers, persons engaged in tobacco-related businesses, individuals displaced from tobacco-related employment, and tobacco product component businesses in this State, and holders of North Carolina tobacco allotments are eligible to apply for and receive assistance pursuant to subsection (b) of this section. Direct payments made to tobacco producers, tobacco allotment holders, and persons engaged in tobacco-related businesses shall be based on losses resulting in 1998 and thereafter. Lost quota shall be a primary determinative factor in calculating the amount of compensable economic loss for tobacco producers, allotment holders, and persons engaged in tobacco-related businesses.

(d) The Commission shall determine the priority of awards among the categories in subsection (b) of this section and within each of those categories.

(e) Financial assistance awards shall be for no more than one year at a time. An award may be renewed annually, without limitation.

(f) The Commission may require applicants to provide copies of documents necessary to determine compensable economic loss.

(g) In no event shall the amount paid to a tobacco producer or allotment holder pursuant to this Article, when combined with the amount received through the National Tobacco Grower Settlement Trust, exceed the compensable economic loss of the producer or allotment holder.

(h) The Commission may consider the criteria used for National Tobacco Grower Settlement Trust payments and may correspond with the National Tobacco Grower Settlement Trust certification entity to ensure that tobacco farmers and allotment holders are treated fairly. (2000-147, s. 3.)

## § 143-721. Benefits and administration of Fund for qualified agricultural programs.

(a) Funds held in the Fund may be expended on qualified agricultural programs as provided in this section.

(b) In implementing qualified agricultural programs, the Commission shall endeavor to identify those areas of the tobacco-related segment of the State's economy in need of assistance to be provided by the Fund in order to assure the continued vitality and solvency of those areas. The Commission shall endeavor to select for funding qualified agricultural programs that will have the greatest favorable impact on the long-term health of the tobacco-related economy of the State.

(c) The benefits of qualified agricultural programs are not limited to persons suffering economic loss resulting from the Master Settlement Agreement, but these programs shall be designed to foster, support, and assist the tobacco-related segment of the agricultural economy.

(d) The Commission may solicit and accept proposals from agencies and departments of the State, including institutions of The University of North Carolina, local units of government, the federal government, and members of the private sector for qualified agricultural programs to be funded with money held in the Fund. (2000-147, s. 3.)

## § 143-722. Reporting.

(a) The chair of the Commission shall report each year by November 1 to the Joint Legislative Commission on Governmental Operations and the chairs of the House and Senate Appropriations Committees regarding the implementation of this Article, including a report on funds disbursed during the fiscal year by amount, purpose, and category of recipient, and other information as requested by the Joint Legislative Commission on Governmental Operations. A written copy of the report shall also be sent to the Legislative Library by November 1 each year.

(b) Any non-State entity as that term is defined in G.S. 143C-1-1 that receives, uses, or expends any funds from the Commission is subject to the applicable reporting requirements of G.S. 143C-6-14. (2000-147, s. 3; 2004-196, s. 4; 2006-203, s. 99; 2008-187, s. 23.)

**Editor's Note.** — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 99, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, in subsection (b), substituted "G.S. 143C-1-1" for "G.S. 143-6.2", and substituted "G.S. 143-6-14." (143C-6-14, renumbered as 143C-6-23) for "G.S. 143-6.2."

Session Laws 2008-187, s. 23, effective August 7, 2008, substituted "G.S. 143C-6-14" for "G.S. 143-6-14" in subsection (b).

## § 143-723. Open meetings; public records; audit.

The Open Meetings Law (Article 33 of Chapter 143 of the General Statutes) and the Public Records Act (Chapter 132 of the General Statutes) shall apply to the Fund and the Commission, and the Fund and the Commission shall be subject to audit by the State Auditor as provided by law. The Commission shall reimburse the State Auditor for the actual cost of the audit. (2000-147, s. 3.)

**§ 143-724:** Reserved for future codification purposes.

# ARTICLE 76.

## *North Carolina Geographic Information Coordinating Council.*

## § 143-725. Council established; role of the Center for Geographic Information and Analysis.

(a) Council Established. — The North Carolina Geographic Information Coordinating Council ("Council") is established to develop policies regarding the utilization of geographic information, GIS systems, and other related technologies. The Council shall be responsible for the following:

(1) Strategic planning.
(2) Resolution of policy and technology issues.
(3) Coordination, direction, and oversight of State, local, and private GIS efforts.
(4) Advising the Governor, the General Assembly, and the State Chief Information Officer as to needed directions, responsibilities, and funding regarding geographic information.

The purpose of this statewide geographic information coordination effort shall be to further cooperation among State, federal, and local government agencies; academic institutions; and the private sector to improve the quality, access, cost-effectiveness, and utility of North Carolina's geographic information and to promote geographic information as a strategic resource in the State. The Council shall be located in the Office of the Governor for organizational, budgetary, and administrative purposes.

(b) Role of CGIA. — The Center for Geographic Information and Analysis (CGIA) shall staff the Geographic Information and Coordinating Council and its committees. CGIA shall manage and distribute digital geographic information about North Carolina maintained by numerous State and local government agencies. It shall operate a statewide data clearinghouse and provide Internet access to State geographic information. (2001-359, s. 1; 2004-129, s. 44.)

**Geographic Information Consolidation.** — Session Laws 2009-451, s. 6.8, as amended by Session Laws 2009-575, s. 3C, which added subsection (h) to this note, provides: "(a) Findings. — The General Assembly finds that there is a critical need for consolidating the investments made in geographic information systems and developing common infrastructures in order for the State to reap all the potential benefits of geographic information systems at the lowest cost.

"(b) Implementation Plan. — The recommendations outlined in the 2008 legislative report prepared by the State Chief Information Officer, the Geographic Information Coordinating Council, and the Office of State Budget and Management, made pursuant to Section 6.13 of S.L. 2008-107, entitled "State Geographic Information Consolidation Implementation Plan," shall be implemented in four distinct work streams, as follows:

"(1) Transferring the Center for Geographic Information and Analysis to the Office of the State Chief Information Officer and establishing appropriated funding for staff activities supporting the Geographic Information Coordinating Council, statewide standards, and the coordination of data acquisition.

"(2) Reestablishing the professional services component and refocusing that effort toward current needs of the community while reducing those overhead costs.

"(3) Revitalizing the NC OneMap project by leveraging new technology in the market to reduce costs while increasing utility of the service.

"(c) Transfers of Agencies, Powers, Duties. — The statutory authority, powers, duties, functions, records, personnel, property, and unexpended balances of appropriations, allocations, or other funds of the State agencies and subunits listed in this subsection are transferred from those entities to the State Chief Information Officer, Office of Information Technology Services, with all of the elements of a Type II transfer as defined by G.S. 143A-6:

"(1) The North Carolina Geographic Information Coordinating Council.

"(2) The Center for Geographic Information and Analysis.

"The Center for Geographic Information and Analysis shall remain in its current office space unless the State Chief Information Officer determines otherwise.

"(d) Center for Geographic Information and Analysis Coordination. — The State Chief Information Officer shall coordinate a professional services component for geographic information systems coordination with the Center for Geographic Information and Analysis that is refocused toward current community needs.

"(e) North Carolina Geographic Information Coordinating Council Coordination. — The State Chief Information Officer, in cooperation with the North Carolina Geographic Information Coordinating Council, shall coordinate the refocusing of the NC OneMap geographic information systems infrastructure project to leverage new technology, to increase the utility of geographic information systems services, and to reduce geographic information systems data layer costs through singly managed contracts.

"(f) Information Technology Fund. — The Information Technology Fund shall be used for the purpose of acquiring and managing, at the lowest cost, data layers useful to multiple State and local organizations, according to the priorities set by the North Carolina Geographic Information Coordinating Council. The Information Technology Fund may receive private grants and may include State, federal, local, and matching funds. Any funding received for GIS may be used only for that purpose.

"(g) Geographic Information Systems Funding. — Of the funds appropriated in this act to the Information Technology Fund, the sum of seven hundred forty thousand dollars ($740,000) for the 2009-2010 fiscal year and the sum of seven hundred forty thousand dollars ($740,000) for the 2010-2011 fiscal year shall be used to effectuate the transfer of the Center for Geographic Information and Analysis, including the cost of moving personnel positions, as provided by this act.

"(h) ESRI License Funding. — The State Chief Information Officer (i) shall use up to the sum of six hundred thousand dollars ($600,000) from funding appropriated to the Information Technology Fund during the 2009-2010 fiscal year to support ESRI licenses for State agencies and (ii) may use anticipated carryforward from fiscal year 2009-2010 to provide the funding for those licensing fees. The State Chief Information Officer shall not charge subscription fees to fund ESRI licenses."

**Editor's Note.** — Session Laws 2001-359, s. 3 provides: "This act shall not be construed to obligate the General Assembly to appropriate any funds to implement the provisions of this act. The provisions of this act shall be implemented from funds otherwise appropriated or available to the Office of the Governor."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

## § 143-726. Council membership; organization.

(a) Members. — The Council shall consist of up to 35 members, or their designees, as set forth in this section. An appointing authority may reappoint a Council member for successive terms.

(b) Governor's Appointments. — The Governor shall appoint the following members:

(1) The head of an at-large State agency not represented in subsection (d) of this section.
(2) An employee of a county government, nominated by the North Carolina Association of County Commissioners.
(3) An employee of a municipal government, nominated by the North Carolina League of Municipalities.
(4) An employee of the federal government who is stationed in North Carolina.
(5) A representative from the Lead Regional Organizations.
(6) A member of the general public.
(7) Other individuals whom the Governor deems appropriate to enhance the efforts of geographic information coordination.

Members appointed by the Governor shall serve three-year terms. The Governor shall appoint an individual from the membership of the Council to serve as Chair of the Council. The member appointed shall serve as Chair for a term of one year.

(c) General Assembly Appointments. — The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall each appoint three members to the Council. These members shall serve one-year terms.

(d) Other Members. — Other Council members shall include:

(1) The Secretary of State.
(2) The Commissioner of Agriculture.
(3) The Superintendent of Public Instruction.
(4) The Secretary of Environment and Natural Resources.
(5) The Secretary of the Department of Transportation.
(6) The Secretary of the Department of Administration.
(7) The Secretary of the Department of Commerce.
(8) The Secretary of the Department of Crime Control and Public Safety.
(9) The Secretary of the Department of Health and Human Services.
(10) The Secretary of the Department of Revenue.
(11) The President of the North Carolina Community Colleges System.
(12) The President of The University of North Carolina System.
(13) The Chair of the Public Utilities Commission.
(14) The State Budget Officer.
(15) The Executive Director of the North Carolina League of Municipalities.
(16) The Executive Director of the North Carolina Association of County Commissioners.
(17) One representative from the State Government GIS User Committee.
(18) One representative elected annually from the Local Government Committee established pursuant to subdivision (h) (2) of this section.
(19) The State Chief Information Officer who shall serve as a nonvoting member.

Council members serving ex officio pursuant to this subsection shall serve terms coinciding with their respective offices. Members serving by virtue of their appointment by a standing committee of the Council shall serve for the duration of their appointment by the standing committee.

(e) Meetings. — The Council shall meet at least quarterly on the call of the Chair. The Management and Operations Committee shall conduct the Council's business between quarterly meetings.

(f) Administration. — The Director of the CGIA shall be secretary of the Council and provide staff support as it requires.

(g) Reports. — The Council shall report at least annually to the Governor and to the Joint Legislative Commission on Governmental Operations.

(h) Committees. — The Council may establish work groups, as needed, and shall oversee the standing committees created in this subsection. Each standing committee shall adopt bylaws, subject to the Council's approval, to govern its proceedings. Except as otherwise provided, the Chair of the Council shall appoint the standing committee chairs from representatives listed in subsections (b), (c), or (d) of this section. The standing committees are as follows:

(1) State Government GIS User Committee. — Membership shall consist of representatives from all interested State government departments. The Chair of the Council shall appoint the committee chair from one of the State agencies represented in subsection (d) of this section.

(2) Local Government Committee. — Membership shall consist of representatives from organizations and professional associations that currently serve or represent local government GIS users, the North Carolina League of Municipalities, the North Carolina Association of County Commissioners, and Lead Regional Organizations. The committee shall elect one of its members to the Council.

(3) Federal Interagency Committee. — Membership shall consist of representatives from all interested federal agencies and Tribal governments with an office located in North Carolina. The appointed federal representative serving pursuant to subdivision (b) (4) of this section shall serve as the Chair of the Federal Interagency Committee.

(4) Statewide Mapping Advisory Committee. — This committee shall consolidate statewide mapping requirements and attempt to gain statewide support for financing cooperative programs. The committee shall also advise the Council on issues, problems, and opportunities relating to federal, State, and local government geospatial data programs.

(5) GIS Technical Advisory Committee. — This committee shall develop the statewide technical architecture for GIS and anticipate and respond to GIS technical opportunities and issues affecting State, county, and local governments in North Carolina.

(6) Management and Operations Committee. — This committee shall consider management and operational matters related to GIS and other matters that are formally requested by the Council. The committee membership shall consist of the Chair of the Council, the State Budget Officer, the chair of each of the standing committees of the Council, and other members of the Council appointed by the Chair. (2001-359, s. 1; 2003-340, s. 1.9.)

## § 143-727. Compensation and expenses of Council members; travel reimbursements.

Members of the Council shall serve without compensation but may receive travel and subsistence as follows:

(1) Council members who are officials or employees of a State agency or unit of local government, in accordance with G.S. 138-6.

(2) All other Council members at the rate established in G.S. 138-5. (2001-359, s. 1.)

**§§ 143-728, 143-729:** Reserved for future codification purposes.

## ARTICLE 77.

## *Managed Care Patient Assistance Program.*

### § 143-730. Managed Care Patient Assistance Program.

(a) The Office of Managed Care Patient Assistance Program is established in an existing State agency or department designated by the Governor. The Director of the Office of Managed Care Patient Assistance Program shall be appointed by the Governor.

(b) The Managed Care Patient Assistance Program shall provide information and assistance to individuals enrolled in managed care plans. The Managed Care Patient Assistance Program shall have expertise and experience in both health care and advocacy and will assume the specific duties and responsibilities set forth in subsection (c) of this section.

(c) The duties and responsibilities of the Managed Care Patient Assistance Program are as follows:

(1) Develop and distribute educational and informational materials for consumers, explaining their rights and responsibilities as managed care plan enrollees.
(2) Answer inquiries posed by consumers and refer inquiries of a regulatory nature to staff within the Department of Insurance.
(3) Advise managed care plan enrollees about the utilization review process.
(4) Assist enrollees with the grievance, appeal, and external review procedures established by Article 50 of Chapter 58 of the General Statutes.
(5) Publicize the Office of the Managed Care Patient Assistance Program.
(6) Compile data on the activities of the Office and evaluate such data to make recommendations as to the needed activities of the Office.

(d) The Director of the Managed Care Patient Assistance Program shall annually report the activities of the Managed Care Patient Assistance Program, including the types of appeals, grievances, and complaints received and the outcome of these cases. The report shall be submitted to the General Assembly, upon its convening or reconvening, and shall make recommendations as to efforts that could be implemented to assist managed care consumers.

(e) All health information in the possession of the Managed Care Patient Assistance Program is confidential and is not a public record pursuant to G.S. 132-1 or any other applicable statute.

For purposes of this section, "health information" means any of the following:

(1) Information relating to the past, present, or future physical or mental health or condition of an individual.
(2) Information relating to the provision of health care to an individual.
(3) Information relating to the past, present, or future payment for the provision of health care to an individual.
(4) Information, in any form, that identifies or may be used to identify an individual, that is created by, provided by, or received from any of the following:
    a. An individual or an individual's spouse, parent, legal guardian, or designated representative.
    b. A health care provider, health plan, employer, health care clearinghouse, or an entity doing business with these entities. (2001-446, s. 1.6; 2002-159, s. 45.)

**Editor's Note.** — Session Laws 2001-446, s. 8 provides, in part: "Nothing in this act obligates the General Assembly to appropriate funds to implement this act."

Session Laws 2001-446, s. 7 is a severability clause.

**Legal Periodicals.** — For comment, "Patients' Bill of Rights; Legislative Cure-All or Prescription for Disaster?," see 81 N.C.L. Rev. 653 (2003).

**§§ 143-731 through 143-734:** Reserved for future codification purposes.

## ARTICLE 78.

## *Commission on State Property.*

**§§ 143-735 through 143-737:** Repealed by Session Laws 2007-12, s. 1, effective April 12, 2007.

**Editor's Note.** — For earlier provisions relating to state-owned surplus real property, see Session Laws 2003-284, s. 6.8(a)-(g), as amended by Session Laws 2004-124, s. 6.4(c).

Session Laws 2007-12, ss. 2-4 provide: "The contract, entered into by the Commission on January 15, 2007, for technical or professional services, is terminated in accordance with paragraph 13 of the contract, as of the effective date of this act. This act shall constitute written notice to the contractor.

"The elimination of any employee positions in the Commission on State Property required by this act shall be deemed an economy in the State Budget, and any employee affected shall be entitled to benefits pursuant to G.S. 143-27.2 [now G.S. 126-8.5].

"No finding or determination by the Commission before the effective date of this act that a property is or should be surplus is binding on the Department of Administration, nor is any selection by the Commission of any person, firm, or corporation to provide brokerage services with respect to any property. The determinations that any property is surplus, that there is a need for brokerage services, and the selection of a provider for any such needed services are in the sole discretion of the Department of Administration."

**§§ 143-738 through 143-744:** Reserved for future codification purposes.

## ARTICLE 79.

## *Internal Auditing.*

### § 143-745. Definitions; intent; applicability.

(a) For the purposes of this section:

(1) "Agency head" means the Governor, a Council of State member, a cabinet secretary, the President of The University of North Carolina, and the Superintendent of Public Instruction.

(2) "State agency" means each department created pursuant to Chapter 143A or 143B of the General Statutes, The University of North Carolina, and the Department of Public Instruction.

(b) This Article applies only to a State agency that:

(1) Has an annual operating budget that exceeds ten million dollars ($10,000,000);

(2) Has more than 100 full-time equivalent employees; or

(3) Receives and processes more than ten million dollars ($10,000,000) in cash in a fiscal year. (2007-424, s. 1; 2009-516, s. 2.)

**Editor's Note.** — This section was originally enacted as G.S. 143-738. It has been renumbered as this section at the direction of the Revisor of Statutes.

The definitions of "State agency" and "Agency head" were renumbered at the direction of the Revisor of Statutes to preserve alphabetical order.

Session Laws 2007-424, s. 2, made this Article effective August 23, 2007.

**Effect of Amendments.** — Session Laws 2009-516, s. 2, effective August 26, 2009, deleted "the Chief Justice of the Supreme Court" following "a cabinet secretary" in subdivision (a)(1); and deleted "the Judicial Branch" following "General Statutes" in subdivision (a)(2).

## § 143-746. Internal auditing required.

(a) Requirements. — A State agency shall establish a program of internal auditing that:

(1) Implements an effective system of internal controls that safeguards public funds and assets and minimizes incidences of fraud, waste, and abuse.

(2) Ensures programs and business operations are administered in compliance with federal and state laws, regulations, and other requirements.

(3) Reviews the effectiveness and efficiency of agency and program operations and service delivery.

(4) Periodically audits the agency's major systems and controls, including:
  a. Accounting systems and controls.
  b. Administrative systems and controls.
  c. Electronic data processing systems and controls.

(b) Internal Audit Standards. — Internal audits shall comply with current Standards for the Professional Practice of Internal Auditing issued by the Institute for Internal Auditors or, if appropriate, Government Auditing Standards issued by the Comptroller General of the United States.

(c) Appointment and Qualifications of Internal Auditors. — Any internal auditor employed by a State agency shall at a minimum have a bachelor's degree from an accredited college or university and:

(1) Certification or licensure as a certified public accountant, certified internal auditor, certified fraud examiner, certified information systems auditor, professional engineer, or attorney; or

(2) A minimum of five years' experience in internal or external auditing, management consulting, program evaluation, management analysis, economic analysis, industrial engineering, or operations research.

(d) Director of Internal Auditing. — The agency head shall appoint a Director of Internal Auditing who shall report to the agency head and shall not report to any employee subordinate to the agency head. (2007-424, s. 1.)

**Editor's Note.** — This section was originally enacted as G.S. 143-739. It has been renumbered as this section at the direction of the Revisor of Statutes.

## § 143-747. Council of Internal Auditing.

(a) The Council of Internal Auditing is created, consisting of the following members:

(1) The State Controller who shall serve as Chair.
(2) The State Budget Officer.
(3) The Secretary of Administration.
(4) The Attorney General.
(5) The Secretary of Revenue.
(6) The State Auditor who shall serve as a nonvoting member. The State Auditor may appoint a designee.

(b) The Council shall be supported by the Office of State Budget and Management.

(c) The Council shall:

(1) Hold its first meeting before November 1, 2007, and thereafter at the call of the Chair or upon written request to the Chair by two members of the Council.

(2) Keep minutes of all proceedings.

(3) Promulgate guidelines for the uniformity and quality of State agency internal audit activities.

(4) Recommend the number of internal audit employees required by each State agency.

(5) Develop internal audit guides, technical manuals, and suggested best internal audit practices.

(6) Administer an independent peer review system for each State agency internal audit activity; specify the frequency of such reviews consistent with applicable national standards; and assist agencies with selection of independent peer reviewers from other State agencies.

(7) Provide central training sessions, professional development opportunities, and recognition programs for internal auditors.

(8) Administer a program for sharing internal auditors among State agencies needing temporary assistance and assembly of interagency teams of internal auditors to conduct internal audits beyond the capacity of a single agency.

(9) Maintain a central database of all annual internal audit plans; topics for review proposed by internal audit plans; internal audit reports issued and individual findings and recommendations from those reports.

(10) Require reports in writing from any State agency relative to any internal audit matter.

(11) If determined necessary by a majority vote of the council:

a. Conduct hearings relative to any attempts to interfere with, compromise, or intimidate an internal auditor.

b. Inquire as to the effectiveness of any internal audit unit.

c. Authorize the Chair to issue subpoenas for the appearance of any person or internal audit working papers, report drafts, and any other pertinent document or record regardless of physical form needed for the hearing.

(12) Issue an annual report including, but not limited to, service efforts and accomplishments of State agency internal auditors and to propose legislation for consideration by the Governor and General Assembly. (2007-424, s. 1.)

**Editor's Note.** — This section was originally enacted as G.S. 143-740. It has been renumbered as this section at the direction of the Revisor of Statutes.

# READY REFERENCE INDEX

A

**AWARDS.**
**State awards system,** §§140A-1 to 140A-6.

B

**BEACHES.**
**Adopt-a-beach program,** §§143-670 to 143-673.

**BICYCLE AND BIKEWAY ACT,** §§136-71.6 to 136-71.13.

**BILLBOARDS.**
**Outdoor advertising control act,** §§136-126 to 136-140.1.

**BOUNDARIES.**
**State boundaries,** §§141-1 to 141-8.

**BOXING.**
**Regulation of boxing,** §§143-651 to 143-658.

**BRIDGES,** §§136-72 to 136-81.
**Ferries, etc., and toll bridges,** §§136-82 to 136-89.
**Public toll roads and bridges,** §§136-89.180 to 136-89.218.

**BUILDING CODE COUNCIL AND BUILDING CODE,** §§143-136 to 143-143.3.

C

**COMMUNITY CONSERVATION ASSISTANCE PROGRAM,** §143-215.74M.

**CONTROLLED-ACCESS FACILITIES,** §§136-89.48 to 136-89.59A.

D

**DRY-CLEANING SOLVENT CLEANUP,** §§143-215.104A to 143-215.104U.

E

**EMERGENCY MEDICAL SERVICES ACT OF 1973,** §§143-507 to 143-519.

**EMINENT DOMAIN.**
**Roads and highways.**
  Condemnation, §§136-103 to 136-121.1.

**ETHICS.**
**State government ethics act,** §§138A-1 to 138A-45.

H

**HEALTH CARE PURCHASING ALLIANCE ACT,** §§143-621 to 143-636.

J

**JUNKYARD CONTROL ACT,** §§136-141 to 136-155.

## VOLUME 16

### M

**MANUFACTURED HOUSING.**
**Manufactured housing board,** §§143-143.8 to 143-143.54.
**Uniform standards code for manufactured homes,** §§143-125 to 143-151.6.

**MEETINGS OF PUBLIC BODIES,** §§143-318.9 to 143-318.18.

### N

**NORTH CAROLINA ART SOCIETY,** §§140-12 to 140-15.

**NORTH CAROLINA MUSEUM OF ART,** §§140-5.12 to 140-5.16.

**NORTH CAROLINA POSTAL HISTORY COMMISSION,** §§143-675 to 143-679.

**NORTH CAROLINA SYMPHONY SOCIETY,** §§140-7 to 140-10.1.

### O

**OIL POLLUTION AND HAZARDOUS SUBSTANCES CONTROL,** §§143-215.75 to 143-215.104.

### P

**POSTAL HISTORY COMMISSION.**
**North Carolina postal history commission,** §§143-675 to 143-679.

**PUBLIC TRANSPORTATION,** §§136-44.20 to 136-44.27.

**PURCHASES AND CONTRACTS,** §§143-48 to 143-64.
**Architectural, engineering and surveying services contracts,** §§143-64.31 to 143-64.34.
**Consultant services contracts,** §§143-64.20 to 143-64.24.
**Public contracts,** §§143-129.1 to 143-135.9.
  Public building contracts, §§143-129.1 to 143-135.9.

### R

**RAILROADS,** §§136-190 to 136-198.

**ROADS AND HIGHWAYS.**
**Bicycle and bikeway act of 1974,** §§136-71.6 to 136-71.13.
**Board of transportation.**
  Powers and duties, §§136-17.2 to 136-44.
**Bridges,** §§136-72 to 136-81.
  Ferries, etc., and toll bridges, §§136-82 to 136-89.
  Public toll roads and bridges, §§136-89.180 to 136-89.218.
**Condemnation,** §§136-103 to 136-121.1.
**Congestion relief and intermodal transportation 21st century fund,** §§136-250 to 136-256.
**Controlled-access facilities,** §§136-89.48 to 136-89.59A.
**Dedication of right-of-way with density or development rights transfer,** §§136-66.10, 136-66.11.
**Department of transportation.**
  Organization, §§136-4 to 136-16.10.
  Powers and duties, §§136-17.2 to 136-44.
**Directional signs, displays and devices.**
  Exemption and deferment from removal, §§136-140.6 to 136-140.9.

**ROADS AND HIGHWAYS** —Cont'd
**Ferries, etc., and toll bridges,** §§136-82 to 136-89.
**Junkyard control act,** §§136-141 to 136-155.
**Litter prevention account,** §§136-125.1, 136-125.2.
**Local governments.**
  Streets and highways in and around, §§136-66.1 to 136-66.8.
**Miscellaneous provisions,** §§136-90 to 136-102.6.
**Neighborhood roads, cartways, church roads, etc.,** §§136-67 to 136-71.
**Outdoor advertising control act,** §§136-126 to 136-140.1.
**Public toll roads and bridges,** §§136-89.180 to 136-89.218.
**Public transportation,** §§136-44.20 to 136-44.27.
**Railroad revitalization,** §§136-44.35 to 136-44.38.
**Rural transportation planning organizations,** §§136-210 to 136-213.
**Scenic beauty of areas along highways.**
  Preservation, etc., §§136-122 to 136-125.
**State highway system,** §§136-45 to 136-64.1.
**State roads,** §§136-44.1 to 136-44.16.
**Transportation corridor official map act,** §§136-44.50 to 136-44.54.
**Trust fund,** §§136-175 to 136-184.

**RURAL REHABILITATION.**
**North Carolina rural rehabilitation corporation,** §§137-31 to 137-43.

**S**

**SALARIES, FEES AND ALLOWANCES,** §§138-1 to 138-8.

**SHERIFFS' SUPPLEMENTAL PENSION FUND ACT OF 1985,** §§143-166.80 to 143-166.85.

**SMOKING IN PUBLIC PLACES,** §§143-595 to 143-601.

**SOIL AND WATER CONSERVATION DISTRICTS.**
**General provisions,** §§139-1 to 139-15.
**Small watershed projects.**
  Grants, §§139-53 to 139-57.
**Watershed improvement programs.**
  Counties, §§139-39 to 139-49.
**Watershed protection.**
  Water supply watershed protection, §§143-214.5 to 143-214.7.

**SOLVENT CLEANUP.**
**Dry-cleaning solvent cleanup,** §§143-215.104A to 143-215.104U.

**SOUTHERN GROWTH POLICIES AGREEMENT,** §§143-490 to 143-506.

**STATE CAPITAL FACILITIES FINANCE ACT,** §§142-80 to 142-101.

**STATE DEBT.**
**Borrowing money in emergencies and in anticipation of collection of taxes,** §§142-16 to 142-19.
**General provisions,** §§142-1 to 142-15.1.
**Refunding bonds,** §§142-29.1 to 142-29.7.
**State capital facilities finance act,** §§142-80 to 142-101.
**State energy conservation finance act,** §§142-60 to 142-70.
**State psychiatric hospital finance act,** §§142-100 to 142-113.

**STATE DEPARTMENTS, INSTITUTIONS AND COMMISSIONS.**
**Adopt-a-beach program,** §§143-670 to 143-673.
**Air pollution control,** §§143-215.105 to 143-215.114C.
**Art.**
  Promotion of arts, §§143-403 to 143-407.1.

**STATE DEPARTMENTS, INSTITUTIONS AND COMMISSIONS** —Cont'd
**Balanced growth policy act,** §§143-506.6 to 143-506.14.
**Building code council and building code,** §§143-136 to 143-143.3.
**Child day care.**
  State/public school child day care contracts, §§143-64.50 to 143-64.52.
**Child fatality review team, task force and study,** §§143-571 to 143-580.
**Code officials qualification board,** §§143-151.8 to 143-151.21.
**Commission to study the care of the aged and handicapped,** §§143-279 to 143-283.
**Consultant services.**
  Contracts to obtain, §§143-64.20 to 143-64.24.
**Council of state governments,** §143-86.
**Criminal justice information network governing board,** §§143-660 to 143-664.
**Defense of public school employees,** §§143-300.13 to 143-300.18.
**Defense of state employees, medical contractors and local sanitarians,** §§143-300.2 to 143-300.10.
**Department of administration,** §§143-334 to 143-345.18.
**Department of human resources.**
  Institutions of department.
    Persons admitted to institutions to pay costs, §§143-117 to 143-127.1.
**Electrical and natural gas meters.**
  Master meters prohibited, §143-151.42.
**Emergency medical services act of 1973,** §§143-507 to 143-519.
**Energy policy for state agencies concerning major construction or renovation of buildings,** §§143-64.10 to 143-64.16.
**Equal employment practices,** §§143-422.1 to 143-422.3.
**Executive mansion,** §§143-410 to 143-415.
**Federal tax reform allocation committee,** §§143-433.6 to 143-433.9.
**First flight centennial commission,** §§143-640 to 143-643.
**Governor's council on employment of the handicapped,** §§143-283.1 to 143-283.8.
**Guaranteed energy savings contracts for local governmental units,** §§143-64.17 to 143-64.17F.
**Health care purchasing alliance act,** §§143-621 to 143-636.
**Home inspector licensure board,** §§143-151.43 to 143-151.63.
**Inaugural ceremonies.**
  Committee on, §§143-532 to 143-539.
**Inoperative boards and agencies.**
  Settlement of affairs, §§143-267 to 143-272.
**Internal auditing requirements,** §§143-738 to 143-740.
**Law-enforcement officers', firemen's, rescue squad workers' and civil air patrol members' death benefits act,** §§143-166.1 to 143-166.7.
**Law-enforcement officers' retirement system.**
  Transfers of assets to other retirement systems, §143-166.70.
**Local affairs,** §§143-320 to 143-326.
**Manufactured housing.**
  Manufactured housing board, §§143-143.8 to 143-143.54.
  Uniform standards code for manufactured homes, §§143-125 to 143-151.6.
**Meetings of public bodies,** §§143-318.9 to 143-318.18.
**National park, parkway and forests development commission,** §143-258.
**Nature and historic preserve dedication act,** §§143-260.6 to 143-260.10G.
**Notice of appointments to public offices,** §§143-47.6 to 143-47.14.
**Nutbush conservation area,** §143-289.
**Officers of state institutions,** §§143-108 to 143-116.
**Oil pollution and hazardous substances control,** §§143-215.75 to 143-215.104.
**Outdoor historical dramas,** §143-204.8.

**STATE DEPARTMENTS, INSTITUTIONS AND COMMISSIONS** —Cont'd
**Payroll savings plan for state employees,** §§143-301 to 143-305.
**Personal property in state institutions.**
  Damage to, §§143-127.2 to 143-127.6.
**Pesticide board,** §§143-434 to 143-470.1.
**Privacy act,** §143-64.60.
**Publications,** §§143-168 to 143-170.5.
**Public building contracts,** §§143-129.1 to 143-135.9.
**Public contracts,** §§143-128 to 143-129.7.
**Purchases and contracts,** §§143-48 to 143-64.
  Architectural, engineering and surveying services contracts, §§143-64.31 to 143-64.34.
  Consultant services contracts, §§143-64.20 to 143-64.24.
  Public contracts, §§143-129.1 to 143-135.9.
**Retirement benefits for local governmental law-enforcement officers,** §143-166.50.
**Retirement benefits for state law-enforcement officers,** §143-166.30.
**Revenue bonds and governmental aid,** §§143-163 to 143-165.
**Review.**
  Periodic review of certain state agencies, §143-34.11.
**Roanoke Island historical association,** §§143-199 to 143-202.
**Salary continuation plan for certain state law-enforcement officers,** §§143-166.12 to 143-166.20.
**Separate insurance benefits plan for state and local governmental law-enforcement officers,** §143-166.60.
**Separation allowances for law-enforcement officers,** §§143-166.40 to 143-166.42.
**Sheriffs' supplemental pension fund act of 1985,** §§143-166.80 to 143-166.85.
**Smoking in public places,** §§143-595 to 143-601.
**Southern growth policies agreement,** §§143-490 to 143-506.
**State and certain local educational entity employees, nonsalaried public officials and legislators required to repay money owed to state,** §§143-552 to 143-562.
**State building commission,** §§143-135.25 to 143-135.40.
**State education commission,** §§143-261 to 143-266.
**State government ethics act,** §§138A-1 to 138A-45.
**State post-war reserve fund,** §§143-191 to 143-194.
**Surplus property,** §§143-64.01 to 143-64.5.
  State agency for surplus property, §§143-64.01 to 143-64.5.
**Tobacco museums,** §§143-431, 143-432.
**Tobacco trust fund commission,** §§143-715 to 143-723.
**Tort claims against state departments and agencies,** §§143-291 to 143-300.1A.
**Traffic laws for institutions,** §§143-116.6 to 143-116.8.
**Transfer of assets of law-enforcement officers' retirement system to other retirement systems,** §143-166.70.
**Various powers and regulations,** §§143-152 to 143-161.
**Vocational rehabilitation services,** §§143-545A to 143-548.
**Water and air resources,** §§143-211 to 143-215.74I.
**Water resources,** §§143-352 to 143-359.
**Wildlife resources commission,** §§143-237 to 143-254.2.
**Zoological authority,** §§143-177 to 143-177.3.

**STATE GOVERNMENT ETHICS ACT,** §§138A-1 to 138A-45.

**STATE PSYCHIATRIC HOSPITAL FINANCE ACT,** §§142-100 to 142-113.

## VOLUME 16

T

**TOLL ROADS AND BRIDGES,** §§136-89.180 to 136-89.218.

**TORT CLAIMS AGAINST STATE DEPARTMENTS AND AGENCIES,** §§143-291 to 143-300.1A.

**TRANSPORTATION PROJECTS.**
**Planning,** §§136-200 to 136-203.

V

**VIRGINIA-NORTH CAROLINA INTERSTATE HIGH-SPEED RAIL COMPACT,** §§136-220 to 136-222.

W

**WATER AND AIR RESOURCES,** §§143-211 to 143-215.74I.

State Library of North Carolina
Raleigh

T

TOLL ROADS AND BRIDGES, §§136-89.180 to 136-89.213.

TORT CLAIMS AGAINST STATE DEPARTMENTS AND AGENCIES, §§143-291 to 143-300.1A.

TRANSPORTATION PROJECTS.
Planning, §§136-200 to 136-202.

V

VIRGINIA-NORTH CAROLINA INTERSTATE HIGH-SPEED RAIL COMPACT, §§136-220 to 136-222.

W

WATER AND AIR RESOURCES, §§143-211 to 143-215.74I.

State Library of North Carolina
Raleigh

STATE LIBRARY OF NORTH CAROLINA
3 3091 00759 6018